IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CASE NOS. 2009-TS-00238-COA
and 2009-TS-00237-COA

CHRISTOPHER FLUKER	**APPELLANT**
VS.	**CASE NO. 2009-TS-00238-COA**
STATE OF MISSISSIPPI	**APPELLEE**
Consolidated With	
CHRISTPHER FLUKER	**APPELLANT**
VS.	**CASE NO. 2009-TS-00237-COA**
STATE OF MISSISSIPPI	**APPELLEE**

APPEAL FROM THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

BRIEF OF APPELLANT CHRISTOPHER FLUKER

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CERTIFICATE OF INTERESTED PERSONS

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 Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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THIS the 30th day of June, 2009.

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STATEMENT REGARDING ORAL ARGUMENT

Defendant/appellant Christopher Fluker respectfully suggests that oral argument is unnecessary in this case. The Court can adequately decide this matter on the Briefs and the argument put forth by Mr. Fluker arguing for the reversal of his convictions in the Circuit Court of Grenada County, Mississippi.

STATEMENT OF THE ISSUES

The issues before the Court are noted below.

1. Whether the State of Mississippi failed to establish that probable cause existed for the stop of Mr. Fluker's vehicle, pursuant to *Mississippi Code Annotated* §63-3-617;

2. Whether the State of Mississippi met the elements of proof for conviction under *Mississippi Code Annotated* §63-3-617;

3. Whether Christopher Fluker received effective assistance of counsel during the trial of this cause and whether ineffective assistance of counsel requires a reversal of the judgment of the Circuit Court of Grenada County, Mississippi;

4. Whether the Circuit Court err in refusing to allow Mr. Fluker to modify the record of his trial pursuant to *Mississippi Rule of Appellate Procedure* 10(e).

STATEMENT OF THE CASE

1. Nature of the Case/Factual Background.

These consolidated cases are criminal appeals from the Circuit Court of Grenada County, Mississippi.

On or about May 25, 2008, Defendant Christopher Fluker was stopped by Mississippi Highway Patrol Officer Ben Williams in Grenada County on Mississippi Highway 8. (Trial Trans. at 4-8) Trooper Ben Williams testified at the trial in Grenada County Circuit Court that he pulled over Mr. Fluker for violation of *Mississippi Code Annotated* §63-3-617, which prohibits driving too close to the center line. (R. at 12-11, 13; Trial Trans. at 4-6). At no time during his trial testimony did he specifically state that he saw Mr. Fluker's vehicle travel near the center of Mississippi Highway 8 for two hundred (200) yards (Trial Trans. at 4-6). On direct examination, he noticed Mr. Fluker's vehicle due to the tint on all four windows and the fact that he was traveling close to the center line, but gave no specific distance. (Trial Trans. at 4-5). He also alleged Mr. Fluker was speeding and produced no other evidence other than his testimony of that fact or that the radar equipment in his cruiser was working properly on the day of the stop. (Trial Trans. at 4-5).

After stopping Mr. Fluker and writing the ticket for traveling close to the center line, Trooper Williams observed a strong smell of alcoholic beverages emanating from the vehicle and asked Mr. Fluker if he had been drinking. (Trial Trans. at 6). According to Trooper Williams, Mr. Fluker then allegedly stated that he had two, possibly three, drinks. (Trial Trans. at 6). Trooper Williams also stated that Mr. Fluker appeared nervous. (Trial Trans. at 6)

He further asked Mr. Fluker if he would take a portable intoxilizer. Mr. Fluker did and which, according to Trooper Williams, gave a strong indication that Mr. Fluker had been drinking. (Trial Trans. at 6-7). After having Mr. Fluker perform a field sobriety test (saying his

ABC's) he placed Mr. Fluker under arrest and transported him to the Mississippi Highway Patrol Trooper station for a second intoxilizer which was allegedly refused by Mr. Fluker. (R., Cause No. 00238 at 11-12; Trial Trans. at 6-7)

Based on Trooper Williams' testimony alone, the Circuit Court of Grenada County, Mississippi found Mr. Fluker guilty of violating *Mississippi Code Annotated* §63-3-617 as well as DUI First Offense and fined him $40.50 and $1,000.00, respectively, plus court costs. (R., Cause No. 00238, at 13-15; R., Cause No. 00237, at 15-16; Trial Trans. at 10-11). Mr. Fluker was further ordered to attend the MASEP School (Trial Trans. at 10-11).

At the Circuit Court trial, Mr. Fluker's counsel of record, Jim Arnold, Esq., presented no witnesses, offered no documentary evidence, and only cross-examined Officer Williams regarding the existence and his possession of a copy of *Mississippi Code Annotated* §63-3-617. (Trial Trans. at 8-11). In addition, Mr. Arnold never notified Mr. Fluker of the January 7, 2009 trial date in Grenada County, and Mr. Fluker was only informed of the trial date, and his subsequent conviction, after being informed of such by Mr. Arnold after his conviction. (Trial Trans. at 11; Supp. Record at 1; Exhibit 1 to Appellant's Motion for Enlargement of Time).

SUMMARY OF THE ARGUMENT

1. The State has not established probable cause to stop Mr. Fluker's vehicle.

Under *Mississippi Code* Annotated §63-3-617:

> It shall be unlawful for the driver of any truck or other vehicle to drive in or near the center of any highway for a distance of more than two hundred (200) yards, or at any time to refuse to return to the right in order that any driver desiring to pass that truck or other vehicle may drive at a higher rate of speed.

Miss. Code Ann. §63-3-617 (1972 and 2008 Supp.)

At Mr. Fluker's trial in Grenada County, the arresting officer, Ben Williams of the Mississippi Highway Patrol, testified that he observed Mr. Fluker's vehicle traveling eastbound on Mississippi Highway 8 and that it was behind two other vehicles and had blacked out tint on all windows. (Trial Trans. at 4-5). While Troooper Williams stated in his testimony that the vehicle was traveling closer to the center line and that *Mississippi Code Annotated* §63-3-117 prohibited driving close to the center line for more than 200 yards, he did not state during his trial testimony that he actually observed Mr. Fluker's vehicle travel close to the center line for 200 or more yards. (Trial Trans. at 4-5). He only stated that he observed the vehicle in his rearview mirror as it went past and gave its approximate speed. (Trial Trans. at 4-6). He did not testify that Mr. Fluker's vehicle traveled close to the center of the highway to prevent another vehicle from overtaking him. (Trial Trans. at 4-6). Furthermore, there was absolutely no testimony as to whether Mississippi Highway 8, in this location, was a two- , three-, or four-lane highway in order to determine whether driving "in or near the center of the highway" would have been considered to be a violation of *Mississippi Code Annotated* §63-3-617. (Trial Trans. at 4-6)

This is a case of a classic pretext stop. Officer Williams became suspicious of Mr. Fluker due to the dark tint in his windows and utilized *Mississippi Code Annotated* §63-3-617 in order

to establish probable cause to stop his vehicle. As a result, it has failed to prove that probable cause existed to stop Mr. Fluker's vehicle, his convictions under *Mississippi Code Annotated* §63-3-617 and §63-11-30 should be reversed.

2. Whether the State of Mississippi met the elements of proof for conviction under *Mississippi Code Annotated* §63-3-617.

For the same reasons cited in the above referenced count, Appellant Christopher Fluker asserts that the State of Mississippi did not meet its burden of proof in convicting him of refusal to clear the center of the highway under *Mississippi Code Annotated* §63-3-617. At no time at the trial court did Trooper Williams testify as to actually seeing Mr. Fluker's vehicle travel in, on, or near the center of Mississippi Highway 8 for a distance of 200 yards or more. (Trial Trans. at 4-6). Furthermore, there is no testimony or other evidence that Mr. Fluker was in, on, or refused to clear the center of the road for a distance of more than 200 yards. (Trial Trans. at 4-6). There is no evidence that Mr. Fluker was attempting to pass another vehicle, crossed the center line in order to pass another vehicle, crossed the center line into the opposite lane of travel, or was occupying the center to prevent a vehicle from overtaking him. (Trial Trans. 4-6). There is likewise no evidence that Mr. Fluker could avoid traveling near the center of Mississippi Highway 8 in this location as there has been no testimony as to whether Highway 8 in this location is a two-, three-, or four-lane highway. (Trial Trans. 4-6). As such, the State has failed to meet its burden beyond a reasonable doubt and his conviction should be reversed.

3. Whether Christopher Fluker received effective assistance of counsel during the trial of this cause and whether ineffective assistance of counsel requires a reversal of the judgment of the Circuit Court of Grenada County, Mississippi.

Mr. Fluker's appellant counsel and trial counsel are two different attorneys. In order to prevail on the claim of ineffective assistance of counsel, Mr. Fluker must meet the two-prong test from *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984).

Under *Strickland*, Mr. Fluker must show that (1) his trial counsel's performance was deficient, and (2) that the deficiency prejudiced the defendant. *Walker v. State,* 703 So. 2d 266, 268 (Miss. 1997). As there is a difference in trial and appellate counsel, Mr. Fluker must raise this argument on direct appeal. *Moore v. State,* 676 So. 2d 244, 245-46 (Miss. 1996); *Sheffield v. State,* 881 So. 2d 249, 252-254 (Miss. Ct. App. 2003). In summary, Mr. Fluker alleges that the performance of the trial counsel was deficient in failing to properly cross examine Trooper Williams as to the probable cause for his stop and the elements of proof under *Mississippi Code Annotated* §63-3-617; failure to properly cross examine Trooper Williams as to the elements of proof of driving under the influence under *Mississippi Code Annotated* §63-11-30(1); failure to call witnesses to testify on Mr. Fluker's behalf; failure to notify Mr. Fluker of the trial date of January 7, 2009, or engage in any discovery motions prior to trial. (R. at 1-24, Cause No. 00238; R. at 1-24, Cause No. 00237; Trial Trans. at 8-11)

For the foregoing reasons, the ineffectiveness of Mr. Fluker's trial counsel mandates that he has been prejudiced thereby under the *Strickland* test. Accordingly, Mr. Fluker's convictions under *Mississippi Code Annotated* §63-3-617 and §63-11-30 should be reversed and this matter remanded back to the Circuit Court of Grenada County, Mississippi for a new trial.

4. The Circuit Court erred in refusing Mr. Fluker's proposed modification of the record under *Mississippi Rule of Appellate Procedure* 10(e).

Mr. Fluker further asserts that the Circuit Court of Grenada County erred in refusing Mr. Fluker's requested modification of the record pursuant to *Mississippi Rule of Appellate Procedure* 10(e). (Supp. R. at 1). Mr. Fluker sought to modify the Circuit Clerk's records of his conviction in Grenada County to include an Affidavit that he had never received notice of his trial date from his trial counsel, Jim Arnold, Esq. Appellant's Motion for Enlargement of Time at Exhibit "1." Mr. Fluker sought to use this Affidavit as further evidence for his ineffective

assistance of counsel claim in this cause. Because the only fashion in which this Affidavit may come before the Appellate Court is through the use of the procedure found in *Mississippi Rule of Appellate Procedure* 10(e), Mr. Fluker asserts that the trial court erred in refusing the requested modification so that a more thorough picture of what occurred at the Circuit Court may be gained by this Court as well as giving it further evidence to evaluate his ineffectiveness of counsel claim. *See Carlisle v. Carlisle,* 2009 Miss. App. LEXIS 234 at *3 (Miss. Ct. App. 2009).

ARGUMENT

I.
WHETHER THE CIRCUIT COURT OF GRENADA COUNTY ERRED IN FINDING THAT PROBABLE CAUSE EXISTED FOR THE STOP OF MR. FLUKER'S VEHICLE.

Mississippi follows the general rule that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States,* 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *Saucier v. City of Poplarville,* 858 So. 2d 933, 934 (Miss. Ct. App. 2003).

In Mississippi, probable cause is determined by the totality of the circumstances. *Harrison v. State,* 800 So. 2d 1134, 1138 (Miss. 2001); *Loveless v. City of Booneville,* 972 So. 2d 723, 730 (Miss. Ct. App. 2007). The Mississippi Supreme Court has stated that "probable cause arises when the facts and circumstances with an officer's knowledge, or which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it." *Harrison,* 800 So. 2d at 1138 (quoting *Conway v. State,* 397 So. 2d 1095, 1098 (Miss. 1980). In establishing probable cause to stop Mr. Fluker's vehicle, Mississippi Highway Patrol Officer Ben Williams utilized *Mississippi Code Annotated* §63-3-617 which provides:

> It shall be unlawful for the driver of any truck or other vehicle to drive in or near the center of any highway for a distance of more than two hundred yards, or at any time to refuse to turn to the right in order that any driver desiring to pass said truck or other vehicle, may drive at a higher legal rate of speed.

Miss. Code Ann. §63-3-617 (1972 & 2008 Supp.).

At trial, Officer Williams testified as follows regarding his observations of Mr. Fluker's vehicle:

> [By Mr. Gore]

Q. For the record, you're an officer for the highway patrol?

A. Yes, sir.

Q. State of Mississippi?

A. That is correct.

Q. On or about May the 25th, 2008, while in Grenada County, Mississippi, what occasion did you have to come into contact with Christopher D. Fluker?

A. While on patrol in Grenada County on Mississippi Highway 8 West, I observed his vehicle traveling west – eastbound on Mississippi 8, near Bute Springs area. The vehicle was behind two other cars and had tint blacked out all the windows, and the vehicle was traveling closer to the center line. And in Mississippi law prohibits a vehicle – and 63-3-617, I believe it is – to drive in or near the center line for more than 200 yards.

Q. 63 –

A. 3-617.

Q. Okay.

A. And I observed this vehicle in my rearview mirror when I went past. The vehicle was traveling about 62 miles an hour. Turned around and the vehicle –

Q. What's the speed limit in – that area?

A. Fifty-five.

Q. Okay. So he was traveling 62?

A. Yes, sir.

Q. Okay.

By Mr. Arnold: Your Honor, may it please the Court, based on this testimony, we would object in that the officer has stated this, but we don't have any proof of that unless –

By the Court: Well, he's under oath and we've got his sworn testimony. And I think it's – sworn testimony under the penalty of perjury is sufficient proof.

By Mr. Gore:
Q. Okay.

A. Turned around on the vehicle and got the vehicle stopped right there at the four lane, just before the auto. And I told him why I stopped him. Black tint and driving near the center of the center line. And I didn't charge him with speeding.

Trial Trans. at 4-6.

First, Appellant would note that there is absolutely no case law in Mississippi determining or illustrating how *Miss. Code Ann.* §63-3-617 is to be interpreted by law enforcement officers or the public at large. *See Miss. Code Ann.* § 63-3-617. A thorough examination of Mississippi Supreme Court and Mississippi Court of Appeals decisions for the statute results in absolutely no cases interpreting its text or its application. See *Miss. Code Ann.* §63-3-617. As a result, the statute's interpretation becomes a subjective matter for the law enforcement officer. The traffic stop must have an objective basis to be valid. *Adams v. City of Booneville,* 910 So. 2d 720, 724 (Miss. Ct. App. 2005). It must be based on an objective standard and if it is clear what the officer observed was not a violation of Section 63-3-617, then there is no basis for the stop. *Adams,* 910 So. 2d at 724 (quoting *U. S. v. Escalante,* 239 F. 3d 678, 680-81 (5th Cir. 2001).

In his trial testimony, Officer Williams stated that Mr. Fluker's vehicle was behind two other cars on Mississippi Highway 8 traveling eastbound near Bute Springs. (Trial Trans. at 4) He noted that the black tint on Mr. Fluker's window and that it was "traveling closer to the center line". (Trial Trans. at 4) He further stated that he observed the vehicle in his rearview mirror as it went past, but at no time stated that he watched Mr. Fluker's vehicle drive close to or straddle the center line for more than 200 yards, the length of two football fields. (Trial Trans. at 4-6)

In addition, there is no indication that even if Mr. Fluker was driving close to the center line at the time he was observed by Officer Williams, this conduct would have constituted a traffic violation necessitating probable cause. *See Miss. Code Ann.* §63-3-617. There is no testimony or other evidence in the record as to whether Mississippi Highway 8 in this location is a two, three, or four lane road. (R. at 4-6; 9-10). It was not requested that the Court take judicial notice of the configuration or width of Highway 8 in this location and no evidence of how traveling close to the center line would constitute a violation of §63-3-617 sufficient to justify probable cause for the traffic stop. (R. at 4-6) There is also no indication that Mr. Fluker was attempting to cross the center line to pass or overtake the two vehicles allegedly traveling in front of him. (R. at 4-6). There is also no indication that Mr. Fluker was driving near or in the center of the road to prevent a vehicle from overtaking him, as is contemplated by the very title and language of the statute itself. See *Miss. Code Ann.* §63-3-617.

In short, there is not probable cause sufficient for the traffic stop as Officer Williams did not state in his trial testimony that he actually observed Mr. Fluker drive in or near the center of the road for the length of two football fields. (R. at 4-6; 9-10) It is simply presumed by the Circuit Court that he did actually observe him for 200 yards without Mr. Williams testimony that he in fact did so. (R. at 4-6; 9-10). In addition, assuming that he did travel for a distance of two football fields in the center or near the center of the road, there is no indication of the size or width of Mississippi Highway 8 in this location and how traveling close to the center line would constitute a traffic violation sufficient for probable cause. (R. at 4-6; 9-10). In fact, if Mississippi Highway 8 in this location is a two-lane highway, as many Mississippi highways are, it is nearly impossible not to travel near the center of the highway. See *Miss. Code Ann.* §63-3-617.

In sum, there must have been an objective basis for the stop of Mr. Fluker's vehicle. *U. S. v. Escalante,* 239 F. 3d 678, 680-81 (5th Cir. 2001); *Adams,* 910 So. 2d at 724-25. A traffic stop must have an objective basis; it cannot be based on a pure subjective conclusion or a hunch of the officer. *Adams,* 910 So. 2d at 724. As the United States Court of Appeals for the Fifth Circuit stated in *Escalante,* if the conduct that the police officer observed did not constitute a violation of the cited traffic law, there is no objective basis for the stop and the stop is improper. *Escalante,* 239 F. 3d at 680-81; *Adams,* 910 So. 2d at 724-25. This was purely a pretextual stop, with Trooper Williams being more concerned about the tint of Mr. Fluker's windows than about any alleged violation of traveling too close to the center line. (R. at 4-6). As there is no objective basis for the stop and the conduct observed by Officer Williams did not constitute a violation of the cited traffic law, the stop is improper.

As there was no probable cause to stop Mr. Fluker's vehicle, any and all evidence procured from the stop of his vehicle on Mississippi Highway 8 should be excluded and, as a result, his conviction for violation of *Miss. Code Ann.* §63-3-617 and for DUI First Offense, pursuant to *Miss. Code Ann.* §63-11-30(1) should be reversed.

II.

THE STATE OF MISSISSIPPI HAS NOT MET THE ELEMENTS FOR PROOF OF CONVICTION UNDER *MISSISSIPPI CODE ANNOTATED* §63-3-617.

As this particular assignment of error will restate much of the foregoing argument, it will be necessarily brief. At the trial in Grenada County, a great deal of confusion existed as to the actual traffic violation alleged by Officer Williams and the very existence of *Miss. Code Ann.* §63-3-617 which has turned out to be a fairly obscure statute in Mississippi. At trial, the record reveals the following:

By Mr. Arnold:

Q. Mr. Williams—Officer Williams, do you recall when we had this case in justice court?

A. Yes, sir.

Q. And I asked you about whether or not you had any code section or any law to produce to substantiate this charge and you said, no, at that time; is that correct?

A. I don't, actually, remember you asking me like that. But I think you did ask me what code it was and I couldn't remember the code at the time. But there is such a law. I think you told me that there was no law that would substantiate the charge.

Q. What code did you cite to the Court a minute ago?

A. I think its 63-3-617

By the Court: 670 or 617?

By the Witness: 617.

By the Court: Okay.

By Mr. Arnold:

Q. And you don't have that code section here today to substantiate your testimony; do you?

A. I don't have a statute book with me today, no.

Q. And did you discuss this case with the prosecutor so that he could have that available for the Court?

A. I have not talked to Jay since—no, sir.

Q. You realize that at the preliminary hearing—or at the justice court hearing, you didn't give any of this testimony about the code section or having it available or knowing that there was a code section regarding that?

A. Oh, I just assumed as an attorney that you would probably know. No offense. But there is such a law, and that's why I charged him with it.

By Mr. Arnold: Okay, That's all I have, Your Honor.

By Mr. Gore: Officer Williams, you step down.

By the Witness: That you, sir.

By Mr. Arnold: Your Honor, may it please the Court. Without having this section—

By the Court: Well, I'm sending for it.

By Mr. Arnold: I'll ask the Court to—63—

By the Court: Well, J.D.'s gone downstairs to get it. So, if you'll just hold on for a minute.

(OFF RECORD)

By the Court: Section 63-3-617 of the *Mississippi Code Annotated* states, "It shall be unlawful for the driver of any truck or other vehicle to drive on or near the center of any highway for a distance of m ore than 200 yards or at any time to refuse to turn to the right in order that any driver desiring to pass that truck or vehicle may drive at a higher rate of speed."

So the Court finds there was, certainly, sufficient probable cause to stop based on the observation of Officer Williams, observing this individual driving close to the center line for excess of 200 yards.

So the Court finds that Mr. Fluker is guilty of that charge.

Record at 8-10.

Given the confusion over the very existence of the statute, the State did not meet the elements of *Miss. Code Ann.* §63-3-617 for conviction of Mr. Fluker on that charge. First, Officer Williams' trial testimony is insufficient to establish that Mr. Fluker traveled for a distance of 200 yards (two football fields) near or over the center line as is required by the statute's language. *See Miss. Code Ann.* §63-3-617. He only testified that he saw that Mr. Fluker's vehicle travel near the center line, but said nothing about the required distance of two football fields. (Trial Trans. at 4-6). In addition, there is no testimony in the record from Trooper Williams, or any other witnesses, that this would have constituted conduct, even if true, that would be a violation of the statute as the record is absent of any testimony or any other

evidence as to the width and configuration of the lanes on Mississippi Highway 8 in the location of the stop. (Trial trans. at 4-6; 9-10). There is no testimony in the record that Mississippi Highway 8 in this location is a two, three or four lane highway and its importance to Mr. Fluker's conduct on the day of his stop. (Trial Trans. at 4-6; 9-10). If Mississippi Highway 8 in this location is a two lane highway, then it would be nearly impossible not to travel near the center of the highway for quite a distance. To allow this conviction to stand without the critical evidence concerning the configuration of the highway would render Mississippi motorists subject to conviction under this particular Code provision for situations where it obviously could not be avoided. *See Miss. Code Ann.* §63-3-617.

In addition, the statute itself, in its language and title presumes that it applies to vehicles traveling near the center line to prevent another vehicle from overtaking or passing another vehicle. *See Miss. Code Ann.* §63-3-617. In Mississippi, the interpretation of a statute is reviewed *de* novo by the appellate courts. *Gilmer v. State,* 955 So. 2d 829, 833 (Miss. 2007) (citing *McLamb v. State,* 456 So. 2d 743, 745 (Miss. 1984). The first question in interpreting the statute is whether the statute is ambiguous. *Gilmer,* 955 So. 2d at 833. When the statute is unambiguous, the court applies the plain meaning of the statute and refrains from using statutory construction principals. *Id.* at 833 (citing *Pinkton v. State,* 481 So. 2d 306, 309 (Miss. 1985)). *Miss. Code Ann.* §63-3-617 is not ambiguous. By its very title it applies only to vehicles who are in the center of the highway or near the center of the highway for more than 200 yards to prevent another vehicle from passing them to drive at a higher rate of speed. See *Miss. Code Ann.* §63-3-617. Indeed, the very title of the statute is "Driving in center of highway; refusal to turn to right to allow overtaking vehicle to pass." *Miss. Code Ann.* §63-3-617.

There is no testimony that Mr. Fluker was traveling near the center of the highway to prevent vehicles from passing or overtaking him. (Trial Trans. at 4-6). Indeed, Officer

Williams' testimony is that Mr. Fluker was traveling *behind* two other vehicles who were preceding him, not attempting to overtake or pass him. (Trial Trans. at 4). As there is no indication that the very language of the statute has been satisfied, there can be no conviction according to its terms.

In conclusion, the language of the statute itself states that it would be unlawful for the driver of a vehicle to drive in or near the center line for a distance of more than 200 yards *or* at any time refuse to turn to the right in order than a driver desiring to pass such other vehicle may drive at a higher legal rate of speed. *Miss. Code Ann.* §63-3-617. The record in this case is absent of any testimony that 1) Mr. Fluker traveled near the center line for a distance of more than 200 yards or that 2) he was attempting to pass another vehicle or was about to be overtaken by another vehicle and refused to return to the right side of the road. (Trial Trans. at 4-6; 9) There is also no other indication of any erratic driving by Mr. Fluker, i.e., crossing the center line or weaving. (Trial Trans. at 4-6)

As the State failed to produce any testimony or other evidence at trial stating that Mr. Fluker's vehicle traveled near the center line for more than 200 yards or that it would have been a traffic violation to do so given the configuration of the highway, the State has failed to meet the elements of this charge beyond a reasonable doubt and Mr. Fluker's conviction thereon should be reversed. *Miss. Code Ann.* §63-3-617.

III.

MR. FLUKER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE CIRCUIT COURT TRIAL IN GRENADA COUNTY, MISISSIPPI

For claims of ineffective assistance of counsel, the Mississippi Supreme Court follows the dictates the United States Supreme Court enunciated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Under the *Strickland* standard a two-part test must

be met for a showing of ineffective assistance: first, the defendant must show that the counsel's performance was deficient, and second that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Walker v. State,* 863 So. 2d 1, 13 (Miss. 2003). Both showings must be made. *Walker,* 863 So. 2d at 20.

Indeed, the standard is high. As the United States Supreme Court stated "[t]he benchmark for judging any claim for ineffective assistance [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result." *Strickland,* 466 U. S. at 686. Furthermore, the Mississippi Supreme Court has stated that in presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Walker v. State,* 863 So. 2d at 17-18 (citing *Stringer v. State,* 454 So. 2d 468, 477 (Miss. 1984). Mr. Fluker's undersigned counsel understands the gravity of the charge being made and it gives him no pleasure to do so. Furthermore, appellate counsel is aware that the Court's scrutiny of counsel's performance is highly deferential and the Court will make every effort to eliminate the distorting effects of hindsight in reconstructing the circumstances of the lower court counsel's challenged conduct. See *Walker v. State,* 863 So. 2d at 18.

Despite the undersigned appellate counsel's reluctance to do so, Appellate asserts that the performance of his trial counsel necessitates the reversal on the conviction under *Mississippi Code Annotated* §63-3-617 and his conviction for DUI First Offense under *Mississippi Code Annotated* §63-11-30(1).

At both trials in the Justice Court of Grenada County and the Circuit Court of Grenada County, Mr. Fluker was represented by Jim Arnold, Esq., of Durant, Mississippi. Mr. Fluker represents that Mr. Arnold's performance at trial was deficient and was ineffective in the following respects:

1. At trial in the Circuit Court of Grenada County, Mississippi, Mr. Arnold was unaware of the existence of *Miss. Code Ann.* §63-3-617. (Trial Trans. at 3). At trial Mr. Arnold stated that he had "checked the statute and checked the judicial handbook and prosecution handbook and found no charges that would resemble [*Mississippi Code Annotated* §63-3-617]." (Trial Trans. at 3) However, Section 63-3-617 has been on the books since at least 1938, according to the current version of *Mississippi Code.* See *Miss. Code Ann.* §63-3-617. Obviously, being able to properly find the Code section under which Mr. Fluker was charged prior to the trial in the Circuit Court of Grenada County hindered Mr. Fluker's defense and prevented Mr. Arnold from adequately preparing a proper defense, cross-examination, or direct-examination in this matter. (Trial Trans. at 3-4) Indeed, despite the fact that the statute has been on the books, it was not until it was retrieved for the Court and read in open court was it finally established for the Court that Section 63-3-617 was contained in the *Mississippi Code Annotated.* (Trial Trans. at 8-10) The knowledge of this particular Code section, which constituted both a conviction for its alleged violation and which established the alleged probable cause for Mr. Fluker's stop impeded a proper defense of this matter and prevented Mr. Fluker from receiving adequate assistance of counsel through a more aggressive cross-examination or a more complete direct examination, should he have chosen to testify.

2. Secondly, there is the conduct of Mr. Arnold's cross-examination of Trooper Williams in this matter. Mr. Arnold's entire cross-examination consisted of questions regarding the existence of Section 63-3-617 and whether Trooper Williams utilized it at the Justice Court trial and whether the Trooper had a copy of it with him that day at trial. (Trial Trans. at 8-10) Mr. Arnold asked no questions of Officer Williams with respect to the basis for his probable cause determination or conviction under Section 63-3-617; he asked no questions to contest or challenge Officer Williams' observations of Mr. Fluker after his existing the vehicle which led to

his charge of alleged DUI-First Offense under *Miss. Code Ann.* §63-11-30(1). (Trial Trans. at 8-10). Mr. Arnold asked no questions of Trooper Williams regarding Mr. Fluker's alleged alcohol intake, his physical demeanor during the stop, or his alleged failure of the one field sobriety test given, reciting the alphabet. (Trial Trans. at 8-10) Likewise, Mr. Arnold did not question Trooper Williams as to his probable cause determination or the conviction under Section 63-3-617 with regard to his observations for a complete distance of 200 yards, the width or configuration of Mississippi Highway 8 in this location and otherwise how any alleged driving too close to the center of the highway constitutes either a traffic violation or a probable cause determination that Mr. Fluker had in fact violated a traffic law. (Trial Trans. at 8-10) In short, the cross-examination is woefully deficient in holding the State of Mississippi to their standard of proof, both for probable cause to stop Mr. Fluker's vehicle or for conviction under *Miss. Code Ann.* §63-3-617 or DUI-First Offense under *Miss. Code Ann.* §63-11-30.

3. Third, Mr. Arnold failed to give Mr. Fluker even notice of his trial, which is the subject of a separate assignment of error in this matter. See Supp. R. at 1; Appellant's Second Motion for Enlargement of Time as Exhibit "1." While not constitutionally required to testify, Mr. Fluker's absence robbed him of the opportunity to assist in his own defense. (Supp. R. at 1) Mr. Arnold obviously received notice of the trial date and his failure to inform Mr. Fluker of the fact is but one more unfortunate example of his ineffective assistance of counsel in this case which cannot be characterized as a mere strategic decision.

4. Fourthly, the Circuit Court record is devoid of any indication that Mr. Arnold engaged in any pretrial discovery motions with the State or requested the dashboard video recording of Mr. Fluker's arrest, if one existed. (R. Cause No. 00238 at 1-24).

Given the above noted deficiencies, Mr. Fluker must also satisfy the second part of the *Strickland* test; that the above referenced failings prejudiced his defense. *Strickland*, 466 U.S. at

686. Appellant Fluker asserts that his defense was prejudiced as the trial counsel did not do an adequate job of holding the State of Mississippi to its proof as to the probable cause for his stop pursuant to Section 63-3-617, its proof on conviction for that same charge, or proof that he was intoxicated for DUI-First Offence under *Miss. Code Ann.* §63-11-30(1). Unfortunately, the failure to know that such a statute was contained in the *Mississippi Code*, as well as the failure to vigorously cross-examine Officer Williams as to the alleged violations of *Miss. Code Ann.* §63-3-617 and the behavior that led to the charge of DUI-First Offense prejudiced Mr. Fluker in that opportunities to create reasonable doubt in the mind of the Circuit Court were lost. (Trial Trans. at 8-11).

In addition, Mr. Fluker's trial counsel failed in his preparation of this case to inform Mr. Fluker of the actual trial date, which is the subject of Count No. 4 in this Brief. Failure to inform Mr. Fluker of the trial date necessarily prejudiced Mr. Fluker by robbing him of the opportunity to assist Mr. Arnold in the defense of his case, and, if he chose to do so, to testify in his own behalf to dispute Officer Williams' version of events, despite the fact he is not constitutionally required to do so.

As a result of the foregoing deficiencies, Christopher Fluker is undoubtedly prejudiced in his defense of this matter and Appellate respectfully requests the Court reverse his convictions for alleged violations of *Mississippi Code Annotated* §63-3-617 and his conviction for DUI-First Offense under *Mississippi Code Annotated* §63-11-30 due to ineffective assistance of counsel.

IV.

THE CIRCUIT COURT OF GRENADA COUNTY ERRED IN REFUSING MR. FLUKER'S REQUESTED MODIFICIATION, PURSUANT TO *MISSISSIPPI RULE OF APPELLATE PROCEDURE* 10(e).

On or about June 2, 2009, Mr. Fluker moved the Circuit Court of Grenada County, Mississippi, for a modification of the Circuit Court record pursuant to *Mississippi Rule of*

Appellate Procedure 10(e) and likewise moved this court for an enlargement of time to file the Appellate Brief so that the Circuit Court could rule on the requested modification of record. (See Appellant's Second Motion for Enlargement of Time; Supp. R. at 1.) In requesting modification of the trial record, Mr. Fluker sought to introduce his Affidavit that he never received notice of the trial date of January 7, 2009 from this then counsel, Jim Arnold, Esq. See Second Motion for Enlargement of Time at 1-2. The State of Mississippi objected to the requested modification of the record and the Circuit Court of Grenada County denied the requested modification of the record on June 10, 2009. (Supp. R. at 1).

Mr. Fluker now asserts that the requested modification was error in the following respects.

Mississippi Rule of Appellate Procedure 10(e) provides as follows:

> **Correction or Modification of the Record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. Any document submitted to either appellate court for inclusion in thee record must be certified by the clerk of the trial court. All other questions as to the form and content of the record shall be presented to the appropriate appellate court.

Miss. R. of App. P. 10(e).

In denying the requested modification, the trial court stated that the reason for the denial was nothing contained in Mr. Fluker's Affidavit occurred in the trial court and the Court could not allow the modification to include information that is not within its knowledge. (Supp. R. at 1) However, it was noted at trial that Mr. Fluker was not present. (Trial Trans. at 11) No

explanation for his absence was given by trial counsel or given by the trial court at that time. (Trial Trans. at 11) While the learned Circuit Court Judge is correct in stating that Mr. Fluker was not present to state that he had not received notice of the trial date, he obviously could not be for that very same reason. He cannot know to be at the trial court for trial if he has never received notice of the trial date by his trial counsel.

Moreover, the only fashion in which to present Mr. Fluker's Affidavit is in his lack of notice of the trial date, pursuant to the *Mississippi Rules of Appellate Procedure*, is to pursue the procedure outlined in *Mississippi Rules of Appellate Procedure* 10(e). *Dunn v. Dunn,* 853 So. 2d 1150, 1156 (S.Ct. Miss. 2003); *Carlisle v. Carlisle,* 2009 Miss. App. LEXIS 234 at *3*4 n. 1 (Miss. Ct. App. 2009). Indeed, any documentation regarding Mr. Fluker's lack of notice must be certified by the Circuit Clerk or it cannot be a record excerpt because it is not contained in the record itself. *Carlisle,* 2009 Miss. App. LEXIS 234 at *3-4 n.1.

Mr. Fluker asserts that he wished to include the Affidavit as an additional ground for his claim of ineffective assistance of counsel. As elaborated in Count III, Mr. Fluker's lack of notice of the trial date and subsequent inability to participate in the trial, either through assisting his trial counsel, or, should he chose to do so, testifying on his own behalf to contest the assertions of Trooper Williams, prejudices his defense in this cause. Because he did not receive notice of the trial itself, he was ineffectively served by his trial counsel and the only way to place his lack of notice before the Court, through his Affidavit, was to request the modification under Rule 10(e) so a complete record of what occurred at the trial court will be before this Court. See *Miss. R. App. P.* 10(e). The inclusion of his Affidavit would adequately explain Mr. Fluker's absence from the trial in the lower court and also give this Court additional information to rule on his ineffective assistance of counsel claim.

In addition, both the State in its objection to the modification and the trial court in denying the modification noted that the requested modification occurred five months after the trial of this cause. (Supp. R. at 1) Timeliness is not an issue under *Mississippi Rule of Appellate Procedure* 10(e). Such a requested modification can be made, pursuant to the terms of the Rule itself, before or after the record has been transmitted to the Supreme Court of Mississippi. *Miss. R. App. P.* 10(e). Therefore, timeliness is not an issue in denying the requested modification.

Accordingly, Mr. Fluker asserts the trial court erred in denying his requested modification so that Mr. Fluker could more fully develop his claim of ineffective assistance of counsel in this case. As such, Mr. Fluker asserts that this is one additional ground in which to reverse his convictions from the Circuit Court of Grenada County, Mississippi.

CONCLUSION

The Court should reverse the Circuit Court of Grenada County, Mississippi, and remand this case back to the Circuit Court for a new trial. The State has failed to establish that probable cause existed, pursuant to *Mississippi Code Annotated* § 63-3-617, sufficient to stop Mr. Fluker's vehicle on Mississippi Highway 8.

Furthermore, for many of the same reasons that the State has failed to establish probable cause, it likewise cannot show a violation of *Mississippi Code Annotated* §63-3-617. There is no testimony from Officer Williams that he actually observed Mr. Fluker drive near the center of Mississippi Highway 8 for a distance of 200 yards, or given the configuration of the highway in this location, that such a driving maneuver would have constituted a violation of *Miss. Code Ann.* §63-3-617. There is no indication that Mr. Fluker was near the center to overtake or prevent another vehicle from overtaking him. *Miss. Code Ann.* §63-3-617. As such, his conviction for this violation should be reversed.

Moreover, Mr. Fluker did not receive adequate assistance of his trial counsel at his trial in Grenada County for both the traffic violation and his alleged conviction for Driving Under the Influence-First Offense pursuant to *Miss. Code Ann.* §63-11-30(1). Mr. Arnold, Mr. Fluker's trial counsel, was unaware of the existence of *Miss. Code Ann.* §63-3-617, did not effectively cross examine Officer Williams as to his observations of Mr. Fluker and his vehicle on the day in question, did not engage any discovery with the State, or notify Mr. Fluker of the trial date itself. As a result, the two-pronged test of *Strickland* is met as Mr. Arnold's performance was deficient and his deficiencies prejudiced Mr. Fluker's case at trial.

Finally, the Circuit Court of Grenada County erred in refusing to allow Mr. Fluker to modify the trial court record pursuant to *Mississippi Rule of Appellate Procedure* 10(e) to

include his sworn Affidavit that he did not receive notice of the Circuit Court trial from Mr. Arnold in order to supplement his claims of ineffective assistance of counsel in this case. The above reference assignments of error indicate that he Court should reverse the convictions of Mr. Fluker for violation of Section 63-3-617 and Driving Under the Influence-First Offense under *Miss. Code Ann.* §63-11-30(1) and remand this case to the Circuit Court of Grenada County, Mississippi for a new trial.

RESPECTFULLY SUBMITTED this the 30th day of June, 2009.

CHRISTOPHER FLUKER, Appellant

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CERTIFICATE OF SERVICE

I, T. Philip Huskey, attorney for defendant, do hereby certify that I have this day mailed, via United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to the following:

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THIS the 30th day of June, 2009.

T. PHILIP HUSKEY, Attorney of Record
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