

IN THE SUPREME COURT OF MISSISSIPPI  
AND/OR  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**STATE OF MISSISSIPPI, APPELLANT**

**VS.**

**JOHNNY DELANEY, APPELLEE**

**CAUSE NO. 2009-CA-01640**

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**BRIEF OF APPELLANT**

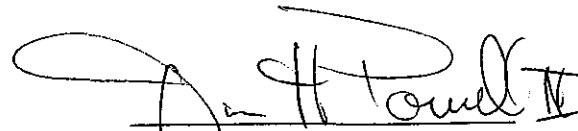
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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Office of District Attorney for the 21<sup>st</sup> Circuit Court District, through James H. Powell, III, District Attorney and Steven Waldrup, Assistant District Attorney on behalf of the Appellant, the State of Mississippi in this cause.
2. Edward Blackmon, Jr., Blackmon & Blackmon, P.O. Box 105, Canton, MS, 39046, attorney of record for the Appellee, Johnny Delaney.
3. Mitchell J. Creel, Creel Law Firm, P.O. Box 276, Greenville, MS 38702, attorney of record for the Appellee, Johnny Delaney.
4. Johnny Delaney, Appellee herein.

This the 16<sup>th</sup> day of February, 2010.

  
James H. Powell, III

  
Steven Waldrup

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
I. Nature of the Case.....	2
II. Procedural History and Disposition of Case.....	2
III. Statement of the Facts.....	3
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT.....	7
I. WHETHER THE COURT ERRED IN RULING THAT SECTION 99-3-28 APPLIED TO GRAND JURY PROCEEDINGS AND INDICTMENTS?.....	7
II. WHETHER THE COURT ERRED BY FAILING TO RULE THAT A FAILURE TO COMPLY WITH THE PROVISIONS OF 99-3-28 WAS A MOOT ISSUE AFTER AN INDICTMENT HAD BEEN RETURNED AGAINST DELANEY BY THE GRAND JURY?.....	11
III. WHETHER THE COURT ERRED IN ORDERING A DISMISSAL WITH PREJUDICE, EVEN IF A DISMISSAL OF THE INDICTMENT FOR A VIOLATION OF MISSISSIPPI CODE ANNOTATED SECTION 99-3-28 WAS WARRANTED?.....	12
IV. WHETHER SECTION MISSISSIPPI CODE ANNOTATED SECTION 99-3-28 CONTRAVENES THE CONSTITUTIONAL MANDATES IMPOSED UPON THE JUDICIARY FOR THE FAIR ADMINISTRATION OF JUSTICE?.....	15
CONCLUSION.....	17

## TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

### *Case Law:*

<i>Birkley v. State</i> , 750 So.2d 1245 (Miss. 1999).....	13
<i>Boyd v. State</i> , 977 So.2d 329 (Miss. 2008).....	13
<i>Brown v. State</i> , 731 So.2d 595 (Miss.1999).....	13
<i>Capital One Servs. v. Page</i> , 942 So.2d 760, (Miss. 2006).....	8
<i>City of Hazlehurst v. Mayes</i> , 96 Miss. 656, 51 So. 890 (1910) .....	8
<i>Clark v. State</i> , 2007-KA-02233-COA (Miss.Ct.App. 2009).....	13
<i>Deeds v. State</i> , 2008-KA-00146-SCT (Miss. 2009).....	14
<i>Finn v. State</i> , 942 So.2d 1270, (Miss. 2008).....	8
<i>Hammer v. Yazoo Delta Lumber Co.</i> , 100 Miss. 349, 56 So. 466 (1911).....	8
<i>Harrison County Sch. Dist. v. Long Beach Sch. Dist.</i> , 700 So.2d 286 (Miss. 1997).....	8
<i>Hogan v. State</i> , 730 So.2d 100 (Miss.Ct.App. 1998).....	11
<i>King v. State</i> , 527 So.2d 641, (Miss. 1998) .....	14
<i>Marx v. Broom</i> , 632 So.2d 1315, (Miss. 1994).....	8
<i>Mayfield v. State</i> , 612 So.2d 1120, (Miss. 1992).....	12
<i>Mississippi Ethics Com'n v. Grisham</i> , 957 So.2d 997, (Miss. 2007) .....	8
<i>Miss. Power Co. v. Jones</i> , 369 So.2d 1381, (Miss. 1979) .....	8
<i>Newell v. State</i> , 308 So.2d 68 (Miss. 1975) .....	15
<i>Sanders v. State</i> , 847 So.2d 903, (Miss.Ct.App. 2003) .....	12
<i>Serfass v. U.S.</i> , 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) .....	14
<i>Sharp v. State</i> , 786 So.2d 372 (Miss. 2001).....	13

<i>State v. Taylor</i> , 100 Miss. 544, 56 So. 521 (1911).....	8
<i>Thornhill v. Ford</i> , 213 Miss. 49, 56 So.2d 23, (1952).....	8
<i>U.S. v. DeFrancesco</i> ,, 449 U.S. 117, 129, 101 S.Ct. 426, 66L.Ed.2d 328 (1980).....	14
<i>U.S. v. Jorn</i> , 400 U. S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).....	14
<i>U.S. v. Martin Linen Supply Co.</i> 430 U.S. 564, 569, 97 S.Ct. 1349, 51, L.Ed.2d 642 (1977).....	14
<i>32 Pit Bulldogs v. County of Prentiss</i> , 808 So.2d 971,(Miss. 2002).....	8
Statutes:	
Mississippi Code Annotated Section 99-3-28 .....	7
Mississippi Code Annotated, Section 19-23-1 .....	9
Other Authorities:	
Uniform Rules of Circuit and County Court Practice Rule 7.03 .....	16

## STATEMENT OF THE ISSUES

- I. WHETHER THE COURT ERRED IN RULING THAT SECTION 99-3-28 APPLIED TO GRAND JURY PROCEEDINGS AND INDICTMENTS?
- II. WHETHER THE COURT ERRED BY FAILING TO RULE THAT A FAILURE TO COMPLY WITH THE PROVISIONS OF 99-3-28 WAS A MOOT ISSUE AFTER AN INDICTMENT HAD BEEN RETURNED AGAINST DELANEY BY THE GRAND JURY?
- III. WHETHER THE COURT ERRED IN ORDERING A DISMISSAL WITH PREJUDICE, EVEN IF A DISMISSAL OF THE INDICTMENT FOR A VIOLATION OF MISSISSIPPI CODE ANNOTATED SECTION 99-3-28 WAS WARRANTED?
- IV. WHETHER SECTION MISSISSIPPI CODE ANNOTATED SECTION 99-3-28 CONTRAVENES THE CONSTITUTIONAL MANDATES IMPOSED UPON THE JUDICIARY FOR THE FAIR ADMINISTRATION OF JUSTICE?

## STATEMENT OF THE CASE

### I. Nature of the Case

The Appellant herein, the State of Mississippi (hereinafter State) seeks reversal of a bench opinion rendered by the Holmes County Circuit Court on September 28, 2009, holding that a law enforcement officer charged with a felony offense occurring while the law enforcement officer is acting within the scope of his duties, may not be indicted for such felony until a probable cause hearing is held pursuant to Mississippi Code Annotated Section 99-3-28 . The State further appeals the Court's decision in said bench opinion to dismiss with prejudice, the indictment against the Appellee, Johnny Delaney, (hereinafter Delaney).

### II. Procedural History and Disposition of Case

Delaney, a trooper with the Mississippi Highway Patrol, was indicted for extortion by the Holmes County Grand Jury in an indictment filed by the Holmes County Circuit Clerk on December 1, 2008. (CP p4) Delaney was served with a copy of his indictment and on December 22, 2008, he waived formal arraignment. (CP p10) The Circuit Court set an initial trial date of April 30, 2009 (CP p13), but the cause was continued until October 1, 2009, by Order of the Holmes County Circuit Court.(CP pp 24,25).

On September 16, 2009, Delaney filed a "Motion to Dismiss and/or Quash the Indictment Against Johnny Delaney"(CP pp 32-35). The Court heard said motion on September 28, 2009, and rendered an opinion from the bench granting said motion and dismissing the indictment against Delaney with prejudice. (T pp 1-22). An "Order" dismissing said indictment with prejudice because of a failure to provide Delaney with a probable cause hearing was subsequently entered on said date. (CP pp 81,82) The State filed its "Notice of Appeal" from the Circuit Court's bench opinion and subsequent Order on October 5, 2009. (CP pp 83,84)





### III. Statement of the Facts

There was never any evidentiary hearing held in this matter in which witnesses were called to testify by either the State or Delaney, since the issue in dispute was primarily a matter of law concerning the interpretation of section 99-3-28 MCA. From the transcript of the motion hearing held on September 28, 2009, it is clear that there are certain facts which are undisputed that apply to this cause.

Delaney was a Mississippi Highway Patrol Trooper who issued a speeding ticket on or about August 29, 2008, to an individual named Jessie Jordan. (T p. 5, CP p4). Jordan complained to law enforcement authorities that Delaney was attempting to extort money from him in order for Delaney to dismiss the ticket. Based on that complaint the Mississippi Bureau of Investigation (MBI) investigated Jessie Jordan's Complaint and developed evidence of the commission of the crime of extortion by Delaney. (T p. 7)

After completing its investigation, the MBI directly presented the evidence it had collected against Delaney to the Holmes County Grand Jury, which returned an indictment against him for extortion. (CP p4)

Delaney's indictment was filed with the Circuit Clerk on December 1, 2008. (CP p4) On December 3, 2008 Mitchell Creel entered an appearance as attorney of record for Delaney (CP p.7). The next day, December 4, 2008, said attorney filed a demand for discovery. (CP p8) On December 19, 2008 an agreed order for bail in the sum of one thousand dollars (\$1,000.00) was signed by the Court and was filed with the Clerk on December 22, 2008. (CP p.9)

Edward Blackmon, Jr. entered an appearance as attorney for Delaney on January 29, 2010. (CP pp 11,12) On February 10, 2010, the Court entered an Order setting Delaney's trial

date for April 30, 2010. (CP p 13) The Court entered an Order on April 29, 2010, continuing the matter and resetting the trial date for October 1 2010. (CP pp 24,25)

Delaney never made any demand for or claim that he should have been given a probable cause hearing prior to indictment by the Grand Jury until he filed his Motion to Dismiss on September 16, 2010, (CP pp 32,33) approximately 10 months after he had received his indictment. Said Motion to dismiss claimed among other things that:

- a. the indictment was “sought and obtained” by the State of Mississippi in violation of Delaney’s Fifth and Fourteenth Amendment Rights to due process and equal protection ; (CP p 22)
- b. the indictment was “sought and obtained” by the State of Mississippi in violation of the requirements of Mississippi Code Annotated Section 99-3-28; (CP p 22) and
- c. that the State “in contravention” of Mississippi Code Annotated Section 99-3-28 wrongly presented the case directly to the Grand Jury. (CP p 23)

Delaney expanded his claims during the September 28, 2010 hearing on his Motion by claiming among other things:

- a. that the Legislature passed Mississippi Code Section 99-3-28 to prohibit that special class of people employed by the State as designated by the legislature from being “arrested or charged” without a probable cause hearing; (T pp. 3,4)
- b. that Mississippi Code Annotated Section 99-3-28 requires in every circumstance a probable cause hearing for a law enforcement officer before he can be arrested or charged with a crime; (T pp 6,7)
- c. that Mississippi Code Annotated Section 99-3-28 applies not only to criminal charges, but prohibits administrative action against law enforcement officers, by their employers

without first having a probable cause hearing pursuant to the statutory language; (T p. 7,8)  
and

- d. that since Delaney was suspended from his duties with the Mississippi Highway Patrol after he was indicted, that employment suspension prejudiced Delaney and warranted a dismissal of the indictment with prejudice. (T p.8)

There are no reported Court of Appeals or Mississippi Supreme Court opinions interpreting Mississippi Code Annotated Section 99-3-28. Neither the State or the Defense were therefore able to cite an opinion providing an interpretation of the Statute. The State did find several opinions dealing with the Statute issued by the Mississippi Attorney General. Those opinions interpret the statute as being limited to proceedings handled by the county prosecuting attorney in justice and county courts. One opinion issued in 2004 specifically stated that the statute did not apply after an indictment had been returned by the Grand Jury. (T. pp 11,12)

The State additionally argued that the statutory requirements were very similar to the requirements for a preliminary hearing for persons charged with felony crimes and that the appellate courts, have held that an indictment renders the preliminary hearing requirement moot. (T p. 12)

Finally, the State argued that since the Supreme Court has adopted procedural rules dealing with the powers of the grand jury, those rules supercede the provisions of Mississippi Code Section 99-3-28, in-so-far as the statute conflicts with the rules adopted by the Courts. (T p. 17)

The Circuit Court found that Mississippi Code Section 99-3-28 applied to the facts of this case and that the state was required to either afford him a probable cause hearing, pursuant to Section 99-3-28 (1) (a) or obtain an arrest warrant pursuant to section 99-3-28 (2) , and that the

State failed to either provide him with a probable cause hearing or seek a warrant pursuant to those provisions. (CP pp. 81, 82)

The Court further found that the State's failure to utilize the provisions of 99-3-28 deprived Delaney of his Fifth and Fourteenth Amendment rights under the United States Constitution; and finally found that Delaney was deprived of liberty and property without due process in violation of the State and Federal Constitutions. The Court then Ordered the indictment against Delaney to be dismissed with prejudice.

#### SUMMARY OF THE ARGUMENT

The Holmes County Circuit Court erroneously construed Mississippi Code Section 99-3-28, and gave it a much broader definition than the literal language of the statute warrants. The statute does not mention Grand Juries or Indictments anywhere within the body of the statute and the language used therein makes it clear that the statute was intended to apply only to courts inferior to the Circuit Court.

The Circuit Court erroneously failed to follow the decisions of the Mississippi Supreme Court and the United States Supreme Court in finding that former jeopardy applied to this case and as a result of said finding, dismissing the indictment against Delaney with prejudice. Delaney was never before the ultimate trier of fact in this cause, and was never at any stage of this proceeding placed in jeopardy of a conviction.

Because of its erroneous rulings and misapplication of the law to the case against Delaney, the Circuit Court deprived the State of Mississippi of its right to prosecute its case against Delaney for extortion while he was employed as a uniformed law enforcement of the State. If Mississippi Code Section 99-3-28 is properly construed, and/or the prior decisions of the Mississippi Supreme Court concerning former jeopardy are applied to this cause, the September

28, 2009 Order of the Circuit Court of Holmes County, Mississippi, will be set aside and this cause will be remanded to the Holmes County Circuit Court for trial of Delaney on the Indictment returned by the Grand Jury.

## ARGUMENT

### I. WHETHER THE COURT ERRED IN RULING THAT SECTION 99-3-28 APPLIED TO GRAND JURY PROCEEDINGS AND INDICTMENTS?

Mississippi Code Annotated Section 99-3-28 provides as follows:

**99-3-28. Teachers or sworn law enforcement officers charged with committing crime while in the performance of duties; certain procedural requirements to be met prior to issuance of arrest warrant.**

(1) (a) Except as provided in subsection (2) of this section, before an arrest warrant shall be issued against any teacher who is a licensed public school employee as defined in Section 37-9-1, a certified jail officer as defined in Section 45-4-9, a counselor at an adolescent offender program created under Section 43-27-201 et seq., or a sworn law enforcement officer within this state as defined in Section 45-6-3 for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the teacher, jail officer, counselor at an adolescent offender program or law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf.

(b) The authority receiving any such charge or complaint against a teacher, jail officer, counselor at an adolescent offender program or law enforcement officer shall immediately present same to the county prosecuting attorney having jurisdiction who shall immediately present the charge or complaint to a circuit judge in the judicial district where the action arose for disposition pursuant to this section.

(2) Nothing in this section shall prohibit the issuance of an arrest warrant by a circuit court judge upon presentation of probable cause, without the holding of a probable cause hearing, if adequate evidence is presented to satisfy the court that there is a significant risk that the accused will flee the court's jurisdiction or that the accused poses a threat to the safety or well being of the public.

The position of the State is that the foregoing statute has no application to grand jury indictments and that the Holmes County Circuit Court incorrectly and erroneously interpreted the statute in its September 28, 2009 ruling from the bench (T pp. 19, 20) and the Order entered subsequent to said bench opinion. (CP pp 81,82)

The review of a trial Court's interpretation of a statute presents a question of law which requires a de novo standard of review. *Mississippi Ethics Com'n v. Grisham*, 957 So.2d 997, 1000 (Miss. 2007) (citing *32 Pit Bulldogs v. County of Prentiss*, 808 So.2d 971, 973 (Miss. 2002)) *Finn v. State*, 942 So.2d 1270, 1272 (Miss. 2008) (citing *Capital One Servs. v. Page*, 942 So.2d 760, 762. (Miss. 2006))

The first question before the reviewing Court is whether the statute is ambiguous. "If the statute is not ambiguous, the court should interpret and apply the statute according to its plain meaning without the aid of principles of statutory construction. " *Finn v. State*, 942 So.2d 1270, 1272 (Miss. 2008) (citing *Harrison County Sch. Dist. v. Long Beach Sch. Dist.*, 700 So.2d 286, 288-89 (Miss. 1997)) (citing *Miss. Power Co. v. Jones*, 369 So.2d 1381, 1388 (Miss. 1979))

"The Courts cannot restrict or enlarge the meaning of an unambiguous statute." *Marx v. Broom*, 632 So.2d 1315, 1318 (Miss. 1994) (citing *City of Hazlehurst v. Mayes*, 96 Miss. 656, 51 So. 890 (1910) ; *Hammer v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466 (1911); and *State v. Taylor*, 100 Miss. 544, 56 So. 521 (1911)) They have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature. *Marx*, *infra* at 1318, (citing *Thornhill v. Ford*, 213 Miss. 49, 56 So.2d 23, (1952))

Mississippi Code Annotated Section 99-3-28 (1) (a), by its plain language expresses a Legislative intent to prohibit Courts below the Circuit Court level from issuing arrest warrants against: Law Enforcement officers and the other persons within a class specified within the statute. The prohibition against issuing an arrest warrant applies: if the Law Enforcement officer or other protected person, is

alleged to have committed a misdemeanor or felony; while such person was acting in the performance of the official duties of the protected class in which he or she is a member.

Subsection (1) (b) places the responsibility for effectuating the provisions of the statute on the “county prosecuting attorney” of presenting to the circuit court having jurisdiction, the misdemeanor or felony offense for which a warrant is being sought against one of the protected persons. District attorneys, grand juries, and indictments are not terms that are mentioned anywhere within the body of the statute. It is inconceivable that the Mississippi Legislature would not have mentioned those terms if it had intended the statute to apply to the actions of a district attorney or a grand jury, or to an indictment returned by a grand jury.

The term “county prosecuting attorney” appears numerous times within the Mississippi Code. It is not a term that is synonymous with the term “district attorney”. Mississippi Code Annotated, Section 19-23-1 provides as follows:

There shall be, in the counties where such an office now exists, a county prosecuting attorney, elected in the county at each general election for state and county officers. The several counties in the state shall have the right to come from under and within the provisions of this chapter in the manner hereinafter provided.

Mississippi Code Annotated Section 19-23-11 defines the duties of a county prosecuting attorney. It provides for both mandatory duties that the county prosecuting attorney must perform and for permissive duties that in the discretion of the county prosecuting attorney may be performed.

Sections (1) and (4) of the statute state that the mandatory duties of the county prosecuting attorney are:

(1) The county prosecuting attorney shall appear and represent the state in all investigations for felony before the various justice court judges in his county. He shall also appear before justice court judges and prosecute all cases against persons charged with offenses therein. The county prosecuting attorney shall be the prosecuting attorney for the county court and shall prosecute all state criminal cases therein, and he shall represent the state in criminal cases appealed from the county court to the circuit court.

(4) The county prosecuting attorney shall have full responsibility for all misdemeanors, youth court proceedings, and all other cases not specifically granted to the district attorney. Provided, however, that in any municipality having a municipal youth court, the municipal prosecutor shall have responsibility for youth court matters in that court. Where any statute of this state confers a jurisdiction, responsibility, duty, privilege or power upon a county attorney or county prosecuting attorney, either solely, jointly or alternatively with a district attorney, such county prosecuting attorney shall be responsible for the prosecution, handling, appearance, disposition or other duty conferred by such statute. Any such provision shall not be construed to bestow such responsibility, jurisdiction or power upon the district attorney where there is no elected county prosecuting attorney, and any such matter shall be handled pursuant to subsection (8) of this section.

Pursuant to the provisions of subsection (1) of the statute, the county prosecuting attorney, is primarily responsible for representing the state in justice courts and county courts. He prosecutes on behalf of the state before the circuit courts on matters appealed from those courts. In subsection (4) of the statute, a county prosecuting attorney has full responsibility for misdemeanors, youth court proceedings, and other cases not specifically granted to the district attorney. It further gives the county prosecuting attorney the responsibility for the prosecution, handling, appearance, and disposition over all statutory matters where the county prosecuting attorney has sole, joint, or alternate jurisdiction with the district attorney.

Subsection (5) Mississippi Code Annotated 19-23-11 deals with situations where a case which is originally the responsibility of the county prosecuting attorney but subsequently becomes the responsibility of the district attorney. It reads as follows:

(5) In any case handled by the county prosecuting attorney pursuant to this section which subsequently results in charges being modified in such a manner that the case would be within the jurisdiction of the district attorney pursuant to Section 25-31-11, the responsibility for prosecution shall be transferred to the district attorney. The county prosecuting attorney shall report to the district attorney the disposition of all affidavits, crimes, occurrences or arrests handled by him wherein any person is charged with a crime for which a conviction may result in imprisonment in the State Penitentiary.

What is the effect if the county prosecuting attorney doesn't carry out a statutory responsibility within his jurisdiction? Subsection (6) of 19-23-11 provides the answer to that question as follows:

(6) The validity of any judgment or sentence shall not be affected by the division of jurisdiction under this section, and no judgment or sentence may be reversed or modified upon the basis that the case was not processed according to subsection (5) of this section.

Mississippi Code Annotated Section 19-23-11, states in plain language that the powers and duties conferred on county prosecuting attorneys by legislative enactments are not jurisdictional. The failure to comply with duties imposed by statute on a county prosecuting attorney will not effect any subsequent jurisdiction dealing with the disposition of the case.

Mississippi Code Annotated, Section 99-3-28, imposes duties on the county prosecuting attorney. It does not however impose any duties on a district attorney. It does not prohibit the presentation of a felony case against a law enforcement officer to a grand jury. It fails to provide any relief to any of the individuals covered by the statute for failure to comply with the statute. And finally, it certainly does not provide for or contemplate the relief of dismissal with prejudice of an indictment as was done in this case.

**II. WHETHER THE COURT ERRED BY FAILING TO RULE THAT A FAILURE TO COMPLY WITH THE PROVISIONS OF 99-3-28 WAS A MOOT ISSUE AFTER AN INDICTMENT HAD BEEN RETURNED AGAINST DELANEY BY THE GRAND JURY?**

The State believes that the Holmes County Circuit Court erred in this case by failing to find that the indictment of Delaney by the Holmes County Grand Jury, made the requirements of Mississippi Code Annotated 99-3-28 moot. The Appellate Courts of this state have repeatedly held that a preliminary hearing is not required after an indictment has been returned. "Once an indictment occurs, even had a preliminary hearing not been provided, that question becomes moot. The purpose of a

preliminary hearing is to explore whether there is probable cause to believe that the defendant has committed an offense.” *Hogan v. State*, 730 So.2d 100, 101 (Miss.Ct.App. 1998) (citing *Mayfield v. State*, 612 So.2d 1120, 1129 (Miss. 1992))

In the case of *Sanders v. State*, 847 So.2d 903, 907 (Miss.Ct.App. 2003) the Court reiterated the ruling in *Hogan*, supra., and further stated: “The indictment by a grand jury removes the purpose of the hearing and none need thereafter be conducted.”

Mississippi Code Annotated, Section 99-3-28, in essence simply provides for a pre-arrest warrant probable cause hearing to be conducted by the circuit judge, for the class of persons covered therein. In this case there was a pre-arrest warrant probable cause determination for Delaney by the Holmes County Grand Jury, which removed the purpose of the hearing provided for in Section 99-3-28.

III. WHETHER THE COURT ERRED IN ORDERING A DISMISSAL WITH PREJUDICE, EVEN IF A DISMISSAL OF THE INDICTMENT FOR A VIOLATION OF MISSISSIPPI CODE ANNOTATED SECTION 99-3-28 WAS WARRANTED?

The State vigorously contends that the Holmes County Circuit Court erred in dismissing Delaney’s indictment. If however, dismissal had been an appropriate remedy in this case, there was no legal basis to support a dismissal with prejudice.

Although Delaney requested that the indictment against him be dismissed with prejudice in his “Motion to Dismiss and/or Quash the Indictment against Johnny Delaney”, filed in the Holmes County Circuit Court on September 16, 2009, he failed to cite any authority within the motion which justified the relief he requested. (CP pp 32-35). Delaney again failed to cite any authority justifying his request for dismissal with prejudice at the September 28, 2009 hearing on his motion. His only offered reasons for a dismissal with prejudice was that he was prejudiced by alleged suspension from his employment

duties after his arrest; (T pp. 7,8) and that double jeopardy had somehow attached because of that alleged prejudice (T p.16)

Since the Holmes County Circuit Court, in neither its opinion from the bench nor the written order, failed to make any specific findings of any actual prejudice to Delaney because of his alleged suspension and loss of income, I will only briefly comment on that claim.

In *Clark v. State*, 2007-KA-02233-COA (Miss.Ct.App. 2009), the appellant claimed his sentences for business burglary and possession of burglary tools should be reversed because he was not Granted a dismissal of the charges against him at trial level on the basis of a denial of his constitutional and statutory rights to a speedy trial.

*Clark* claimed he was prejudiced because he lost income from his occupation of scavenging salvageable property while he was incarcerated for a period o 542 days prior to his trial. (Paragraphs 17 and 18 of opinion.) In response to those claims the Court of Appeals said in paragraph 18 of the opinion: “incarceration alone is not sufficient prejudice to warrant reversal.” (citing *Birkley v. State* , 750 So.2d 1245, 1252 (Miss. 1999)); and “It is the possibility of impairment of a defendant’s available defense that this Court considers most carefully.” (Citing *Sharp v. State*, 786 So.2d 372, 381 (Miss. 2001)) . No evidence was introduced at the hearing on Delaney’s motion to show even that he was actually suspended or lost any income as the result of the indictment. But if that is in fact true, it does not rise to the standard of impairment of an available defense, which would be necessary to warrant a dismissal with prejudice.

The Holmes County Circuit Court based its dismissal with prejudice on Delaney’s double jeopardy claim. The State believes that the Court’s finding of double jeopardy is erroneous.

A de novo standard of review applies to claims of double jeopardy. *Boyd v. State*, 977 So.2d 329, 334 (Miss. 2008) (citing *Brown v. State*, 731 So.2d 595, 598 (Miss.1999))

On December 3, 2009, the Mississippi Supreme Court decided the case of *Deeds v. State*, 2008-KA-00146-SCT (Miss. 2009). In *Deeds*, the defendant was convicted of an aggravated DUI charge after a charge of DUI first offense, arising out of the same offense had been dismissed by a municipal court. The defendant claimed that his conviction for aggravated DUI in the Circuit Court of Desoto County, was wrongfully obtained in violation of the Double Jeopardy Clause of the Fifth Amendment.

In paragraph 10 of the *Deeds*, *supra*, opinion the Court reviewed the purposes and protections of the Double Jeopardy Clause, as articulated by our courts using the following language:

The Supreme Court of the United States has held that the guarantee against double jeopardy protects against : (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *U.S. v. DeFrancesco*, 449 U.S. 117, 129, 101 S.Ct. 426, 66L.Ed.2d 328 (1980). The first step of this analysis is to define the point at which jeopardy attaches for purposes of invoking the protections of the Double Jeopardy Clause. The U. S. Supreme Court has held that the “protections afforded by the [Double Jeopardy] Clause are implicated *only when the accused has actually been placed in jeopardy*. This state of jeopardy attaches when a jury is empaneled or sworn, or in a bench trial, *when the judge begins to receive evidence*.” *U.S. v. Martin Linen Supply Co.* 430 U.S. 564, 569, 97 S.Ct. 1349, 51, L.Ed.2d 642 (1977) (emphasis added). The United States Supreme Court has consistently adhered to the view that jeopardy does not attach until “the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge.” *U.S. v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). Citing *Martin Linen Supply*, this Court has likewise pronounced that jeopardy does not attach in the case of a bench trial until the first witness is sworn. *King v. State*, 527 So.2d 641, 643 (Miss. 1998).

Further, in paragraph 14 of the *Deeds*, *supra* opinion the Court discusses *Serfass v. U.S.*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) where the United States Supreme Court said: “that an accused must suffer jeopardy before he can suffer double jeopardy.”

The hearing at which the Circuit Court dismissed Delaney’s case with prejudice was on his motion. No trial was taking place, he was in no danger of being convicted of any thing on that date. At the time of the Circuit Court’s ruling, Delaney had not suffered any jeopardy so he could not suffer double jeopardy.

IV. WHETHER SECTION MISSISSIPPI CODE ANNOTATED SECTION 99-3-28  
CONTRAVENES THE CONSTITUTIONAL MANDATES IMPOSED UPON THE  
JUDICIARY FOR THE FAIR ADMINISTRATION OF JUSTICE?

In 1975, the Mississippi Supreme Court with the decision in *Newell v. State*, 308 So.2d 68 (Miss. 1975) recognized that the judiciary was a co-equal department of State government, and that as such powers properly belonging to the judiciary could not be exercised by either the executive or legislative branches. Prior to the *Newell*, decision trial courts were precluded by statute from instructing juries on the law without requests for instructions from the parties to an action.

In deciding *Newell*, The Court said:

We conclude that Mississippi Code Annotated sections 11-7-155 and 99-17-35 (1972) contravene the constitutional mandates imposed upon the judiciary for the fair administration of justice since such administration is thwarted by the terms of the statute "at the request of either party" which prohibits a judge from instructing a jury as to the applicable law of the case when he has the sworn duty to administer justice and uphold the law. *Newell* pp 77,78.

Since *Newell*, the judiciary has promulgated rules to govern the practices and procedures of the various courts of this state. Mississippi Code Annotated Section 99-3-28 is contrary to rules adopted by the judiciary, and acts to thwart the fair administration of justice because it mandates that certain classes of citizens of this state be given special treatment by the courts. It is simply a poorly thought out statute and has the potential for disastrous consequences.

If this law was applicable to the recent events in Alabama, where a professor allegedly shot six of her co-workers, killing three of them, we could not obtain a warrant for the arrest of that individual until the county prosecuting attorney was able to track down a circuit judge, and only then if the attorney could satisfy the judge, that the defendant was flight risk or posed a threat to harm someone else. If he couldn't meet that criteria, an arrest warrant would have to wait until a hearing could be scheduled.

On the other hand, if a citizen, who wasn't in one of the groups protected by our statute walked in off the street and shot six people, he or she would be subject to immediate arrest.

In this case, our law enforcement officer, Delaney, fortunately didn't shoot anybody. He wasn't arrested. His case was simply presented to the Grand Jury which indicted him as is provided for in the Uniform Rules of Circuit and County Court Practice as adopted by the judiciary. URCCC 7.03 provides as follows:

A grand jury has the power to indict any person upon affirmative vote of 12 or more grand jurors. The grand jury report should not accuse any person by name of an offense, malfeasance or misfeasance unless an indictment is returned. If accusations are included in a grand jury report, the comments may be expunged upon the motion of the individual(s), or on motion of the court.

The ruling of the Holmes County Circuit Court in applying Mississippi Code Annotated Section 99-3-28 to acts of the Grand Jury has the effect of amending URCCC 7.03 so that grand juries can not indict any person who is not in one of the protected classes set out in Mississippi Code Annotated Section 99-3-28, without first obtaining permission from the Circuit Court to seek an indictment. The statute clearly interferes with the equal and fair administration of justice by the courts of this state and it should be declared unconstitutional.

## CONCLUSION


The State respectfully requests that this Court reverse the Circuit Court of Holmes County's dismissal with prejudice of the indictment of Delaney, and remand this case to the Holmes County Circuit Court to be placed back on the trial docket.

Respectfully submitted on behalf of the State of Mississippi, on this the 16<sup>th</sup> day of February, 2010.

BY: 

JAMES H. POWELL, III  
DISTRICT ATTORNEY

AND

  
STEVEN WALDRUP  
ASSISTANT DISTRICT ATTORNEY

**IN THE SUPREME COURT OF MISSISSIPPI  
AND/OR  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**STATE OF MISSISSIPPI**

**VS.**

**CAUSE NO. 2009-CA-01640**

**JOHNNY DELANEY**

**APPELLEE**

**CERTIFICATE OF SERVICE**

I, James H. Powell, III, District Attorney, hereby certify that I have this day, by first class United States mail, postage prepaid, mailed a true and correct copy of the Brief of Appellant and the Appellant's Record Excerpts to the following:

Honorable Edward Blackmon, Jr.  
P. O. Box 105  
Canton, MS 39046

Honorable Mitchell J. Creel  
P. O. Box 276  
Greenville, MS 38702

DATED, this the 16<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
**JAMES H. POWELL, III**  
**DISTRICT ATTORNEY**

**IN THE SUPREME COURT OF MISSISSIPPI  
AND/OR  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**STATE OF MISSISSIPPI**

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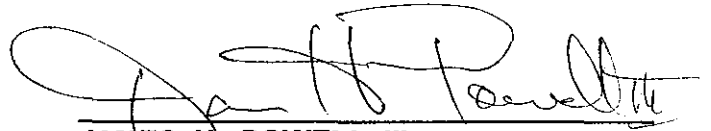
**JOHNNY DELANEY**

**APPELLEE**

**CERTIFICATE OF SERVICE**

I, James H. Powell, III, District Attorney, hereby certify that I have this day, by first class United States mail, postage prepaid, mailed a true and correct copy of the Brief of Appellant and the Appellant's Record Excerpts to the Honorable Judge Jannie Lewis, at her usual mailing address of P. O. Box 605, Lexington, Mississippi 39095-0605.

DATED, this the 18<sup>th</sup> day of February, 2010.

A handwritten signature in black ink, appearing to read 'James H. Powell, III', written over a horizontal line.

**JAMES H. POWELL, III  
DISTRICT ATTORNEY**