IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY DALE BEECHAM — APPELLANT

VS. — NO. 2009-KA-0251-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Jeffery Dale Beecham, a recidivist, has been convicted of DUI causing death, i.e., DUI homicide, after operating his motor vehicle on a wet thoroughfare in DeSoto County with a blood-alcohol content of .26%.

By virtue of his status as a habitual offender under Miss.Code Ann. §99-19-81, Beecham, in the wake of a bifurcated trial, was sentenced to serve twenty-five (25) years, day for day, in the custody of the MDOC. (C.P. at 105-06)

Understandably, this did not sit well with Mr. Beecham who now claims, *inter alia*, his maximum sentence is disproportionate to the offense of driving under the influence and causing death because " . . . the facts of this case are not typical of the facts normally seen on these type cases . . . [and because the] [d]ecedent basically pulled out in front of the Appellant who had no time to stop." (Brief of the Appellant at 11) Beecham, like others before him, contends a mandatory twenty-five (25) year sentence, under these circumstances, constitutes cruel and unusual punishment in violation of the Eighth Amendment. (Brief of the Appellant at 10-12)

The sentence imposed, although severe, was not "grossly" disproportionate given Beecham's status as a habitual offender and his commission of a third felony offense.

The sufficiency and weight of the evidence supporting Beecham's conviction of felony DUI is also at issue in this appeal.

JEFFREY DALE BEECHAM, a fifty (50) year old Caucasian male, resident of Nesbit, and prior convicted felon twice previously sentenced (R. 301-02, 314; C.P. at 16-17, 144), prosecutes a criminal appeal from his convictions of DUI death and recidivism following separate trials by both jury and judge conducted on December 2-4, 2008, and December 16, 2008, in the Circuit Court of DeSoto County, Robert P. Chamberlin, Circuit Judge, presiding.

A separate sentencing hearing focusing on sentence enhancement was conducted on December 16, 2008, following trial on the merits. (R. 300-319)

Beecham's indictment, as it originally stood, was returned on November 13, 2007.

It stated that

> JEFFERY DALE BEECHAM . . . [o]n or about the **27TH** day of **March . . . 2007**, . . . did wilfully, unlawfully, and feloniously, operate a motor vehicle while under the influence of intoxicating liquor which impaired his ability to operate said vehicle, and did thereby, in a negligent manner, cause the death of Freda Lovelace, a human being, in direct violation of Section 63-11-30(5), Mississippi Code 1972 Annotated as amended . . . * * * (C.P. at 8)

The indictment was later amended so as to charge Beecham as a habitual offender under Miss.Code. Ann. §99-19-81 by virtue of his prior convictions in 1992 of sexual battery and a prior conviction in 2003 of a convicted felon in possession of a firearm. (C.P. at 93-94) After being adjudicated a recidivist during a separate hearing conducted on December 16, 2008, before judge alone (R. 300-335), Beecham was sentenced to the maximum term of twenty-five (25) years to be served day for day without the benefit of parole. (R. 311; C.P. at 185-186)

Beecham seeks vacation of his conviction for DUI death and requests a new trial but, if not, at least a new sentence.

He also seeks vacation of his sentence of twenty-five (25) years without parole which, he contends, was unduly harsh and constitutes cruel and unusual punishment in violation of the Eighth Amendment. (Brief of the Appellant at 5, 11) Beecham invites this court to overturn his sentence and remand his case for the purpose of re-sentencing him to something less than the maximum. (Brief of the Appellant at 12)

Seven (7) individual issues are raised on appeal to this Court:

Issue No. 1. Probable Cause for a Blood Warrant.

Whether the court erred in allowing the blood alcohol evidence due to the alleged insufficiency of probable cause for Beecham's blood search.

Issue No. 2. Testimony of Accident Reconstructionist.

Whether the court erred in allowing the testimony of Lance Weems, the State's accident reconstructionist, in that it not only failed to meet the standards of **Daubert,** Weems was not qualified to testify as an expert.

Issue No. 3. Admission of Death Certificate.

Whether the court erred in allowing the introduction into evidence of the decedent's death certificate which allegedly was hearsay thus denying the defendant the right to confront the statement contained therein.

Issue No. 4. Photograph of Steering Wheel.

Whether the court erred in allowing into evidence a photograph of the steering wheel of the decedent's motor vehicle which allegedly depicted blood and inflamed the jury.

Issue No. 5. Sufficiency and Weight of Evidence.

Whether the court erred in denying the defendant's motion for a directed verdict, peremptory instruction, judgment notwithstanding the verdict and/or motion for a new trial.

Issue No. 6. Sentence.

Whether the court erred in imposing the maximum punishment which was both cruel and unusual.

Issue No. 7. Admission of Accident Report.

Whether the court erred in admitting into evidence the accident report prepared by Officer Weems, the State's accident reconstructionist.

STATEMENT OF FACTS

On March 27, 2007, Freda Lovelace, a seventy-seven (77) year old married resident of Nesbit, was seriously injured when her Buick Century automobile was struck broadside by a GMC pickup truck being driven by Jeffrey Dale Beecham. The two-vehicle accident took place on a rainy evening around 8:00 p.m. when Mrs. Lovelace attempted to exit onto Church Road from an entrance only driveway leading to Horn Lake High School. (R. 89)

After Mrs. Lovelace was extricated from her motor vehicle, she was air lifted to a regional medical center in Memphis where she died from her injuries on May 19, 2007, a month and a half later. The immediate cause of death appearing on her Certificate of Death is "[c]omplications of blunt force injuries to head and chest." (State's Exhibit 1; R. 123-26)

After viewing the scene of the accident as a part and parcel of the defendant's case-in-chief, the jury found Beecham guilty of DUI and causing the death of Mrs. Lovelace. (R. 293)

Eight (8) witnesses testified for the State during its case-in-chief, including police detective **Roger Hutchins** who applied for a blood search warrant (R. 111), and **Lance Weems**, a police officer qualified as an accident reconstructionist. (R. 160-61)

Michael Mueller, a Horn Lake fireman described both the accident scene and the patient/defendant. With respect to the latter, Mueller testified as follows:

> Q. [BY PROSECUTOR:] While you're attempting to serve the patient, did he [the defendant] make any statements?
>
> A. He made a statement that he had had about a pint of vodka.
>
> Q. A pint of vodka?
>
> A. Right. (R. 102)

Frazer Toole, a lieutenant with the Horn Lake fire department, described the accident scene and the defendant as well.

> Q. [BY PROSECUTOR:] Did he make any statements in your presence, sir?
>
> A. Yes, he did, when we were getting him ready for transport to the hospital. The medic on the scene asked the gentleman if he had had any alcohol[ic] beverages, and the gentleman said he had just bought a bottle of vodka. (R. 105)

At the close of the State's case-in-chief, Beecham's motion for a directed verdict and his renewed motion for a directed verdict were overruled by Judge Chamberlin who placed his reasons on the record. (R. 244-48) Among those reasons is the following:

> THE COURT: * * * Certainly, all issues have to be finally decided by a jury. Certainly, questions of speeding and causing the accident and further causing the death are certainly issues that are well-adjoined before this jury, but yet, they are jury issues, and the Motion for Directed Verdict will be denied. (R. 247)

The defendant did not testify and rested without producing any witnesses. (R. 282-83) Beecham did, on the other hand, as part of his defense, have the jury visit the scene of the accident. (R. 206, 227, 237)

At the close of all the evidence, peremptory instruction was denied. (R. 261; C.P. at 103)

Following closing arguments not transcribed (R. 284), the jury retired to deliberate at 11:50 a.m. (R. 286)

Three and one-half (3 ½) hours later, at 3:17 p.m., the jury returned the following verdict: "We, the jury, find the defendant, Jeffrey Dale Beecham, guilty of driving under the influence causing a death." (R. 293)

A poll of the jurors, individually by number, reflected the verdict was unanimous. (R. 294-95)

On December 16, 2008, at the close of a sentence-enhancement hearing following trial-on-the-merits, the trial judge adjudicated Beecham a habitual offender within the meaning and purview of Miss.Code Ann. §99-19-81. (R. 311) Beecham, fifty (50) years of age at the time of sentencing, was thereafter sentenced as a habitual offender to serve twenty-five (25) years in the custody of the MDOC to be served day for day. (R. 314-15; C.P. at 185)

We note with interest that Judge Chamberlin found as a fact and concluded as a matter of law the sentence imposed was neither disproportionate nor cruel and unusual punishment. (R. 311-15)

On January 23, 2009, during a hearing on a motion for a new trial, Judge Chamberlin again rejected Beecham's argument his sentence constituted cruel and unusual punishment. (R. 321-35)

John D. Watson, a practicing attorney in Southaven, represented Beecham quite effectively during the trial of this cause.

Mr. Watson's representation on appeal to this Court has been equally proficient.

SUMMARY OF THE ARGUMENT

ISSUE NUMBER 1. The trial judge did not err in finding as a fact and concluding as a matter of law there was probable cause for the issuance of a warrant for a blood search. **Vaughn v.**

State, 972 So.2d 56 (Ct.App.Miss. 2008); **Dove v. State,** 912 So.2d 1091 (Ct.App.Miss. 2005); **Mayo v. State,** 843 So.2d 739 (Ct.App.Miss. 2003); **Ware v. State,** 790 So.2d 201 (Ct.App.Miss. 2001), reh denied, cert denied; **Dale v. State,** 785 So.2d 1102 (Ct.App.Miss. 2001).

ISSUE NUMBER 2. The trial judge did not abuse his judicial discretion in admitting into evidence the testimony of Lance Weems, the State's expert in accident reconstruction. **Mississippi Transp. Com'n v. McLemore,** 863 So.2d 31 (Miss. 2003); **Lawrence v. State**, 931 So.2d 600 (Ct.App.Miss. 2005); **Ware v. State,** *supra,* 790 So.2d 201 (Ct.App.Miss. 2001), reh denied, cert denied.

ISSUE NUMBER 3. The trial judge did not abuse his judicial discretion in admitting into evidence the victim's death certificate which certified the following as the cause of Mrs. Lovelace's death: "Complications of blunt force injuries to head and chest." The death certificate was admissible under Miss.R.Evid. 902(4) as a self-authenticating public record exception to the hearsay rule. **Birkhead v. State,** No. 2007-KA-00666-SCT decided February 19, 2009 [Not Yet Reported]"

ISSUE NUMBER 4. The trial judge did not abuse his judicial discretion in admitting into evidence, State's exhibit number 20, a post-accident photograph of the steering wheel on the victim's automobile. The trial judge found the photograph both relevant and probative. (R. 232-33) **Gossett v. State,** 660 So.2d 1285, 1292 (Miss. 1995).

ISSUE NUMBER 5. Viewing the evidence in the light most favorable to the verdict returned, there was enough to support Beecham's guilt of DUI death. **Bush v. State,** 895 So.2d 836, 843 (Miss. 2005).

The trial judge did not abuse his judicial discretion in denying Beecham's motion for a new trial. The evidence fails to preponderate heavily, if at all, in favor of Beecham who produced no

evidence. To uphold the integrity of the jury's verdict would not work an unconscionable injustice. **Cummings v. State,** No. 2009-KA-00317-COA (¶¶ 7,8) decided March 2, 2010 [Not Yet Reported].

ISSUE NO. 6. A sentence of twenty-five (25) years as a habitual offender was within statutory guidelines and was neither excessive, disproportionate, nor cruel nor unusual. A correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the context of the habitual offender statute. **Oby v. State,** 827 So.2d 731 (Ct.App.Miss. 2002), habeas corpus dismissed by 2005 WL 1172413. *See also* **Mangum v. Hargett,** 67 F.3rd 80 (5th Cir. 1995), certiorari denied 116 S.Ct. 957, 516 U.S. 1133, 133 L.Ed.2d 880 (1996); ***Sones v. Hargett,*** 61 F.3rd 410 (5th Cir. 1995).

ISSUE NO. 7. The trial court did not abuse its judicial discretion in admitting into evidence the accident report prepared by Lance Weems, the state's accident reconstruction expert. **Copeland v. City of Jackson,** 548 So.2d 970 (Miss. 1989).

ARGUMENT

ISSUE NO. 1.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THE WARRANT- ISSUING MAGISTRATE HAD PROBABLE CAUSE FOR A BLOOD SEARCH. THERE IS SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD SUPPORTING THIS FINDING.

Beecham claims the damning blood alcohol evidence should have been suppressed pursuant to his pretrial motion to suppress this evidence because there was insufficient probable cause to draw Beecham's blood. (C.P. at 88-89)

In ruling on this matter Judge Chamberlin made the following findings:

> First, regarding the search warrant, the Court finds that the

> appropriate avenue to obtain a search warrant from a person located in Shelby County, Tennessee is to obtain a search warrant from Shelby County, Tennessee. While for the purpose of this motion, I have not researched, I will note that generally most warrants are not -- most search warrants are not applicable [if] signed by a magistrate in the state of Mississippi for someone in Tennessee or some location in Tennessee. But nevertheless, the Court finds that the use of a State of Tennessee magistrate to issue a warrant to retrieve blood from a person located in the state of Tennessee is, in fact, a proper avenue.
>
> As regards the probable cause or basis for the warrant, the Court finds there is sufficient probable cause, that being that Mr. Beecham was involved in an accident; that upon arriving at the accident, Mr. Beecham smelled of a strong odor, intoxicating beverage; and then as certainly would be a characteristic of someone who had been drinking, Mr. Beecham was uncooperative with officers and paramedics until his transport.
>
> Certainly, I guess it bears noting that does not prove Mr. Beecham's guilt in any way; however, it is sufficient to establish appropriate probable cause to obtain a search warrant for the drawing of his blood. Therefore, as to the Motion to Suppress the Evidence, that motion will be denied. (R. 47-48)

Beecham laments " . . . the officer relied on the smell of alcohol and the fact that Appellant was uncooperative with paramedics." (Brief of the Appellant at 6)

"When reviewing a trial court's ruling on a motion to suppress, we must assess whether substantial credible evidence supports the trial court's finding considering the totality of the circumstances." **Vaughn v. State,** *supra*, 972 So.2d 56, 59 (Ct.App.Miss. 2008).

During the pretrial hearing the circuit judge asked defense counsel the following:

> BY THE COURT: Do you have any case law that would indicate that an automobile accident combined with the smell of intoxicating beverage combined with uncooperative behavior would not be sufficient?
>
> BY MR. WATSON: There again, Your Honor, I do not. I'm just relying on the Fourth Amendment saying that it wasn't. (R. 45-46)

"There is a long line of precedent in Mississippi which holds the smell of alcohol emanating from a car is enough to provide an officer with probable cause to make an arrest." **Mayo v. State,** 843 So.2d 739, 741 (¶ 7) (Ct.App.Miss. 2003); **Dale v. State,** 785 So.2d 1102, 1107 (¶16) (Ct.App.Miss. 2001).

By analogy, we respectfully submit the smell of alcohol emanating from a person involved in a motor vehicle accident causing injury is enough to provide probable cause for the issuance of a blood warrant.

The affidavit in the case at bar sworn by Detective Hutchins reads, in its pertinent parts, as follows:

> On March 27, 2007 Jeffrey Beecham was involved in a tow [sic] car accident at Church Road w/o Tulane that resulted in serious injuries to the other driver. Officer Bradley Kerr made contact with Beecham and smelled a strong odor of intoxicating beverage coming from his person. Beecham was uncooperative past that point with officers and paramedics until transported for treatment. (C.P. at 42)

The following cases are cited in support of our argument that Judge Chamberlin did not err in overruling Beecham's motion to suppress the blood-alcohol evidence. **Turner v. State,** 726 So.2d 117 (Miss. 1998); **Vaughn v. State,** 972 So.2d 56 (Ct.App.Miss. 2008); **Dove v. State,** 912 So.2d 1091 (Ct.App.Miss. 2005); **Ware v. State,** 790 So.2d 201 (Ct.App.Miss. 2001), reh denied, cert denied.

A reviewing court is bound to accept a trial judge's finding of probable cause unless it is able to conclude he abused his judicial discretion. It was true in **Ware**, and it is equally true here, that "[b]ased on the totality of the circumstances, we cannot so conclude." **Ware v. State,** *supra*, 790 So.2d at 212 (¶41)

ISSUE NO. 2.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ALLOWING THE TESTIMONY OF LANCE WEEMS, THE STATE'S EXPERT IN ACCIDENT RECONSTRUCTION.

Beecham contends the trial judge abused his judicial discretion in allowing Lance Weems, a Horn Lake police officer, to testify as an expert in the field of accident reconstruction. Beecham points primarily to Sergeant Weems's lack of experience, stating " . . . that this case was the first real case he had reconstructed" and " . . . he had never been qualified as an expert in a court" and " . . he just guessed as to how much water to put on the pavement to measure the drag factor." (Brief of the Appellant at 7)

At the close of a hearing adjudicating this matter, Judge Chamberlin made the following observations relevant to Beecham's complaint:

> BY THE COURT: All right. First of all, the court finds that a law enforcement officer may, with proper training and experience, qualify as an expert accident reconstructionist pursuant to **Ware versus State.** Nothing about the findings in **McLemore,** adopting the modified **Daubert** standard, has changed the fact that accident reconstruction testimony has been recognized in the State of Mississippi as proper for expert testimony.
>
> I would note, I think that Officer Weems has set forth clearly sufficient evidence of proper training. Obviously, by his own admission, he does not have a lot of experience in the field; however, there's always a first time for someone to have to proceed as an expert witness. So I find that that in and of itself does not disqualify him in that regard.
>
> Regarding - - I certainly have received the testimony regarding his principles and methods and application of those principles and methods. And certainly, at first blush today, that meets the requirements of Rule 702.
>
> I will take the matter under advisement to review the case law

> in that regard to rule first thing in the morning, but I did want to make sure that I noted that certainly accident reconstruction is recognized as a field for expert testimony. And certainly, at first blush, the testimony of Sergeant - - of the Sergeant would meet the application of Rule 702, but I will review the most recent case law in that regard over the evening break. I may rule in the morning. (R. 41-43)

Beecham's attack on Weems's qualifications as an expert in the field of accident reconstruction is controlled by the case law found in the following decisions: **Mississippi Transp. Com'n v. McLemore,** *supra,* 863 So.2d 31 (Miss. 2003); **Lawrence v. State**, *supra,* 931 So.2d 600 (Ct.App.Miss. 2005); **Ware v. State,** *supra,* 790 So.2d 201 (Ct.App.Miss. 2001), reh denied, cert denied.

"[T]he analytical framework provided by the modified *Daubert* standard requires the trial court to perform a two-pronged inquiry in determining whether expert testimony is admissible under rule 702. [citation omitted] The modified *Daubert* rule is not limited to scientific expert testimony - rather, the rule applies equally to all types of expert testimony." [citation omitted]

> First, the court must determine that the expert testimony is relevant - that is, the requirement that the testimony must " 'assist the trier of fact' means the evidence must be relevant." [citation omitted] Next, the trial court must determine whether the proffered testimony is reliable. [citation omitted] Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the *Daubert* analysis is a flexible one. *Id. Daubert* provides "an illustrative, but not an exhaustive, list of factors" that trial courts may use in assessing the reliability of expert testimony. *Id.*" **McLemore,** 863 So.2d at 38 (¶16).

"[A] law enforcement officer may, with proper training and experience, qualify as an expert accident reconstructionist." **Ware v. State,** *supra*, 790 So.2d at 210.

We respectfully submit that Judge Chamberlin followed the modified *Daubert* guidelines to a proverbial "T." (R. 41-43, 160-61)

In light of the *Daubert* issue, the State first qualified Weems during the pretrial hearing. (R. 19-27) Beecham thereafter cross-examined extensively. (R. 27-38) Following argument, Judge Chamberlin took the matter under advisement. (R. 42)

During trial itself a thorough voir dire examination was conducted with Weems as the potential witness. Weems was re-qualified. (R. 151-58) Beecham was again allowed to cross-examine. (R. 158-160)

Following brief arguments from both litigants, Judge Chamberlin accepted Weems as an expert in the field of accident reconstruction. (R. 160-61)

Beecham's cross-examination of Weems during trial consists of twenty-three (23) pages during which defense counsel fully covered the proverbial waterfront. (R. 198-221)

It was true in **Lawrence v. State,** *supra,* and it is equally true here, that "[t]he defense extensively cross-examined the witnesses at issue regarding the methods used to arrive at their opinions on speed determination and the qualifications to calibrate the machine used to determine the blood alcohol level of Lawrence." 931 So.2d at 606 (¶22)

Contrary to Beecham's claim suggesting otherwise, no abuse of judicial discretion has been demonstrated here.

ISSUE NO. 3.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT S-1, A DEATH CERTIFICATE.

State's exhibit S-1 is a Certificate of Death identified by the decedent's husband, Mitchell Lovelace, and introduced as a full evidentiary exhibit during his testimony. (R. 84-85) The Certificate of Death introduced here is an original document with raised blue and red seals, one in

each bottom corner. It certifies in block 28 that the immediate cause of Mrs. Lovelace's death was "[c]omplications of blunt force injuries to head and chest." (State's exhibit S-1; R. 85)

In describing his wife's injuries, Mr. Lovelace testified that "... virtually every bone in her face was broken. She had several broken ribs, and she had some bleeding around the brain and a punctured lung." (R. 83) "She was on a respirator and had feeding tubes for the entire time that she was in the hospital." (R. 83)

> Q. [BY PROSECUTOR JUBERA:] And it might sound like a silly question, sir, but did she have any of those injuries before the wreck?
>
> A. No.
>
> Q. Was she able to leave the hospital?
>
> A. No.
>
> Q. What ward was she in, in the hospital?
>
> A. She was in ICU the whole time she was in the hospital. They - - they tried to move her out one time, and she was out, I believe – - if I'm not mistaken, I think she stayed out a day and they had to put her back in ICU. (R. 84)

Beecham, citing **Melendez-Diaz v. Massachusetts,** 557 U.S. __, 129 S.Ct. ___, 174 L.Ed.2d 314 (2009), argues the death certificate, objected to below on the grounds it was hearsay (R. 85, 125-26), should not have been admitted into evidence because he could not, in essence, cross-examine a piece of paper.

The certificates assailed in **Melendez-Diaz** were in the form of affidavits, which fell within the core class of testimonial statements covered by the Confrontation Clause of the United States Constitution. In addition, they were made under circumstances which would have led an objective witness reasonably to believe that they were made for use in a criminal trial. Neither one of these

contingencies exists here. A death certificate is a public record which is neither testimonial in nature nor intended for use in a criminal trial. **Birkhead v. State,** No. 2007-KA-00666-SCT decided February 19, 2009 [Not Yet Reported].

Beecham laments he " . . . did not concede the cause of death in that the accident occurred on March 27, 2007[,] and the victim died on May 19, 2007." (Brief of the Appellant at 8)

While this is true, and while the matter has caused us some concern, we respectfully submit the death certificate was admissible as a self-authenticating public record exception to the hearsay rule.

In ruling on this matter the circuit judge stated the following:

> BY THE COURT: Regarding the issue, I'll note, of course, the case law that's been previously cited, *Neal versus State* and *Thompson versus State*. More recently, I will note *Luster versus State,* a 1987 case. In that case - - and I think this is important - - the proposition for which it stands, I'll not[e] the death certificate was entered in that case by stipulation, which is obviously a different circumstance. However, that case stands with the proposition that in a case w[h]ere there had been a delay between the incident and death, that even if there's no expert or lay testimony, that the death certificate which would list the cause of death would be sufficient into evidence and that lay testimony can be used to show cause of death.
>
> I will note in various cases where a death certificate has been introduced it is not dispositive of the issue. The Defense certainly has a right to present any proof as to any other cause of death or attack that testimony in any manner. However, I believe under the case law, it is properly introduced, and under Rule 9.02(1), it is a domestic public record under seal, and therefore, it's satisfactorily authenticated. (R. 125-26)

The posture of Beecham's complaint is controlled by the following language found in **Birkhead v. State,** *supra,* No. 2007-KA-00666-SCT decided February 19, 2009 [Not Yet Reported]:

Additionally, the State asserts that the death certificate is a public record which is not testimonial in nature and is therefore admissible. Mississippi Rule of Evidence 902(4) states, in its pertinent parts, as follows:

> Extrinsic evidence of authentication as a condition precedent to admissibility is not required with respect to the following:
>
> * * * * *
>
> (4) **Certified copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, * * *

We find that the State is correct in its assertion that the death certificate is admissible as a public record. "[B]ecause some hearsay is reliable and trustworthy, the rule against hearsay has exceptions." **Burchfield v. State,** 892 So.2d 191, 198 (Miss. 2004). **Burchfield** further held, "[t]he Confrontation Clause of the United States Constitution permits hearsay evidence to be admitted against the defendant only where the evidence falls within a recognized hearsay exception or particularized guarantees of trustworthiness assure the reliability of the evidence." *Id.* at 200 (citing **Ohio v. Roberts,** 448 U.S. 56, 66, 100 S.Ct. 2539, 65 L.Ed.2d 597, 608 (1980)). The death certificate meets this standard, and therefore, this issue has no merit.

We respectfully submit the same is true to no less extent here.

ISSUE NO. 4.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT NUMBER 20, A PHOTOGRAPH THAT WAS NEITHER GRUESOME NOR IRRELEVANT.

Beecham contends the trial judge erred in allowing into evidence a post-accident color photograph - State's exhibit 20 - taken by Sergeant Weems the night of the accident. (R. 162) The

photograph depicted the steering wheel of Mrs. Lovelace's Buick automobile as well as the headlight control knob. (R. 196-97) According to Beecham "[t]he photographs [sic] of the deceased's blood served no probative value regarding whether Defendant caused [the] victim's death by DUI." (Brief of the Appellant at 8)

The court did not abuse its judicial discretion in allowing the photograph in question because (1) the scene depicted is not gruesome, (2) the photograph was admitted into evidence without any reference to the victim's blood, (3) traces of blood, if any at all, are minuscule, (4) among the injuries to the victim as described by her husband were " . . . virtually every bone in her face was broken" (R. 83), and (5) according to Beecham's statement to Weems there was some question as to whether or not the headlights on Mrs. Lovelace's Buick automobile were on and illuminating on the night of the accident. (R. 196)

The photograph in question - state's exhibit 20 - was shown to Weems during direct examination at which time the following colloquy took place:

> Q. [BY PROSECUTOR JUBERA:] Let's talk about the headlights. Did you - - I'm going to show you what's previously been marked as Exhibit 20.
>
> You stated earlier that you had an opportunity to look inside the Buick; is that correct?
>
> A. Yes.
>
> Q. Did the headlights appear to be on or off, sir?
>
> A. They appeared to be on.
>
> Q. Take a look at that photo closely. Is the control switch for the headlights indicated there or shown on there?
>
> A. Yes, sir.
>
> Q. Does that appear to be on or off?

A. It appears to be on.

Q. Is that consistent or inconsistent with what the Defendant said?

A. That is inconsistent with what he said. (R. 196-97)

Defense counsel, we note, cross-examined Weems with respect to whether or not the headlights were on and working. (R. 213)

In ruling on the admissibility of this photograph, the trial judge made the following observations:

> BY THE COURT: All right. I'll note my ruling was that the photograph was relevant; although I concur with the Defense argument at the bench that the question of whether the [headlight] knob's out or in is just not easily ascertainable from the photograph. The officer who identified the photograph indicated that he could identify it as being out. **That's a credibility issue for the jury.**
>
> But secondly, I found that the blood in the photograph was likewise relevant in that this is a case in which the State has to prove an accident and has to connect that accident to the death of the victim. I find that the blood is relevant in that regard. I will note that, in the Court's opinion, it was not gory or, for lack of a better term, over the top or anything of that nature, and I ruled that it would be admissible. (R. 232-33)[emphasis supplied]

"This Court will not reverse a trial court's decision to allow the admission of photographs into evidence absent an abuse of discretion by the trial court." **Ware v. State,** *supra,* 790 So.2d 201, 206 (¶14) (Ct.App.Miss. 2001), citing **Holland v. State,** 705 So.2d 307, 350 (Miss. 1997).

In **Ware,** a prosecution for DUI manslaughter, we find the following language relevant to the facts before us:

> * * * The trial court judge found that the photographs were gruesome but held that they were admissible under the circumstances because the jury was entitled to know the facts surrounding the collision and its effect on the victims. The judge determined that the photographs were probative in this regard and would assist the jury in

> understanding these things. We do not find that the photographs had any probative value on the ultimate issue before the jury. However, we also conclude that their admission did not result in any prejudice to Ware as we do not find them particularly gruesome. We, therefore, hold that there was no abuse of discretion on the part of the trial court in the admission of the photographs.

Same here.

Beecham is well aware the admissibility of photographs rests within the sound discretion of the trial judge whose decision will be upheld on appeal absent an abuse of that judicial discretion.

"The trial judge is granted broad discretion in ruling on the admissibility of photographs." **Gossett v. State,** *supra*, 660 So.2d 1285, 1292 (Miss. 1995) [Photographs contain probative value when they supplement or add clarity to witness' testimony.] *See also* **McDowell v. State,** 813 So.2d 694, 699 (Miss. 2002), reh denied ["Photographs have evidentiary value [in a homicide prosecution] where they aid in describing the circumstances of the killing and the *corpus delicti*, where they describe the location of the body and cause of death, and where they supplement or clarify witness testimony."]; **Stevens v. State,** 808 So.2d 908, 927 (Miss. 2002) ["Rather than being merely cumulative, the autopsy photograph served to clarify the pathologist's clinical observations of the path of the fatal bullet."]; **Davis v. State,** 660 So.2d 1228, 1259 (Miss. 1995); **Westbrook v. State**, 658 So.2d 847, 849 (Miss. 1995).

The trial court's ruling favoring admissibility will not be disturbed on appeal absent a clear abuse of that judicial discretion. **Noe v. State,** 616 So.2d 298 (Miss. 1993).

The general rule is contained in **Noe v. State**, *supra*, 616 So.2d at 303, where this Court opined:

> It is well settled in this state that the admission of photographs is a matter left to the sound discretion of the trial judge and that his decision favoring admissibility will not be disturbed absent a clear

> abuse of that judicial discretion. *Gardner v. State*, 573 So.2d 716 (Miss. 1990); *Sudduth v. State*, 562 So.2d 67 (Miss. 1990). "A review of our case law indicates that the discretion of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value." [emphasis supplied] *Williams v. State*, 544 So.2d 782, 785 (Miss. 1987).

Although the dialogue taking place during a bench conference was not reported (R. 163), later colloquy reflects quite clearly the prosecution sought to demonstrate that Mrs. Lovelace had her headlights on when she collided with Beecham's pickup on a dark and rainy night in Desoto County. (R. 230-33) Admittedly, the position of the headlight knob in the S-20 photograph is not clearly portrayed. Nevertheless, we agree with Judge Chamberlin "that's a credibility issue for the jury." (R. 232)

ISSUE NO. 5.

ANY RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT BEECHAM WAS DUI AND CAUSED THE DEATH OF ANOTHER IN A NEGLIGENT MANNER.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN OVERRULING BEECHAM'S MOTION FOR A NEW TRIAL.

AFFIRMATION OF BEECHAM'S CONVICTION WILL NOT WORK AN UNCONSCIONABLE INJUSTICE.

Beecham assails both the *sufficiency* of the evidence, i.e., denial of his motions for directed verdict, peremptory instruction and his post-verdict motion for judgment notwithstanding the verdict, as well as the *weight* of the evidence, i.e., denial of his motion for a new trial, ground number 5. (C.P. at 132-33)

At the outset, we invite the attention of the Court to jury instructions S-5, D-10 and D-11. (C.P. at 102, 112-13) The issues of causation and negligence were resolved by the jury adversely

to the defendant's position he was guilty of a lesser included offense. These were jury issues, and the jury has spoken.

"The elements to the crime of DUI resulting in death are . . . (1) operating a vehicle while under the influence of intoxicating liquor or with a blood alcohol level of [.08%] or more; and (2) causing the death of another in a negligent manner." **Turner v. State,** 726 So.2d 117, 124 (Miss. 1998); Miss.Code Ann. §63-11-30(1) and (5).

By virtue of Miss.Code Ann. §63-11-30(5), ". . . the State had the burden of proving that [Beecham] was not only driving under the influence of intoxicating liquor at the time of the accident, but that he performed a negligent act that caused the death of [Mrs. Lovelace.]" **Campbell v. State,** 858 So.2d 177, 180 (Ct.App.Miss. 2003).

Beecham claims the State's evidence was insufficient to support his conviction of DUI death. He also claims his conviction was against the weight of the evidence.

Sufficiency of the Evidence.

The sufficiency of the evidence claim is controlled, in part, by the law found in **Turner v. State,** *supra,* and **Campbell v. State,** 858 So.2d 177 (Ct.App.Miss. 2003), an appeal from a conviction of DUI death.

"The State was not required to prove that the intoxicating liquor caused or contributed to the accident, only that [Beecham], while under the influence of intoxicating liquor, committed a negligent act that cause the death of [Mrs. Lovelace.]" **Campbell v. State,** *supra,* 858 So.2d at 180.

Nor does fault or contributory negligence of the victim, if any, in exiting via a road intended as an entrance have any bearing on the outcome. **Smith v. State,** 956 So.2d 997, 1008 (Ct.App.Miss. 2007) [Smith points to no authority which would exonerate an intoxicated driver who

negligently causes death or injury to another, simply because the victim, or anyone else, was also negligent.] *Cf.* **Dickerson v. State,** 441 So.2d 536, 538 (Miss. 1983), where we find the following:

> Contributory negligence is not a defense to [culpable negligence] manslaughter. All that the state must prove with respect to the victim is that he was prior to the incident a live human being. The homicide laws of this State protect all living beings within the jurisdiction, sinners as well as saints, drunks as well as deacons.

See also **Clayton v. State,** 359 So.2d 419, 422 (Ct.Cr.App.Al. 1978) and the cases cited therein.

Proof the proximate cause of Mrs. Lovelace death was blunt force trauma inflicted to her head and chest during the accident was supplied by the testimony of Mr. Lovelace who described his wife's injuries and the treatment therefor, as well as by the Certificate of Death.

Mrs. Lovelace was a healthy 77 year old woman prior to the accident; she suffered extensive injuries during the accident, and she remained in a hospital ICU until her death a month and a half after the accident. No other rational conclusion as to causation can be reached.

In reviewing the sufficiency of the evidence, as opposed to its weight, " . . . all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be reasonably drawn from the evidence." **Jiles v. State,** 962 So.2d 604, 605 (Ct.App.Miss. 2006).

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Bush v. State,** *supra*, 895 So.2d 836, 843 (¶16) (Miss. 2005), quoting from **Jackson v. Virginia,** 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

"Should the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable

men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." **Bush v. State,** *supra*, 895 So.2d at 843 citing, *inter alia*, **Edwards v. State,** 469 So.2d 68, 70 (Miss. 1985).

We respectfully submit there was enough evidence to support Beecham's conviction.

Testimony during direct examination from Lance Weems, the State's accident reconstruction expert, is quoted as follows:

> Q. [BY PROSECUTOR JUBERA:] What, if anything else, did you do to try to determine or to reconstruct the accident?
>
> A. Well, to use the solution we used, I gather measurements, we got a drag factor, was able to establish an area of impact and I had final rest of the vehicles. I had enough to use the solution I used.
>
> Q. What was that solution, sir?
>
> A. 360-degree momentum. (R. 174)
>
> * * * * * *
>
> Q. What does 360-degree momentum, what will that tell you?
>
> A. That will give us a speed. What we're looking for is to give us a speed pre-impact, speed of both vehicles pre-impact. (R. 174)

Beecham's GMC was traveling at 50 mph at the time of impact while the victim's Buick was traveling 14 mph. (R. 184) The discrepancy in speed pointed out by Beecham between Weems's trial testimony and his incident report is negligible, and a jury could have found it insignificant.

According to Weems, Beecham was exceeding the speed limit by at least 12-15 mph prior to impact, and there was no evidence of any braking. (R. 166-67, 187) Had Beecham been traveling 35 mph, he would have been able to stop. (R. 187) But for Beecham's level of intoxication, impaired coordination and reaction time, and excessive speed, he could have stopped his truck prior

to colliding with Mrs. Lovelace's Buick. (R. 187) Beecham's level of intoxication of .26% was well above the legal limit of .08%.

Line of sight for Beecham was a distance of 240 feet. (R. 194) Assuming Beecham was observing the speed limit, but for his impairment, he should have been able to see Mrs. Lovelace in enough time to stop. (R. 221-226)

Beecham's statement to Weems on a later date that he was only traveling 30-35 mph was inconsistent with Weems's findings. (R. 196)

Although Beecham was in the correct lane of travel on this night, Weems expert testimony indicated that Beecham was exceeding the speed limit by 15 miles per hour. Exceeding the speed limit is illegal. A reasonable, fair-minded juror could have found beyond a reasonable doubt that Beecham was DUI and caused the death of Mrs. Lovelace in a negligent manner.

Weight of the Evidence.

A motion for a new trial implicates the "weight" of the evidence, as opposed to "sufficiency" of evidence, and is addressed to the trial court's sound discretion. **Cannon v. State,** 904 So.2d 155 (Miss. 2005); **Dunn v. State,** 891 So.2d 822 (Miss. 2005); **Hilliard v. State,** 749 So.2d 1015, 1016 (Miss. 1999) ["A motion for a new trial tests the weight of the evidence rather than its sufficiency."]; **McClain v. State,** 625 So.2d 774, 781 (Miss. 1993); **Smith v. State,** 897 So.2d 1002 (Ct.App.Miss. 2004) [A motion for a new trial challenges the weight of the evidence and implicates the trial court's sound discretion.] *See also* Rule 10.05, Uniform Rules of Circuit and County Court Practice (1995).

"When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." **Cummings v. State,** *supra*, No. 2009-KA-00317-COA, slip opinion at 4 (¶7) [Not Yet Reported] quoting from **Bush v.**

State, 895 So.2d 836, 844 (¶18) (Miss. 2005).

The testimony of the witnesses for the state, balanced against the lack of any testimony proffered in Beecham's behalf, justifies the conclusion the evidence as a whole fails to preponderate heavily, if at all, in favor of Beecham. Affirmation of the jury's verdict would not work an unconscionable injustice as well.

Although Beecham complains that Weems had to guess how much water to put on the road for the purpose of his accident reconstruction, we note that Beecham was present at the scene the night of the accident, and even though it was dark he was able to observe the amount of water on the road at that time. (R. 168, 172) Thus, Weems was not completely in the dark about this matter.

These evidentiary facts of prominence are not outweighed by Beecham's evidence because there was none.

The rules of law applicable here are found in **Gary v. State,** No. 2008-KA-00619-COA decided June 16, 2009 [Not Yet Reported], ¶¶ 16, 17, slip opinion at 7-8, as follows:

> "When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush [v. State],* 895 So.2d at 844 (¶18) citing *Herring v. State,* 691 So.2d 948, 957 (Miss. 1997)). On a motion for new trial, the circuit court sits as a thirteenth juror and only in exceptional cases in which the evidence preponderates heavily against the verdict will a new trial be granted. *Id.* (Citing *Amiker v. Drugs For Less, Inc.,* 796 So.2d 942, 947 (¶18) (Miss. 2000)) Our review requires that we weigh the evidence in the light most favorable to the verdict. *Id.*
>
> Looking at the evidence as a limited "thirteenth juror" in this case and viewing the evidence in the light most favorable to the verdict, we cannot say that the guilty verdict would sanction an unconscionable injustice. We find that the evidence does not preponderate heavily against the verdict, and the trial court did not abuse its discretion in denying Gary's motion for a new trial. This issue is without merit." (¶¶ 16, 17, slip opinion at 7-8)

A reviewing court can easily conclude that to allow the jury's verdict to stand would not sanction an unconscionable injustice. We respectfully submit Beecham's complaint targeting the weight and sufficiency of the evidence used to convict him of DUI causing death is devoid of merit.

ISSUE NO. 6.

BEECHAM'S SENTENCE OF TWENTY-FIVE YEARS WITHOUT PAROLE, EVEN IF SEVERE, WAS WITHIN THE LIMITS PRESCRIBED, IF NOT REQUIRED, BY STATUTE AND WAS NOT "GROSSLY DISPROPORTIONATE" TO THE DEFENDANT'S OFFENSE GIVEN HIS RECORD OF TWO PRIOR FELONY CONVICTIONS.

Beecham claims "[t]he maximum sentence imposed by the court was cruel and unusual punishment." (Brief of the Appellant at 10)

During the sentence-enhancement proceeding, Judge Chamberlin stated he had "utmost sympathy" for Beecham's mother whose testimony was proffered in extenuation and mitigation of her son's sentence. (R. 304-07, 314)

So also do we.

Beecham himself expressed his remorse and apologized to the family of the decedent. (R. 315-16)

Nevertheless, at the time he committed the present offense, Beecham, a recidivist, had prior convictions for sexual battery in Tennessee and possession in Mississippi of a firearm by a convicted felon. (C.P. at 16-17; R. 303-04)

By virtue of Miss.Code Ann. §63-11-30(5), the maximum sentence for DUI causing death is twenty-five (25) years. By virtue of Miss.Code Ann. §99-19-81, the sentence imposed is to be served without parole.

Judge Chamberlin made a finding on the record the sentence he imposed was not a disproportionate sentence and was neither cruel nor unusual. (R. 311-15) We invite this Court to place his comments and observations under scrutiny.

The identical issue was raised and addressed in the recent case of **Cummings v. State,** *supra,* No. 2009-KA-00317-COA decided March 2, 2010 [Not Yet Reported], an appeal from a conviction of felony DUI (3rd offense) where Cummings was sentenced as a habitual offender to life imprisonment without eligibility for probation or parole.

Presiding Justice Lee's observations there are equally *apropos* to the case at bar. We quote:

> Our supreme court has consistently held that sentences under the habitual-offender statute do not constitute cruel and unusual punishment. *Huntley v. State,* 524 So.2d 572, 575 (Miss. 1988); *Jackson v. State,* 483 So.2d 1353, 1355 (Miss. 1986); *Baker v. State,* 394 So.2d 1376, 1378-79 (Miss. 1981). * * * In light of the gravity of Cummings' current offense and his prior offenses, the trial judge's imposition of a life sentence does not give rise to an inference of gross disproportionality; thus, we do not proceed with an Eighth Amendment proportionality analysis. This issue is without merit.

The same is equally true here.

The sentence of life imprisonment without parole, even if severe, was not "grossly disproportionate" to the present offense of felony DUI in light of Beecham's prior felony convictions of sexual battery and possession of a firearm by a convicted felon. Accordingly, it did not violate the Eighth Amendment.

The trial court's imposition of a twenty-five (25) year sentence without parole does not give rise in this case to an inference of gross disproportionality. Therefore, an Eighth Amendment proportionality analysis is not even required. **Bonner v. State,** 962 So.2d 606 (Ct.App.Miss. 2006); **Forkner v. State,** 902 So.2d 615 (Ct.App.Miss. 2004).

Finally, the sentence imposed is within the limits prescribed by statute. In this posture, no

abuse of judicial discretion has been demonstrated here. **Clay v. State,** 881 So.2d 354 (Ct.App.Miss. 2004).

This issue is controlled, at least in part, by the following language found in **Bonner v. State,** *supra,* 962 So.2d 606, 610-11 (Ct.App.Miss. 2006), reh denied (2007), where Justice Irving made the following observations:

> Bonner relies on the three-pronged proportionality analysis announced in *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), to support his argument that his life sentence [without the possibility of parole, reduction, suspension, or probation] is violative of the Eighth Amendment to the United States Constitution. In *Solem,* the United States Supreme Court set the standard for proportionality as follows: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (I) the gravity of the offense and harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291, 103 S.Ct. 3001.
>
> However, the Court limited *Solem* in *Harmelin v. Michigan,* 501 U.S. 957, 965, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), to the extent that it found a proportionality guarantee in the Eighth Amendment. "In light of *Harmelin*, it appears that *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.' " *Hoops v. State,* 681 So.2d 521, 538 (Miss. 1996) (quoting *Smallwood v. Johnson,* 73 F.3d 1343, 1347 (5th Cir. 1996).
>
> Bonner contends that the trial judge had the responsibility to review, and possibly modify, his life sentence. Bonner relies on *Clowers v. State,* 522 So.2d 762, 765 (Miss. 1988), to support his argument. We find that *Clowers* offers no support for Bonner's contention that the trial court had an obligation to automatically review, and possibly modify, his life sentence. It is true that the trial judge in *Clowers* refused to sentence Clowers, a habitual offender, to the statutorily-mandated sentence of fifteen years, finding instead that the mandated sentence was disproportionate to Clowers' crime: uttering a forged $250 check. On appeal, the Mississippi Supreme Court affirmed, finding that "the trial court did not commit reversible error in reducing what it found to be a disproportionate sentence

under the facts of this case."

> We interpret *Clowers* to hold that, if warranted by the special and unique facts of a case, a trial judge may depart from the sentencing mandates of our recidivism statutes if the judge determines that the mandated sentence is disproportionate to the crime. As we have already stated, *Clowers* does not stand for the proposition that a trial judge must automatically review a recidivist's statutorily-mandated sentence.
>
> Bonner's life sentence complies with Mississippi Code Annotated section 99-19-83 (Rev.2000) which provides:
>
> [statutory language omitted]
>
> The Mississippi Supreme Court has held that when a trial court imposes a sentence which complies with statutory limitations, the court will not be held in error and will not have abused its discretion. *Johnson v. State,* 461 So.2d 1288, 1292 (Miss. 1984) (citing *Contreras v. State,* 445 So.2d 543, 546 (Miss. 1984).
>
> In *Huntley v. State,* 524 So.2d 572 (Miss. 1988), the Mississippi Supreme Court stated, "[t]his is not the first time that Mississippi's habitual offender statute has been challenged as cruel and unusual punishment. This Court has consistently held that sentences under Mississippi Code Annotated section 99-19-83 do not constitute cruel and unusual punishment." *Id.* at 575 [additional citations intentionally omitted].
>
> In light of the gravity of Bonner's current offense, and his prior predicate offenses (grand larceny, forgery, and robbery), the trial court's imposition of a life sentence does not give rise to an inference of gross disproportionality; thus, we do not proceed with an Eighth Amendment proportionality analysis.

Under our law Beecham's sentence to twenty-five (25) yeas was mandatory, extenuating circumstances notwithstanding. This is not to say the trial judge, in his discretion, cannot depart from the sentencing mandates of our recidivism statutes if the judge determines that the mandated sentence is disproportionate to the crime. **Bonner v. State,** *supra*, 962 So.2d 606, 611 (Ct.App.Miss. 2006).

Judge Chamberlin simply did not so determine in Beecham's case.

This issue then is controlled, in part, by this Court's long established rule " . . . that a trial court will not be held in error or held to have abused [its] discretion if the sentence imposed is within the limits fixed by statute." **Johnson v. State,** 461 So.2d 1288, 1292 (Miss. 1984), and the cases cited therein. *See also* **Barnwell v. State,** 567 So.2d 215, 221 (Miss. 1990) [Save for instances where the sentence is "manifestly disproportionate" to the crime committed, extended proportionality analysis is not required by the Eighth Amendment]; **Hart v. State,** 639 So.2d 1313 (Miss. 1994); **Edwards v. State,** 615 So.2d 590 (Miss. 1993); **Reed v. State,** 536 So.2d 1336 (Miss. 1988).

ISSUE NO. 7.

THE TRIAL JUDGE DID NOT ABUSE HIS JUDICIAL DISCRETION IN ALLOWING THE INCIDENT/ACCIDENT REPORT PREPARED BY LANCE WEEMS INTO EVIDENCE.

Beecham, in an abbreviated argument, claims the trial judge abused his judicial discretion in admitting into evidence the incident/accident report prepared by Lance Weems, the State's expert in accident reconstruction. His reasoning is that Weems " . . . was present to testify and therefore the accident report should not have been allowed into evidence." (Brief of the Appellant at 12)

How can this be?

In the recent case of **Deeds v. State,** No. 2008-KA-00146-SCT decided December 3, 2009 [Not Yet Reported], we find the following rules to be applied here:

> "This Court reviews the trial court's decision to admit or exclude evidence under an abuse of discretion standard of review." **Smith v. State,** 986 So.2d 290, 295 (Miss. 2008). Furthermore, this Court will affirm the trial court's ruling " ' [u]nless we can safely say the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case.' " **Id.** (quoting **Jones v. State,** 918 So.2d 1220, 1223 (Miss. 2005)) * * *

Admittedly, the Supreme Court has opined in the past that "[t]he report is simply a substitute for the officer appearing in person and testifying." **Copeland v. City of Jackson,** 548 So.2d 970, 976 (Miss. 1989).

No matter.

The fact that Weems was available to testify and did in fact testify is all the more reason admission of his report was not error. This is especially true where, as here, Beecham's cross-examination of Weems pointed out certain statements in his report which conflicted with Weems testimony at trial. (R. 209-11)

In **Copeland v. City of Jackson,** *supra*, 548 So.2d 970 (Miss. 1989), the Supreme Court held it was error on the part of the trial court to refuse to allow into evidence the accident report filed by the officer on the scene. The Court relied upon a comment to rule 803(6) of the Mississippi Rules of Evidence and concluded that "[t]herefore, police reports prepared during the investigation of an accident should be admissible into evidence." *See also* **Fisher v. State,** 690 So.2d 268, 273 (Miss. 1996), quoting from **Copeland v. State,** *supra.*

In ruling on the matter Judge Chamberlin made the following observations:

> BY THE COURT: I will note, first of all, I took in abeyance the ruling on the accident report from yesterday. Regarding the accident report, it will be moved into evidence. I would cite *Fisher vs. State* as well as *Copeland vs. City of Jackson.* Both dealt with accident reports coming into evidence when they have been testified to, when they've been prepared in the scope of an officer's investigation and, of course, testified to regarding their authenticity by the actual officer, both of which we have in this case. That certainly does not take away the right to attack the admissibility of things that may be contained in the report, but that's certainly not something that we've had before this Court, and so that Exhibit * * * 23 will be moved into evidence. * * * When we take a break - - when we take a break, the parties can get together to redact Exhibit No. 25. If there's any concerns about the redactions, if y'all will bring it to my attention, I will certainly help in that regard. (R. 280)

Does this appear to be an abuse of judicial discretion?

We think not.

Judge Chamberlin handled the matter with a great deal of wisdom and circumspection.

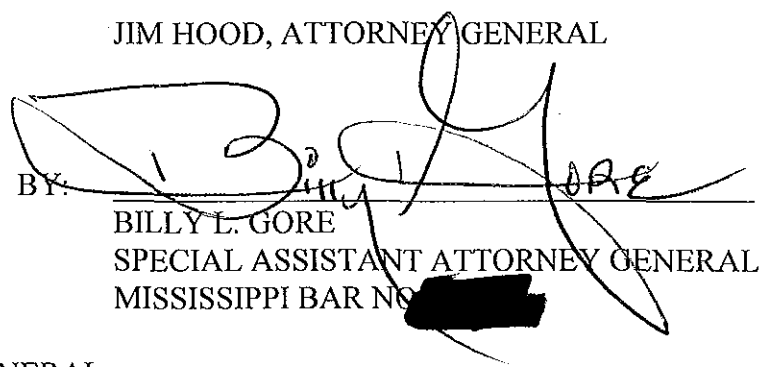
CONCLUSION

Appellee respectfully submits that no reversible error, If any error at all, took place during the trial of this cause.

Accordingly, the judgments of conviction of DUI causing death and recidivism, together with the twenty-five (25) year sentence without probation or parole imposed by the trial judge, should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

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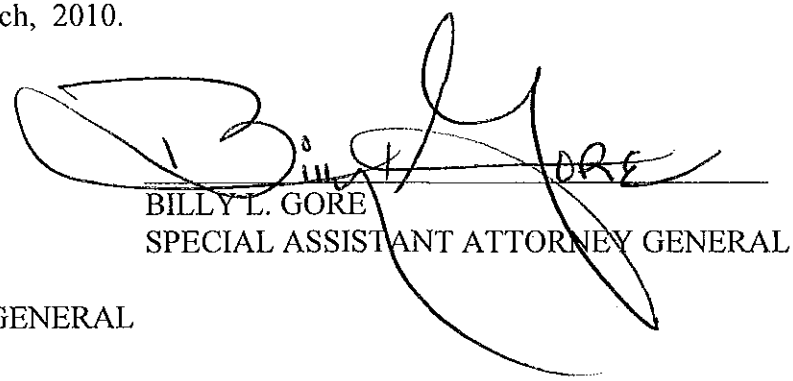
This the 26th day of March, 2010.



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