Mississippi

DUI Benchbook

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exhibit 7

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This manual is intended for educational and informational purposes only. It is not intended to provide legal advice or to be a treatise on either DUI law or criminal procedures in Mississippi. Readers are responsible for consulting the statutes, rules, and cases pertinent to their issue or proceeding. Readers should keep in mind that statutes, case law and rules of procedure are subject to change.

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CHAPTER 1

THE DRUG EVALUATION AND CLASSIFICATION PROGRAM & DUI STATISTICS

THE DRUG EVALUATION AND CLASSIFICATION PROGRAM (DECP)

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THE DRUG EVALUATION AND CLASSIFICATION PROGRAM (DECP)[1]

➤ **About DECP**

The Los Angeles Police Department (LAPD) originated the program in the early 1970's. Back then LAPD officers noticed that many of the individuals arrested for driving under the influence (DUI) had very low or zero alcohol concentrations. The officers reasonably suspected that the arrestees were under the influence of drugs, but lacked the knowledge and skills to support their suspicions. In response, two LAPD sergeants collaborated with various medical doctors, research psychologists and other medical professionals to develop a simple, standardized procedure for recognizing drug influence and impairment. Their efforts culminated in the development of a multi-step protocol and the first Drug Recognition Expert (DRE) program. The LAPD formally recognized the program in 1979.

The LAPD DRE program attracted the attention of the National Highway Traffic Safety Administration (NHTSA) in the early 1980s. The two agencies collaborated to develop a standardized DRE protocol, which led to the development of the Drug Evaluation and Classification (DEC) program. During the ensuing years, NHTSA, and various other agencies and research groups examined the DEC program. These various studies demonstrated that a properly trained DRE can successfully identify drug impairment and accurately determine the category of drugs causing such impairment.

(DECP) http://www.decp.org/about/

➤ **What is a Drug Recognition Expert (DRE)?**

A Drug Recognition Expert (DRE), sometimes referred to as a drug recognition evaluator, is an individual who has successfully completed all phases of the Drug Evaluation and Classification Program's (DECP) training requirements for

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[1]All information under this heading was copied and printed from the Drug Evaluation and Classification Program at http://www.decp.org with the permission of the International Association of Chiefs of Police (IACP), which is wholly responsible for the veracity of its contents.

certification as established by the International Association of Chiefs of Police (IACP) and the National Highway Traffic Safety Administration (NHTSA) of the US Department of Transportation. A DRE is skilled in detecting and identifying persons under the influence of drugs and in identifying the category or categories of drugs causing the impairment.

(DECP) http://www.decp.org/experts/whattheydo.htm

➤ **States and Countries with DREs**

The Drug Evaluation and Classification (DEC) program began in the early 1970s in Los Angeles, California. With success, the program has continued to expand to other states and eventually into Canada and other countries. The following 48 states, plus the District of Columbia, are participating in the program in the United States:
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

(DECP) http://www.decp.org/experts/statescountries.htm

➤ **Three Determinations of a DRE**

A DRE conducts a detailed, diagnostic examination of persons arrested or suspected of drug-impaired driving or similar offenses. Based on the results of the standardized and systematic drug evaluation, the DRE forms an expert opinion on the following:
1. Is the person impaired? If so, is the person able to operate a vehicle safely? If the DRE concludes that the person is impaired…
2. Is the impairment due to an injury, illness or other medical complication, or is it drug-related? If the impairment is due to drugs…

3. Which category or combination of categories of drugs is the most likely source of the impairment?

(DECP) http://www.decp.org/experts/whattheydo.htm

➤ **The DRE Drug Evaluation**

DREs conduct their evaluations in a controlled environment, typically at police precincts, intake centers, troop headquarters or other locations where impaired drivers are transported after arrest. The drug evaluation is not normally done at roadside and is typically a post-arrest procedure.

In some cases, the person evaluated will be a driver the DRE personally arrested. In many cases, however, the DRE will be called upon to conduct the evaluation after the driver was arrested by another officer. The DRE is requested to assist in the investigation because of his special expertise and skills in identifying drug impairment.

The DRE drug evaluation takes approximately one hour to complete. The DRE evaluates and assesses the person's appearance and behavior. The DRE also carefully measures and records vital signs and makes precise observations of the person's automatic responses and reactions. The DRE also administers carefully designed psychophysical tests to evaluate the person's judgment, information processing ability, coordination and various other characteristics. The DRE will systematically consider everything about the person that could indicate the influence of drugs.

(DECP) http://www.decp.org/experts/whattheydo.htm

➤ **The 12-Step DRE Protocol**

The DREs utilize a 12-step process to assess their suspect:

1. Breath Alcohol Test
2. Interview of the Arresting Officer
3. Preliminary Examination and First Pulse
4. Eye Examination
5. Divided Attention Psychophysical Tests

6. Vital Signs and Second Pulse
7. Dark Room Examinations
8. Examination for Muscle Tone
9. Check for Injection Sites and Third Pulse
10. Subject's Statement and Other Observations
11. Analysis and Opinions of the Evaluator
12. Toxicological Examination

(DECP) http://www.decp.org/experts/12steps.htm

➤ **The 7 Drug Categories under the DECP**

DREs classify drugs in one of seven categories: Central Nervous System (CNS) Depressants, CNS Stimulants, Hallucinogens, [Dissociative Anesthetics], Narcotic Analgesics, Inhalants, and Cannabis. Drugs from each of these categories can affect a person's central nervous system [and] impair a person's normal faculties, including a person's ability to safely operate a motor vehicle.

1. **Central Nervous System (CNS) Depressants**

CNS Depressants slow down the operation of the brain and the body. Examples of CNS Depressants include alcohol, barbiturates, anti-anxiety tranquilizers (e.g., Valium Librium, Xanax, Prozac, and Thorazine), GHB (Gamma Hydroxybutyrate), Rohypnol and many other anti-depressants (e.g., Zoloft, Paxil).

2. **CNS Stimulants**

CNS Stimulants accelerate the heart rate and elevate the blood pressure and "speed-up" or over-stimulate the body. Examples of CNS Stimulants include Cocaine, "Crack", Amphetamines and Methamphetamine ("Crank").

3. **Hallucinogens**

Hallucinogens are drugs or substances that affect a person's perceptions, sensations, thinking, self awareness, and emotions. They may also cause hallucinations (a sensory

experience of something that does not exist outside of the mind). Examples include LSD, Peyote, Psilocybin and MDMA (Ecstasy).

4. **Dissociative Anesthetics**

Dissociative Anesthetics include drugs that inhibit pain by cutting off or dissociating the brain's perception of the pain. PCP (Phencyclidine) and its analogs (Ketamine, Ketalar, and Dextromethorphan) are examples of Dissociative Anesthetics.

5. **Narcotic Analgesics**

A narcotic analgesic relieves pain, induces euphoria and creates mood changes in the user. Examples of narcotic analgesics include Opium, Codeine, Heroin, Demerol, Darvon, Morphine, Methadone, Vicodin and Oxycontin.

6. **Inhalants**

Inhalants include a wide variety of breathable substances that produce mind-altering results and effects. Examples of inhalants include Toluene, plastic cement, paint, gasoline, paint thinners, hair sprays and various anesthetic gases.

7. **Cannabis**

Cannabis (scientific name for marijuana) is the category of drugs that derive primarily from carious species of Cannabis plants. The active ingredient in Cannabis is delta-9 tetrahydrocannabinol, or THC. This category includes cannabinoids and synthetics like Dronabinol.

(DECP) http://www.decp.org/experts/7categories.htm

DUI STATISTICS

➤ **National DUI Statistics**

State Highway Safety Plans for the 50 states, District of Columbia, American Samoa, Bureau of Indian Nations, Guam, Puerto Rico, Northern Mariana Islands, and Virgin Islands are accessible at www.nhtsa.gov/nhtsa/whatsup/SAFETEAweb/pages/SafetyPlans.

➤ **Mississippi DUI Statistics**

Statewide DUI statistics, as provided by the Office of Highway Safety, Division of Public Safety Planning of the Mississippi Department of Public Safety, include the following:

A. Arresting Agency

In 2010, there were 23,264 DUI arrests of Mississippi licensed drivers in Mississippi. Of these arrests, 44.6% were made by police departments; 29.9% were made by sheriff's departments and 24.7% were made by the Mississippi Highway Safety Patrol.

B. Average Age, Gender, Race

In 2010, 8.7% of all DUI arrests of Mississippi licensed drivers were of persons under the age of 21.

In 2009, 9.1% of all DUI arrests of Mississippi licensed drivers were persons under the age of 21. Male offenders were responsible for 83% of all DUI arrests of Mississippi licensed drivers. 56.5% of all DUI arrests of Mississippi licensed drivers were Caucasian offenders; 40.8 % were African American; and less than 3% were of other races.

C. Percentage of DUI Refusals/Tested and Average BAC

In 2009, almost one fourth (24.2%) of all drivers refused to submit to chemical testing when pulled over for suspicion of driving under the influence. The average (mean) BAC for all DUI arrests during 2009 was .139%.

D. Conviction Rate / Number of Repeat Offenders

In 2009, the conviction rate for DUI arrests of Mississippi licensed drivers was 90.4 %. Of all the DUI arrests in 2009, 88% were DUI first offense; 9.6 % were DUI second offense, and 2.4% were DUI third offense (felony).

E. Alcohol-Related Crashes

During 2009, there were 631 fatal traffic crashes in Mississippi, resulting in 700 fatalities. Of those fatalities, 264 or 38% were alcohol-related. Of those alcohol related fatalities, 234 or 33% were crashes where the highest BAC in the crash was 0.08 or above.

F. Top Five Counties for Serious Injury Crashes

In 2010, the five leading counties for crashes with serious injuries were: Jackson, Harrison, Hinds, Pearl River, and Lauderdale.

In 2009, the five leading counties for crashes with serious injuries were: Harrison, Hinds, Jackson, Covington, and Rankin.

G. Top Five Agencies for DUI Arrests

In 2010, the five leading police departments for DUI arrests of Mississippi licensed drivers were: Gulfport (968), Jackson (434), Starkville (372), Hattiesburg (358), and Oxford (335). The top five sheriff's departments for DUI arrests were: Harrison County (487), Forrest County (457), Madison County (389), Lauderdale County (312), and Simpson County (301). The top five counties (city and county agencies combined and not including MHP) for DUI arrests were: Harrison County (1,982), Desoto County (988), Forrest County (902), Rankin County (802), and Hinds County (766).

See also the Mississippi Department of Public Safety website at http://psdl.ssrc.msstate.edu/ for more information on traffic safety data and reports.

CHAPTER 2

TRAFFIC STOPS & CHECKPOINTS

TRAFFIC STOPS

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TRAFFIC STOPS

➤ **When an officer may make an investigatory stop**

Reasonable suspicion, not probable cause, is the standard for making an investigatory stop:

> The constitutional requirements for an investigative stop and detention are less stringent than those for an arrest. This Court has recognized that "given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest," that is, on less information than is constitutionally required for probable cause to arrest.

Wilson v. State, 935 So. 2d 945, 950 (Miss. 2006).

An officer has a duty to be alert for suspicious circumstances. Dies v. State, 926 So. 2d 910, 919 (Miss. 2006)("The Fourth Amendment does not require police who lack the information necessary for probable cause to simply shrug their shoulders and allow a crime or a criminal escape to occur. Rather, it allows for investigatory stops to encourage the police to pursue their reasonable suspicions."). But any investigative stop must be within constitutional limits. *See* Walker v. State, 881 So. 2d 820, 826 (Miss. 2004). The stopping of a vehicle and the detention of its occupants is a "seizure" within the meaning of the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 653 (1979); U.S. v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993).

To make an investigatory stop the officer must:

- have a reasonable suspicion;
- based upon specific and articulable facts; and
- which, taken together with rational inferences from those facts, result in the conclusion that criminal behavior has occurred or is imminent.

See Terry v. Ohio, 392 U.S. 1, 21 (1968); Burchfield v. State, 892 So. 2d 191, 194 (Miss. 2004); Bone v. State, 914 So. 2d 209, 212 (Miss. Ct. App. 2005).

➤ **What is reasonable suspicion?**

Reasonable suspicion exists when the detaining officer can point to specific and articulable facts that, when taken together with rational inferences from those facts, reasonably warrant the search and seizure. *See* United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006). It is more than an inchoate and unparticularized suspicion or hunch of criminal activity, but considerably less than proof of wrongdoing by a preponderance of the evidence. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000); U.S. v. Rodriguez, 564 F.3d 735, 741 (5th Cir. 2009).

> "[It is] a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."

Alabama v. White, 496 U.S. 325, 330 (1990).

The test is one of reasonableness to be determined on a case-by-case basis. *See* Green v. State, 348 So. 2d 428, 429 (Miss. 1977). Both the content of information possessed by police and its degree of reliability must be taken into account. *See* United States v. Cortez, 449 U.S. 411, 417 (1981). No single fact is determinative. *See* U.S. v. Rodriguez, 564 F.3d 735, 741 (5th Cir. 2009)("A "divide-and-conquer" approach to this analysis is not permitted."). Instead,

> The reasonable suspicion analysis is a fact-intensive test in which the court looks at all circumstances together to weigh not the individual layers, but the laminated total. Factors that ordinarily constitute innocent behavior may provide a composite picture sufficient to raise reasonable suspicion in the minds of experienced officers.

U.S. v. Jacquinot, 258 F.3d 423, 427-28 (5th Cir. 2001).

Thus, "a brief stop of a suspicious individual, in order to determine [a person's] identity or to maintain the status quo momentarily while obtaining more information, may be most

reasonable in light of the facts known to the officer at the time."Adams v. Williams, 407 U.S. 143, 147 (1972).

➤ **Reasonable suspicion to be determined from the totality of the circumstances**

Courts must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. The officer's collective knowledge and experience is an important consideration: "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *See* U.S. v. Arvizu, 534 U.S. 266, 273 (2002); United States v. Estrada, 459 F.3d 627, 631-32 (5th Cir. 2006); United States v. Guerrero-Barajas, 240 F.3d 428, 433 (5th Cir. 2001). "A collection of actions which, individually, are subject to innocent explanation may be sufficient to create reasonable suspicion under the totality of the circumstances." Anderson v. State, 864 So. 2d 948, 951 (Miss. Ct. App. 2003).

Below are a few cases where our courts have upheld the investigatory stop upon reasonable suspicion:

- Dies v. State, 926 So. 2d 910, 918 (Miss. 2006)("[T]he agents identified the smell of burnt marijuana, and their experience with the Mississippi Bureau of Narcotics exposed them to that smell on multiple occasions. They were able to trace the smell back to the red camaro through an open window. They came to this knowledge while remaining outside of the vehicle in a space that was open to the public.").

- Wilson v. State, 935 So. 2d 945, 950 (Miss. 2006)("Officer Young was aware from the dispatch call that the bank had been robbed, and he was in route to the bank. On the way to respond, Officer Young testified that he saw an individual that appeared to be a shoplifter at the County Market. The individual, later identified as Wilson, was crouched behind cars when the police passed. He then ran down the street and behind a school bus.").

- Burchfield v. State, 892 So. 2d 191, 195 (Miss. 2004)("[T}he police were informed by a Walgreens clerk that two white males in a Cadillac with Arkansas license plates had each purchased a quantity of pills containing pseudoephedrine and were leaving the

parking lot, westbound on Goodman Road from Highway 51. Within minutes, officer Thomas spotted two white males in a Cadillac with Arkansas license plates, on Goodman Road.").

- Bone v. State, 914 So. 2d 209, 212 (Miss. Ct. App. 2005)("Thompson's decision to stop Bone was reasonable. A clerk from Fred's informed Thompson that Bone had purchased a large amount of pseudoephedrine. Bone proceeded to Kroger. Thompson personally observed Bone purchase several boxes of pseudoephedrine at Kroger. Additionally, Thompson verified with the police department that Bone was driving his vehicle. Furthermore, Thompson received information regarding Bone's criminal history before proceeding with the stop. Given the available information, it was reasonable for Thompson to infer that Bone was purchasing these products with the intent to manufacture narcotics thereby validating the stop.").

But there must be a "particularized and objective basis" for suspecting legal wrongdoing to withstand constitutional scrutiny:

> Spooner stated that when he exited his car and identified himself as an officer, Rainer "began to back out of the parking lot in an effort to flee." This bare, uncorroborated assertion is not supported by any facts submitted by the State. Spooner's report makes no mention of any facts that support the conclusion that Rainer entered into unprovoked flight at the sight of the police. For example, there is no evidence of the speed at which Rainer attempted to exit the parking lot, nor is there evidence that Rainer drove erratically upon trying to leave. Notably, the lack of evidence of flight compelled the trial court to mention that "[i]t may very well have been that [Rainer] was leaving the gas pump simply because he was through getting his gas and had paid for it." Accordingly, in the absence of more detail, we are not prepared to affirm a finding of flight.

Rainer v. State, 944 So. 2d 115, 119 (Miss. Ct. App. 2006).

➤ **Probable cause to believe a traffic violation has occurred is sufficient**

A traffic stop is reasonable if the officer has probable cause to believe that a traffic violation has occurred. *See* Brendlin v. California, 551 U.S. 249, 263 (2007); Whren v. United States, 517 U.S. 806, 810 (1996); Walker v. State, 881 So. 2d 820, 826-27 (Miss. 2004). This is true irrespective of the officer's motives. *See* United States v. Colin, 928 F.2d 676, 678 (5th Cir. 1991)("Officer Gomez had probable cause to stop the vehicle. Because he had probable cause, his motive-even if anything but proper-was irrelevant.").

Probable cause is a practical, nontechnical concept, based upon the conventional considerations of everyday life on which reasonable and prudent men, not legal technicians, act. "It arises when the facts and circumstances within an officer's knowledge, or of 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." Maryland v. Pringle, 540 U.S. 366, 370-71 (2003); Adams v. City of Booneville, 910 So. 2d 720, 722 (Miss. Ct. App. 2005).

Our courts have upheld the following circumstances for probable cause:

- No brake lights. *See* Walker v. State, 881 So. 2d 820 (Miss. 2004).
- Running onto the shoulder of the road. *See* Leuer v. City of Flowood, 744 So. 2d 266 (Miss. 1999).
- Crossing center line of the road. *See* Loveless v. City of Booneville, 972 So. 2d 723 (Miss. Ct. App. 2007).
- Driving at night with only one headlight. *See* Scott v. City of Booneville, 962 So. 2d 698 (Miss. Ct. App. 2007).
- Drifting into the lane of oncoming traffic. *See* Tran v. State, 963 So. 2d 1 (Miss. Ct. App. 2006).
- Tint-law violation. *See* Walker v. State, 962 So. 2d 39 (Miss. Ct. App. 2006).
- Driving in the middle of the two northbound lanes in the early hours of New Year's Day. *See* Adams v. City of Booneville, 910 So. 2d 720 (Miss. Ct. App. 2005).
- Swerving off the side of the road. *See* Henderson v. State, 878 So. 2d 246 (Miss. Ct. App. 2004).
- Speeding. *See* Burnett v. State, 876 So. 2d 409, 411 (Miss. Ct. App. 2004).

- Crossing over double-line multiple times. *See* Saucier v. City of Poplarville, 858 So. 2d 933 (Miss. Ct. App. 2003).

But a random traffic stop simply to check for a valid driver's license and registration is not reasonable. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979).

➤ **Tip of erratic driving as a basis for the stop**

An officer may conduct a traffic stop upon a tip of erratic driving if:

- the tip contains a sufficient indicia of reliability, including predictive information that tests the informant's knowledge or credibility. *See* Alabama v. White, 496 U.S. 325, 332 (1990); Williamson v. State, 876 So. 2d 353, 355 (Miss. 2004); and
- the tip is reliable in its assertion of illegality, not just in its tendency to identify a particular person. *See* Florida v. J.L., 529 U.S. 266, 267-72 (2000).

There is no requirement that the officer actually observe the erratic driving to make the stop:

> Officer Palmer merely investigated a complaint received from the dispatcher regarding a reckless driver. The public concern served by the seizure is evident-a reckless driver poses a mortal danger to others. . . . [He] had a duty to investigate the detailed complaint given to the police department concerning a driver who may have been ill, impaired, reckless or dangerous to the public.

Floyd v. City of Crystal Springs, 749 So. 2d 110, 117 (Miss. 1999).

Instead, the court must consider the totality of the circumstances:

- Did the informant give a specific description of the vehicle, the precise location where the erratic driving occurred, and details as to the type of violation?
- How was this information reported to the officer?
- Did the tip come from a named source who had given good information in the past?

See Alabama v. White, 496 U.S. 325, 332 (1990)("When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop."). The dispatcher's report of a tip is not hearsay when it's merely offered to explain why the officer initiated the stop. *See* Arnold v. State, 809 So. 2d 753, 758 (Miss. Ct. App. 2002).

➤ **Reasonable suspicion transferrable**

Reasonable suspicion (and probable cause) can be transferred from officer to officer and police department to police department: "There is no reason why information received from another law enforcement official, who has a sworn duty to uphold the law, should be any less reliable than information received from an informant [whose] credibility, in many situations, is uncertain." Dies v. State, 926 So. 2d 910, 920 (Miss. 2006).

➤ **Mistake in law allowable as a basis for the stop**

A mistake in law may provide probable cause for a stop:

> [A] good faith, reasonable belief that a traffic law has been violated may give an officer probable cause to stop a vehicle, even though, in hindsight, a mistake of law was made and the defendant is acquitted of the traffic violation.

Adams v. City of Booneville, 910 So. 2d 720, 724 (Miss. Ct. App. 2005).

See also Harrison v. State, 800 So. 2d 1134, 1139 (Miss. 2001)("Regardless of whether there were construction workers present in the area the deputies had an objective reasonable basis for believing that Harrison violated the traffic laws of Mississippi by exceeding the speed limit.").

But any mistake in law must have a reasonable basis:

> Officer Vincent had no reasonable basis to believe that Couldery was committing a traffic violation in driving in the left-hand lane of the interstate. Under the totality of the circumstances, Officer Vincent lacked a reasonable basis for his stop, and the stop was not proper. Accordingly, the trial court erred in not

suppressing all contraband which stemmed from this stop.

Couldery v. State, 890 So. 2d 959, 965-66 (Miss. Ct. App. 2004).

➤ **Traffic stops may not extend beyond a reasonable duration**

An investigatory stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *See* Haddox v. State, 636 So. 2d 1229, 1234 (Miss. 1994). Further, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion. *See* Florida v. Royer, 460 U.S. 491, 501 (1983). The reasonableness of an investigatory stop is determined by balancing the scope of the intrusion against the governmental interest in conducting the stop and, then, deciding if a person of reasonable caution and belief would find the action taken appropriate.

When conducting a traffic stop the officer may:

- request to examine a driver's license and vehicle registration or rental papers to run a computer check on both. *See* United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006); U.S. v. Brigham, 382 F.3d 500, 508 (5th Cir. 2004); and
- ask about the purpose and itinerary of a driver's trip during the traffic stop. *See* United States v. Gonzalez, 328 F.3d 755, 758-59 (5th Cir. 2003).

Additionally,

> An officer may ask questions outside the scope of the stop, but only so long as such questions do not extend the duration of the stop. It is the length of the detention, not the questions asked, that makes a specific stop unreasonable: the Fourth Amendment prohibits only unreasonable seizures, not unreasonable questions, and law enforcement officers are always free to question individuals if in doing so the questions do not effect a seizure.

U.S. v. Machuca-Barrera, 261 F.3d 425, 432 (5th Cir. 2001).

"There is . . . no constitutional stopwatch on traffic stops. Instead, the relevant question in assessing whether a detention extends beyond a reasonable duration is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.'" U.S. v. Brigham, 382 F.3d 500, 511 (5th Cir. 2004)(citing U.S. v. Sharpe, 470 U.S. 675, 686 (1985)). But once the purpose of a valid traffic stop has been completed and an officer's initial suspicions have been verified or dispelled, the detention must end unless there is additional reasonable suspicion supported by articulable facts. *See* United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006).

➤ **Protective search incident to a traffic stop**

"It is a fundamental concept of police work that officers, in the course of conducting an investigation that involves close contact with persons suspected of criminal activity, are entitled to take reasonable precautions to ensure their safety." Dees v. State, 758 So. 2d 492, 495 (Miss. Ct. App. 2000). Incident to a traffic stop, an officer may order the driver and passengers out of the vehicle. *See* Maryland v. Wilson, 519 U.S. 408, 415 (1997); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977). If there is an articulable and reasonable belief that the driver or passengers are armed and dangerous, the officer may frisk the outer clothing for concealed weapons. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968); United States v. Colin, 928 F.2d 676, 678 (5th Cir. 1991). Further, if there is an articulable and reasonable belief that the driver or passengers are dangerous and might access the vehicle to gain immediate control of weapons, the officer may search the interior of the vehicle for concealed weapons–including the passenger compartment and any open or closed containers that might contain a weapon. *See* Michigan v. Long, 463 U.S. 1032, 1049-51 (1983). But a protective search for weapons is not a general warrant to rummage and seize at will. *See* Texas v. Brown, 460 U.S. 730, 748 (1983). The key inquiry is whether the steps taken to ensure the safety of the officer were reasonable:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 129 S.Ct. 1710, 1723-24 (2009).

In *Gant*, the U.S. Supreme Court held that the police had overstepped the constitutional limitations:

> [Once handcuffed and secured in a patrol car,] Gant clearly was not within reaching distance of his car at the time of the search. . . . An evidentiary basis for the search was also lacking in this case. . . . Gant was arrested for driving with a suspended license-an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Arizona v. Gant, 129 S.Ct. 1710, 1719 (2009).

Thus, a protective search may not escalate into an evidentiary search absent some independent probable cause to arrest or other exception. *See* Tate v. State, 946 So. 2d 376, 384 (Miss. Ct. App. 2006)("Agent Lea stated that the when he touched the bulge, he could feel stems and seeds through the fabric of Tate's shorts that he thought [based upon his six years of experience as a narcotics officer] was marijuana. . . . Agent Lea had the requisite probable cause to . . . reach into Tate's shorts and remove the bag."); McFarlin v. State, 883 So. 2d 594, 599 (Miss. Ct. App. 2004)("Even if [the officer] had been authorized to do a pat down search for weapons under *Terry*, his identification of a small "knot like nudge" was unreasonable. The continued exploration of McFarlin's pockets after determining that no weapon was present amounts to "the sort of evidentiary search that *Terry* expressly refused to authorize.'").

➤ **Restrained detention does not automatically transform a stop into an arrest**

"Although the use of some force does not automatically transform an investigatory detention into an arrest, any overt show of force or authority should be justified under the circumstances." U.S. v. Ricardo D., 912 F.2d 337, 340 (9th Cir. 1990). Sometimes restrictions are necessary to eliminate the possibility of an assault or an attempt to flee, particularly if an arrest is imminent. *See, e.g.*, U.S. v. Taylor, 716 F.2d 701, 709 (9th Cir. 1983)(handcuffing justified where suspect

disobeyed an order to raise hands, and made furtive movements inside truck); United States v. Holtzman, 871 F.2d 1496, 1502 (9th Cir. 1989)(restraints justified by belief suspect was attempting to flee); U.S. v. Bradshaw, 102 F.3d 204, 212 (6th Cir. 1996)(detention in patrol car justified where suspect appeared "nervous" and "jittery").

➤ **Plain view seizure**

When conducting a traffic stop, the officer may seize contraband in plain view. This requires:

- the officer to be in a lawful position to view the object;
- probable cause, i.e., the incriminating nature of the object must be immediately apparent; and
- the officer to have a lawful right of access to the object itself.

See Minnesota v. Dickerson, 508 U.S. 366, 374 (1993); Horton v. California, 496 U.S. 128, 138 (1990); McFarlin v. State, 883 So. 2d 594, 598-99 (2004); Brown v. State, 690 So. 2d 276, 285 (Miss. 1996); Howell v. State, 300 So. 2d 774, 775 (Miss. 1974).

The smell of marijuana constitutes reasonable suspicion and supports further investigation of suspected criminal offense, including the search of the passengers and interior of a vehicle. *See* Gonzales v. State, 963 So. 2d 1138 (Miss. 2007); Walker v. State, 962 So. 2d 39 (Miss. Ct. App. 2006). An arrest following a plain view seizure allows an officer to conduct a search of the immediate surrounding area for weapons and evidence of criminal conduct. *See* New York v. Belton, 453 U.S. 454, 462 (1981); McFarland v. State, 936 So. 2d 960, 963 (Miss. Ct. App. 2006); Ficklin v. State, 767 So. 2d 1035, 1037 (Miss. Ct. App. 2000).

CHECKPOINTS

➤ **Balancing test for determining whether checkpoint is reasonable**

A Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976). Whether the checkpoint stop is "reasonable" under a Fourth Amendment analysis is determined by balancing:

- the gravity of the public concerns served by the seizure;
- the degree to which the seizure advances the public interest; and
- the severity of the interference with individual liberty.

See Michigan Department of State Police v. Sitz, 496 U.S. 444, 447-55 (1990); McLendon v. State, 945 So. 2d 372, 379 (Miss. 2006); Graham v. State, 878 So. 2d 162, 165 (Miss. Ct. App. 2004).

➤ **The gravity of the public concerns served by the seizure**

The State has a legitimate interest in the health, safety, and welfare of its citizens. However, if the primary purpose of the State's legitimate interest in conducting the checkpoint is not distinct from a "general interest in crime control" (i.e., an interest in detecting evidence of ordinary criminal wrongdoing) then the ensuing stop is unreasonable. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37-44 (2000).

Primary interests distinct from a general interest in crime control include:

- Sobriety checkpoints to remove drunk drivers from the road. *See* Michigan Department of State Police v. Sitz, 496 U.S. 444, 455 (1990); Sasser v. City of Richland, 850 So. 2d 206, 208 (Miss. Ct. App. 2003).

- Driver's license, insurance card, registration, or inspection checkpoints to ensure that drivers are properly licensed and that vehicles are properly registered and periodically inspected. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000); McLendon v. State, 945 So. 2d 372, 379 (Miss. 2006); Hampton v. State, 966 So. 2d 863, 867 (Miss. Ct. App. 2007); Dixon v. State, 828 So. 2d 844, 846 (Miss. Ct. App. 2002); Briggs v. State, 741 So. 2d 986, 989 (Miss. Ct. App. 1999).

- Roadside truck weigh-stations and inspection checkpoints. *See* Delaware v. Prouse, 440 U.S. 648, 663 n.26. (1979); Edwards v. State, 795 So. 2d 554, 557-58 (Miss. Ct. App. 2001).

- Illegal game or firearms checkpoints in a game management area. *See* Drane v. State, 493 So. 2d 294, 296-97 (Miss. 1986).

- Border checkpoints to detect illegal aliens. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 545-67 (1976).

- Certain exigencies warranting "an appropriately tailored" checkpoint, e.g., to thwart an imminent terrorist attack or to catch an escaping criminal. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

"[I]t is the primary purpose which determines whether a roadblock is constitutional." Dale v. State, 785 So. 2d 1102, 1105 (Miss. Ct. App. 2001). Minor deviations in departmental policies ordinarily will not affect the validity of the stop if there is a legitimate public safety purpose and the roadblock is conducted in a safe and reasonable manner. *See* Field v. State, 28 So. 3d 697, 706 (Miss. Ct. App. 2010).

➤ **The degree to which the seizure advances the public interest**

To be reasonable under a Fourth Amendment analysis, the State must show some measure of empirical evidence that the roadblock advances the State's interest. *See, e.g.*, Michigan Department of State Police v. Sitz, 496 U.S. 444, 455 (1990)(1.6 percent of drivers passing through the checkpoint arrested for alcohol impairment sufficient); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)(0.5 percent ratio of illegal aliens detected to vehicles stopped sufficient). The mere fact that a reasonable alternative to a checkpoint is available is inconsequential: "[F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." Michigan Department of State Police v. Sitz, 496 U.S. 444, 453-54 (1990).

➤ **The severity of the interference with individual liberty**

Random spot checks or roving-patrol stops are unreasonable since such involve an unconstrained exercise of discretion. *See* Delaware v. Prouse, 440 U.S. 648, 661 (1979). But routine checkpoint stops are far less intrusive:

> First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the

> location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest.

United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

The State's interest in conducting stationary roadblocks in which every vehicle is stopped substantially outweighs the minimal intrusion of the motorist's individual liberty. *See* McLendon v. State, 945 So. 2d 372, 382 (Miss. 2006). Further, because this type of checkpoint is considered routine and not random, there is no requirement that the officers keep a logbook detailing how many cars were stopped or given tickets. *See* McLendon v. State, 945 So. 2d 372, 382 (Miss. 2006)("McLendon fails to recognize that while there were no written guidelines or set procedures in place, the officers stopped every single vehicle which came through the roadblock. Thus, there was no unbridled officer discretion since the officers did not choose who to stop or who not to stop."); Dale v. State, 785 So. 2d 1102, 1105 (Miss. Ct. App. 2001)("This Court refuses to treat this [stationary roadblock in which every car that drove through it was stopped] as a random stop.").

➤ **When a motorist evades a checkpoint**

When a motorist evades a roadblock, police may stop the vehicle to check the validity of the license tag and inspection sticker. *See* Boches v. State, 506 So. 2d 254, 264 (Miss. 1987); Boyd v. State, 751 So. 2d 1050, 1052 (Miss. Ct. App. 1998). Such an investigative stop must be reasonably related in scope to the circumstances which justified the interference in the first place. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968). In assessing whether a detention is too long in duration, the court should look to see whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly during which time it was necessary to detain the defendant. *See* United States v. Sharpe, 470 U.S. 675, 686 (1985). Where a detention exceeds the scope of an investigative stop, it approaches a seizure. *See* Boches v. State, 506 So. 2d 254, 264 (Miss. 1987); McCray v. State, 486 So. 2d 1247, 1250 (Miss.1986).

CHAPTER 3

DUI ARRESTS

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STANDARD FOR MAKING ARRESTS

➤ **When an officer may make an arrest**

Miss. Code Ann. Section 99-3-7(1) provides in part:

> An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.

"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). The presence requirement is contextual and may be satisfied under specific circumstances even though the arresting officer did not physically see the misdemeanor criminal act. Spencer v. State, 908 So. 2d 783, 786 (Miss. Ct. App. 2005).

Significant factors in deciding if the presence requirement is satisfied–even though the officer first discovers the offender after the vehicle has come to rest–include:

- whether the intoxicated suspect had made an admission of driving; or
- whether others have others identified the intoxicated suspect as driving.

See Goforth v. City of Richland, 603 So. 2d 323, 326 (Miss. 1992)("Significantly, Goforth admitted to [the officer] he had been driving the automobile."); Williams v. State, 434 So. 2d 1340, 1346 (Miss. 1983)("It should also be noted that other factors, e.g., admission of the intoxicated arrestee that he was the driver or identification by a witness of the intoxicated arrestee as the driver, can satisfy the presence requirement.").

Section 99-3-7(1) also authorizes an officer or private person to arrest "any person without warrant, for an indictable offense committed, ..." In this situation, knowledge that an indictable offense has been committed is not a prerequisite for the authority to make an arrest.

➤ **What is probable cause?**

Probable cause arises when the facts and circumstances within the officer's knowledge, including any reasonably trustworthy information, are sufficient to justify a person of average caution in the belief that a crime has been committed and that a particular person committed it. *See* Beck v. Ohio, 370 U.S. 89 (1964); Bevill v. State, 556 So. 2d 699 (Miss. 1990); Strode v. State, 231 So. 2d 779, 782 (Miss. 1970); Passman v. State, 937 So. 2d 17 (Miss. Ct. App. 2006). It is more than a bare suspicion, but less than needed for a conviction. *See* Brinegar v. U.S., 338 U.S. 160, 174-76 (1949).

➤ **Probable cause to be determined from the totality of the circumstances**

Probable cause is determined from the totality of the circumstance on a case by case basis. Young v. City of Brookhaven, 693 So. 2d 1355, 1361 (Miss. 1997). The key inquiry is "whether a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the officer possessed." Anderson v. Creighton, 483 U.S. 635 (1987); *see also* Northington v. State, 749 So. 2d 1099, 1102 (Miss. Ct. App. 1999)("Once the alcohol was observed by the officers, which was clearly visible to them as it lay on the rear floorboard . . ., then the issue of probable cause had been met to support an arrest for possession of alcohol in a dry county."). But the information relied on by the officer doesn't need to meet the criteria for admissibility at trial:

> There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.

Draper v. U.S., 358 U.S. 307, 311-12 (1959).

Nor does it require a conviction on the underlying probable cause charge:

> Even though the beer possession charge was dismissed, it is not necessary that the information the officer had at the time of the arrest be sufficient to sustain a conviction of the crime charged . . . nor does the arrest have to have been on the charge ultimately brought.

Mayo v. State, 843 So. 2d 739, 741 (Miss. Ct. App. 2003).

Any probable cause hearing should be conducted before a judge outside the hearing of the jury.

➤ **Probable cause transferrable**

Probable cause can be transferred from officer to officer and police department to police department:

> There is no reason why information received from another law enforcement official, who has a sworn duty to uphold the law, should be any less reliable than information received from an informant [whose] credibility, in many situations, is uncertain.

Dies v. State, 926 So. 2d 910, 920 (Miss. 2006).

See also Hamburg v. State, 248 So. 2d 430, 432 (Miss. 1971)("The bulletin on the police radio [which described an attempt to make an LSD sale to a band member at the Stone Toad and provided a description of the vehicle] was sufficient information to indicate probable cause for an arrest.").

➤ **Considerations for probable cause**

The following are appropriate considerations for probable cause:

- The smell of alcohol emanating from inside the car. *See* Dale v. State, 785 So. 2d 1102, 1107 (Miss. Ct. App. 2001)("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.").

- Poor performance of field sobriety tests. *See* Edwards v. State, 795 So. 2d 554, 563 (Miss. Ct. App. 2001)("Such tests may create probable cause to arrest for driving under the influence.").

- Stumbling, slurring, or staggering. *See* McDonald v. City Of Aberdeen, 906 So. 2d 774, 776 (Miss. Ct. App. 2004)("[McDonald] was swaying badly, was very incoherent, and did not know his whereabouts. [He] also admitted . . . that he had consumed three beers.").

- Glassy and bloodshot eyes. *See* Saucier v. City of Poplarville, 858 So. 2d 933, 935 (Miss. Ct. App. 2003)("The record reflects that the officers smelled alcohol, that Saucier's eyes were glassy and bloodshot, that she swayed, and that she could not adequately perform two field sobriety tests. Saucier admitted to drinking at a casino that night.").

- Admission of drinking. *See* Mayo v. State, 843 So. 2d 739, 742 (Miss. Ct. App. 2003)("[The officer] observed an open container of beer in Mayo's vehicle, and that Mayo admitted that he had been drinking. The officer smelled an intoxilyzing substance on Mayo's breath and noticed that Mayo appeared disoriented.").

- Open container of intoxicating substance. *See* Watson v. State, 835 So. 2d 112, 116 (Miss. Ct. App. 2003)("The presence of the whiskey bottle was simply another link in the chain of evidence constituting probable cause for the officer to believe that Watson was intoxicated.").

- Erratic driving. *See* McDuff v. State, 763 So. 2d 850, 855 (Miss. 2000)("It is not overwhelmingly burdensome for an officer to establish probable cause to believe that a

driver may be under the influence of alcohol or drugs (i.e. the smell of alcohol on the driver's breath, erratic driving, alcohol containers or drug paraphernalia in plain sight in the vehicle, etc.).").

➤ **Field sobriety tests as a basis for probable cause**

An officer may request a motorist suspected of driving under the influence of alcohol or drugs to perform field sobriety tests. *See* Pennsylvania v. Bruder, 488 U.S. 9, 11 (1988). "Probable cause to administer a field sobriety test can be the basis of probable cause to arrest and administer a breath test." Saucier v. City of Poplarville, 858 So. 2d 933, 935 (Miss. Ct. App. 2003).

There two different types of field sobriety tests:

- psychophysical tasks; and
- scientific field sobriety tests.

Psychophysical tasks.

Psychophysical tasks are simple exercises allowing an officer to observe if the driver is slurring words, stumbling, staggering, or otherwise appearing intoxicated or impaired. *See* Young v. City of Brookhaven, 693 So. 2d 1355, 1360 (Miss. 1997); Capler v. City of Greenville, 207 So. 2d 339, 340 (Miss. 1968).

> Many of the most reliable and useful psychophysical tests employ the concept of divided attention: they require the subject to concentrate on two things at once. Driving is a complex divided attention task. In order to operate a vehicle safely, drivers must simultaneously control steering, acceleration and braking; react appropriately to a constantly changing environment; and perform many other tasks. Alcohol and many other drugs reduce a person's ability to divide attention.

http://www.justia.com/criminal/drunk-driving-dui-dwi/docs/

The officer's observations of such tasks are admissible to show probable cause to arrest and administer a breath test and, at trial, as proof of intoxication. *See* Edwards v. State, 795 So. 2d 554, 563 (Miss. Ct. App. 2001); Graves v. State, 761 So. 2d 950, 955 (Miss. Ct. App. 2000). Before conducting the field sobriety tests, the officer will usually inquire as to any physical impairments. But there is no legal requirement to do so. *See* Wright v. City of Water Valley, 832 So. 2d 1241, 1243 (Miss. Ct. App. 2002).

Common psychophysical tasks include, but are not limited to, the following:

- walking a straight line;
- standing on one leg;
- finger-count; and
- finger-to-nose.

See Saucier v. City of Poplarville, 858 So. 2d 933, 936 (Miss. Ct. App. 2003)(finger-to-nose and finger-count).

Scientific field sobriety tests.

Horizontal Gaze Nystagmus and the portable breath test are scientific tests. These tests are admissible, within the sound discretion of the judge, to show probable cause to arrest and administer a breath test, but not as evidence of DUI. *See* Young v. City of Brookhaven, 693 So. 2d 1355, 1360-61 (Miss. 1997); Graves v. State, 761 So. 2d 950, 954 (Miss. Ct. App. 2000); Price v. State, 752 So. 2d 1070, 1077 (Miss. Ct. App. 1999). However, an officer's testimony at trial as to administering an HGN or portable breath test will ordinarily not constitute plain or reversible error if no numerical results are disclosed and there is other evidence to sustain the conviction. *See* Cannon v. State, 904 So. 2d 155, 159 (Miss. 2005)("[A]lthough reference was made to the result of the portable breath test, the actual result was not revealed. . . ."); Ward v. State, 881 So. 2d 316, 322 (Miss. Ct. App. 2004)("Officer Word testified that Ward failed the portable Intoxilizer breath test but did not state the result in numerical terms. . . . We find no plain error."); Rhoades v. State, 832 So. 2d 544, 547 (Miss. Ct. App. 2002)("[T]here was no testimony as to the numerical result of the HGN test, nor that this was the only test relied upon. The test results were not admitted into evidence.").

Further, there should be a contemporaneous objection to preserve the issue on appeal. *See* Graham v. State, 878 So. 2d 162, 165 (Miss. Ct. App. 2004)("Graham did not object to testimony regarding the HGN. In the absence of a contemporaneous objection, this issue is not properly preserved for appellate review."); Blake v. State, 825 So. 2d 707, 709 (Miss. Ct. App. 2002)("In the absence of a contemporaneous objection to the evidence, we do not think, in the context of a bench trial, that the evidence was capable of so misleading the trial court in making the requisite factual determination that we would be required to note it as plain error.").

STANDARDIZED FIELD SOBRIETY TESTS

➤ **Horizontal Gaze Nystagmus, Walk and Turn, and One Leg Stand**

Driving requires maintaining the proper speed and lane, observing traffic conditions and signals, and watching for hazards. And alcohol impairs one's ability to focus on these multiple tasks. The National Highway Traffic Safety Administration (NHTSA) has developed and validated through numerous studies three tests to assist officers in their arrest decisions: Horizontal Gaze Nystagmus, Walk and Turn (WAT), and One Leg Stand (OLS).

See (NHTSA) http://www.nhtsa.gov/people/injury/alcohol/SFST/introduction.htm.

➤ **Horizontal Gaze Nystagmus (HGN)**

> Horizontal Gaze Nystagmus is an involuntary jerking of the eye[s] that occurs naturally as the eyes gaze to the side. Under normal circumstances, nystagmus occurs when the eyes are rotated at high peripheral angles. However, when a person is impaired by alcohol, nystagmus is exaggerated and may occur at lesser angles. An alcohol-impaired person will also often have difficulty smoothly tracking a moving object. In the HGN test, the officer observes the eyes of a suspect as the suspect follows a slowly moving object such as a pen or small flashlight, [or finger] horizontally with his or her eyes. The examiner looks for three indicators of impairment in each eye: if the eye cannot follow a moving object smoothly, if jerking is distinct when the eye is at maximum deviation, and if the angle of onset of jerking is within 45 degrees of center. If, between the two eyes, four or more clues appear, the suspect likely has a BAC of 0.08 or greater. . .

HGN may also indicate consumption of seizure medications, phencyclidine, a variety of inhalants, barbiturates, and other depressants.

(NHTSA) http://www.nhtsa.gov/people/injury/alcohol/SFST/appendix_a.htm

See also Pennsylvania v. Muniz, 496 U.S. 582, 585 n.1 (1990)("[W]hereas everyone's eyes exhibit some jerking while turning to the side, when the subject is intoxicated the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct.").

➤ **Walk and Turn (WAT)**

The Walk and Turn is a divided attention test consisting of two stages: Instructions Stage, and Walking Stage. The officer instructs the person being tested to take nine (9) heel to toe steps up a line, to turn in a prescribed manner, and to take nine (9) heel to toe steps back down a line.

There are two clues that officers are trained to look for during the Instructions Stage and six clues that officers are trained to look for in the Walking Stage.

Instructions Stage clues:

1. Can't balance during instructions;
2. Starts too soon.

Walking Stage clues:

1. Stops while walking;
2. Doesn't touch heel to toe;
3. Steps off line;
4. Uses arms to balance;
5. Takes the wrong number of steps;
6. Loses balance on turn or turns incorrectly.

➤ **One Leg Stand (OLS)**

The One Leg Stand is a divided attention test consisting of two stages: Instructions Stage, and Balancing and Counting Stage. The officer instructs the person being tested to stand with their feet together, hands by their side, and to raise either leg of choice approximately 6" off the ground counting out loud "one thousand one, one thousand two, one thousand three..." until the officer tells the person to stop.

There are four clues that officers are trained to look for are:

1. Uses arms to balance;
2. Sways while balancing;
3. Hops;
4. Puts foot down.

CHAPTER 4

CHEMICAL TESTING FOR ALCOHOL OR DRUGS

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APPROVED METHODS FOR CHEMICAL TESTING FOR ALCOHOL OR DRUGS

➤ **Testing is according to methods approved by the State Crime Lab**

Miss. Code Ann. § 63-11-19 provides in part:

> A chemical analysis of the person's breath, blood or urine, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the State Crime Laboratory created pursuant to Section 45-1-17 and the Commissioner of Public Safety and performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis.

➤ **State Crime Lab to issue permits**

Miss. Code Ann. § 63-11-19 provides in part:

> The State Crime Laboratory and the Commissioner of Public Safety are authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory.

➤ **Who may receive permits**

Miss. Code Ann. § 63-11-19 provides in part:

> The State Crime Laboratory shall not approve the permit required herein for any law enforcement officer other than a member of the State Highway Patrol, a sheriff or his deputies, a city policeman, an officer of a state-supported institution of higher learning campus police force, a security officer appointed and commissioned pursuant to the Pearl River Valley Water Supply District Security Officer Law of 1978, a national park ranger, a national park ranger technician, a military policeman stationed at a United States military base located within this state other than a military policeman of the Army or Air National Guard or of

Reserve Units of the Army, Air Force, Navy or Marine Corps, a marine law enforcement officer employed by the Department of Marine Resources, or a conservation officer employed by the Mississippi Department of Wildlife, Fisheries and Parks.

➤ **Restrictions that apply to marine law enforcement officers and conservation officers**

Miss. Code Ann. § 63-11-19 provides in part:

> The permit given a marine law enforcement officer shall authorize such officer to administer tests only for violations of Sections 59-23-1 through 59-23-7. The permit given a conservation officer shall authorize such officer to administer tests only for violations of Sections 59-23-1 through 59-23-7 and for hunting related incidents resulting in injury or death to any person by discharge of a weapon as provided under Section 49-4-31.

➤ **Periodic testing of methods, machines, or devices used for testing**

Miss. Code Ann. § 63-11-19 provides in part:

> The State Crime Laboratory shall make periodic, but not less frequently than quarterly, tests of the methods, machines or devices used in making chemical analysis of a person's breath as shall be necessary to ensure the accuracy thereof, and shall issue its certificate to verify the accuracy of the same.

Mississippi currently uses the Intoxilyzer 8000, which is self-calibrating:

> The Implied Consent Program of the Mississippi Crime Laboratory utilizes the Intoxilyzer 8000 breath instrument for breath alcohol analysis. This instrument is attached to a centralized computer database that tracks the function and calibration of these instruments. Each time a test is conducted two calibration checks occur automatically. The instruments are serviced as needed by MCL staff assigned to these duties.

(Department of Public Safety) http://www.dps.state.ms.us.

See also Matthies v. State, No. 2010-KM-00783-COA, 2011 WL 2120060 (Miss. Ct. App. 2011) where the Court found the admission of the calibration records nontestimonial in nature and the Confrontation Clause did not require the testimony of their preparer. "The certificates at issue here do nothing more than verify the accuracy of the equipment. Though the intoxilyzer was calibrated for use in criminal prosecutions, the certificates were not specifically prepared with an eye on prosecuting Matthies." The Court specifically held that the recent United States Supreme Court case of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), does not always require the person who calibrated an intoxilyzer to testify for the proper admission of the calibration records.

WHEN OFFICER IS TO ADMINISTER CHEMICAL TESTS FOR ALCOHOL OR DRUGS

➤ **Implied consent to tests**

Miss. Code Ann. § 63-11-5(1) provides in part:

> Any person who operates a motor vehicle upon the public highways, public roads and streets of this state shall be deemed to have given his consent, subject to the provisions of this chapter, to a chemical test or tests of his breath for the purpose of determining alcohol concentration. A person shall give his consent to a chemical test or tests of his breath, blood or urine for the purpose of determining the presence in his body of any other substance which would impair a person's ability to operate a motor vehicle.

The Implied Consent Law allows not only a chemical test or tests of a person's breath, but also blood or urine tests. All three methods are valid tests for determining whether a person is DUI. *See* Fulton v. City of Starkville, 645 So. 2d 910, 913-914 (Miss. 1994).

➤ **Tests to be administered upon reasonable grounds and probable cause**

Miss. Code Ann. § 63-11-5(1) provides in part:

> The test or tests shall be administered at the direction of any highway patrol officer, any sheriff or his duly commissioned deputies, any police officer in any incorporated municipality, any national park ranger, any officer of a state-supported institution of higher learning campus police force if such officer is exercising this authority in regard to a violation that occurred on campus property, or any security officer appointed and commissioned pursuant to the Pearl River Valley Water Supply District Security Officer Law of 1978 if such officer is exercising this authority in regard to a violation that occurred within the limits of the Pearl River Valley Water Supply District, when such officer has reasonable grounds and probable cause to believe that the person was driving or had under his actual physical control a motor vehicle upon the public streets or highways of this state while under the influence of intoxicating liquor or any other substance which had impaired such person's ability to operate a motor vehicle.

Probable cause is proven by the totality of the circumstances:

> Officer McLaurin indicated that he smelled alcohol when he approached Green's vehicle, that Green's eyes were watery and bloodshot, that Green had to steady himself by holding onto the door of the truck, and that Green failed the HGN test. Therefore, this Court finds that Officer McLaurin had sufficient information upon which to establish probable cause to believe that Green was impaired.

Green v. State, 710 So. 2d 862, 866 (Miss. 1998).

See also Deeds v. State, 27 So. 3d 1135, 1145 (Miss. 2009)("[Under] the facts and circumstances of this case [which involve a head-on collision and indications of drinking], this Court is satisfied that exigent circumstances existed that justified taking a blood sample without first seeking a warrant."); McDuff v. State, 763 So. 2d 850, 856 (Miss. 2000)("We hold that the drawing of the two (2) tubes of McDuff's blood, done specifically at the request of law enforcement, was improper because this was done without probable cause, a warrant or consent, and was not

incident to a lawful arrest. This violated both the Fourth Amendment to the United States Constitution and Article 3, § 23 of the Mississippi Constitution."); Wilkerson v. State, 731 So. 2d 1173, 1177 (Miss. 1999)("[B]lood searches based upon probable cause are admissible."); Setzer v. State, 54 So. 3d 226 (Miss. 2011)(citing Green v State, 710 So. 2d 862, 865 (Miss. 1998)("[A]s long as there is probable cause to believe that the person is impaired by some substance... the results of the blood alcohol tests are admissible.")).

CONDUCTING CHEMICAL TESTS FOR ALCOHOL OR DRUGS

➤ **Qualifications to administer tests**

Miss. Code Ann. § 63-11-5(1) provides in part:

> No such test shall be administered by any person who has not met all the educational and training requirements of the appropriate course of study prescribed by the Board on Law Enforcement Officers Standards and Training; provided, however, that sheriffs and elected chiefs of police shall be exempt from such educational and training requirement.

➤ **Observation period**

Miss. Code Ann. § 63-11-5(1) provides in part:

> No such tests shall be given by any officer or any agency to any person within fifteen (15) minutes of consumption of any substance by mouth.

But the Mississippi Department of Public Safety Guidelines and the Intoxilyzer 8000 Implied Consent Policies and Procedures Manual require that the person be observed for 20 minutes immediately before any breath sample is taken. This 20-minute observation period does not require that a single officer observe the person being tested, but only that "the person being tested has been observed" for 20 minutes immediately prior to collecting the breath sample. *See* Hudspeth v. State, 28 So. 3d 600, 603 (Miss. Ct. App. 2009)("Deputy Campbell testified that he combined his observation time with the prior officer's and the fire chief's observation times, which totaled an observation time of approximately twenty-nine minutes."). Moreover, an

officer is not required to stare at the defendant the whole time–"in the presence of the officer" is sufficient:

> A dispute as to whether the observation lasted the mandatory length of time or whether the observation was performed while in the presence of an officer goes to the weight of the testimony and the credibility of the witnesses.

Fisher v. City of Eupora, 587 So. 2d 878, 882 (Miss. 1991).

See also Godbold v. Water Valley, 962 So. 2d 133, 135 (Miss. Ct. App. 2007)("[T]he record clearly reflects that the test in question began twenty-seven minutes after the observation period began, well beyond the statutorily-required fifteen-minute waiting period. Godbold has presented no evidence to suggest that the observation of him did not continue as the machine was calibrated in preparation for his test."); Briggs v. State, 741 So. 2d 986, 990 (Miss. Ct. App. 1999)("While Briggs himself testified to being left alone or in the company of the arresting officer's wife after he was detained, the officer himself testified to placing Briggs in his squad car and taking him immediately to the jail where he personally observed Briggs until the test was administered. . . . At best, Briggs's contention was a disputed issue of fact to be raised at trial and submitted to the jury for resolution on proper instruction.").

➤ **Officer to inform of consequences for refusal**

Miss. Code Ann. § 63-11-5(2) provides:

> If the officer has reasonable grounds and probable cause to believe such person to have been driving a motor vehicle upon the public highways, public roads, and streets of this state while under the influence of intoxicating liquor, such officer shall inform such person that his failure to submit to such chemical test or tests of his breath shall result in the suspension of his privilege to operate a motor vehicle upon the public streets and highways of this state for a period of ninety (90) days in the event such person has not previously been convicted of a violation of Section 63-11-30, or, for a period of one (1) year in the event of any previous conviction of such person under Section 63-11-30.

Mississippi Attorney General Opinions:

When refusal penalty applies.
"[A]n officer may request the test of a subject's breath, with a penalty for refusal to take the test, only under the above conditions set forth in § 63-11-5. [Under] § 63-11-30(1), it is "unlawful for any person to drive or otherwise operate a vehicle within this state" who is under the influence of intoxicating liquor. Therefore, a subject could be convicted of DUI for driving a vehicle on a nonpublic road even though the officer might not be able to request the test of the subject's breath." Op. Att'y Gen. 1984 WL 61541 (July 14, 1984).

➤ **Right to telephone for legal or medical assistance after booking**

Miss. Code Ann. § 63-11-5(4) provides:

> Any person arrested under the provisions of this chapter shall be informed that he has the right to telephone for the purpose of requesting legal or medical assistance immediately after being booked for a violation under this chapter.

➤ **Person tested may, at own expense, have an independent test conducted**

Miss. Code Ann. § 63-11-13 provides:

> The person tested may, at his own expense, have a physician, registered nurse, clinical laboratory technologist or clinical laboratory technician or any other qualified person of his choosing administer a test, approved by the state crime laboratory created pursuant to section 45-1-17, in addition to any other test, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. The failure or inability to obtain an additional test by such arrested person shall not preclude the admissibility in evidence of the test taken at the direction of a law enforcement officer.

There is no obligation to inform of Implied Consent rights beyond those specifically delineated by the legislature. An officer does not need to give notification of the right to an independent

test. Moreover, a defendant's failure or inability to obtain an additional test does not preclude the admissibility of the test taken by the officer:

> Because [section 63-11-13] does not impose an affirmative duty on law enforcement to give notification of the right to an independent test, and Green is presumed to know his rights under the law, and was given the opportunity to obtain legal assistance, this Court holds that there is no merit to Green's claim that the results of the intoxilyzer test administered by Officer McLaurin should be suppressed.

Green v. State, 710 So. 2d 862, 869 (Miss. 1998).

Additionally, destruction of the blood sample must be shown to have had exculpatory value apparent before it was destroyed, and that the State acted in bad faith to prevail on a due process violation:

> Although Harness had a right to test the blood sample taken by the State, the sample was destroyed. Harness must show that it had exculpatory value which was apparent before it was destroyed, that he would be unable reasonably to obtain comparable evidence, and that the State acted in bad faith in order to prevail on his due-process claim. Harness failed to meet the first prong of the *Trombetta* test — that the blood sample had exculpatory value before it destroyed. The Court held defendant's blood sample did not have exculpatory value which was apparent before it was destroyed, and thus, the State's failure to preserve the sample did not violate due process.

Harness v. State, 58 So. 3d 1 (Miss. 2011).

See also Taylor v. State, No. 2009-KA-01846-COA, 2011 WL 1549239, (Miss. Ct. App. 2011)(Taylor's blood sample was not preserved for trial, but was destroyed 10 months after testing as a matter of routine. The court held there was no evidence of bad faith on the part of the crime lab. There was no evidence that the blood sample was exculpatory in nature.).

Not all denials, however, are unreasonable. *See* Scarborough v. State, 261 So. 2d 475, 480 (Miss. 1972)("The arrest of the defendant was made about midnight and it is recognized by the Court that it might have been difficult, if not impossible, to have a test made at such an hour.").

See also Case v. State, 817 So. 2d 605, 608 (Miss. Ct. App. 2002)("Case's argument suggests that he should have been supplied an alternative test by the State. This suggestion is clearly erroneous and this issue is without merit."); Ivy v. City of Louisville, 976 So. 2d 951, 953 (Miss. Ct. App. 2008)("Ivy also argues that the officers should have informed him that he had the right to obtain his own blood test in support of his defense under Mississippi Code Annotated section 63-11-13 (Rev. 2004). This, however, is not the law in Mississippi.").

➤ **Effect of refusal to submit to testing**

Miss. Code Ann. § 63-11-21 provides:

> If a person refuses upon the request of a law enforcement officer to submit to a chemical test of his breath designated by the law enforcement agency as provided in Section 63-11-5, none shall be given, but the officer shall at that point demand the driver's license of the person, who shall deliver his driver's license into the hands of the officer. If a person refuses to submit to a chemical test under the provisions of this chapter, the person shall be informed by the law enforcement officer that the refusal to submit to the test shall subject him to arrest and punishment consistent with the penalties prescribed in Section 63-11-30 for persons submitting to the test. The officer shall give the driver a receipt for his license on forms prescribed and furnished by the Commissioner of Public Safety. The officer shall forward the driver's license together with a sworn report to the Commissioner of Public Safety stating that he had reasonable grounds and probable cause to believe the person had been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor, or any other substance which may impair a person's mental or physical ability, stating such grounds, and that the person had refused to submit to the chemical test of his breath upon request of the law enforcement officer.

➤ **Refusal admissible as evidence**

Miss. Code Ann. § 63-11-41 provides:

> If a person under arrest refuses to submit to a chemical test under the provisions of this chapter, evidence of refusal shall be admissible in any criminal action under this chapter.

Refusal to submit to an intoxilyzer test may be considered as evidence of guilt. Brewer v. State, 812 So. 2d 1153, 1155 (Miss. Ct. App. 2002). It is consider physical instead of testimonial evidence:

> The very nature of a drunk driving charge makes it critical for the State to obtain the necessary evidence before that evidence dissipates with time. Therefore, the penalty of introducing the refusal serves an important state interest in encouraging defendants to take the test. And as the refusal is physical instead of testimonial, its introduction into evidence violates neither the Fifth Amendment nor § 26.

Ricks v. State, 611 So. 2d 212, 216 (Miss. 1992).

See also Price v. State, 752 So. 2d 1070, 1074 (Miss. Ct. App. 1999)("[Section 63-11-41] clearly vitiates Price's argument that his refusal to submit to the intoxilyzer test was improperly admitted into evidence against him in violation of his federal and state constitutional rights against self-incrimination.").

➤ **When blood draw allowed despite a refusal**

If there is a refusal to submit to a requested chemical test, the officer can still obtain a blood sample for proof of DUI under the following circumstances:

- By securing a search warrant from the court to draw a blood sample.

See Dove v. State, 912 So. 2d 1091, 1092-93 (Miss. 2005)("Dove refused to submit to an intoxilyzer test, so Officer Birmingham obtained a warrant from a municipal court judge to draw Dove's

blood. . . . The municipal judge was within his discretion in issuing the warrant [based upon probable cause and exigent circumstances].").

- As a search incident to a lawful arrest.

See Vaughn v. State, 972 So. 2d 56, 60 (Miss. Ct. App. 2008)("[W]e agree with the State's contention that the blood test was admissible under the search incident to the lawful arrest exception to the warrant requirement.").

But any test chosen to measure the person's blood-alcohol level must be a reasonable one and be performed in a reasonable manner:

> Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment-for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Schmerber v. California, 384 U.S. 757, 771-72 (1966).

- Without a search warrant when probable cause exists that the person had been driving under the influence of alcohol or drugs.

A search made without warrant not incident to a lawful arrest is not illegal per se, but the search must have been predicated on probable cause prior to the blood sample being taken:

> In McDuff v. State, 763 So.2d 850, 856 (Miss. 2000), the court held that "the drawing of the two (2) tubes of ... blood, done specifically at the request of law enforcement, was improper because this was done without probable cause, a warrant or consent, and was not incident to a lawful arrest." The police officers in McDuff did not see or speak to the suspect at the time of the accident, or before the blood test was ordered. The court found probable cause did not exist prior to

> the blood test and the suspect was not placed under arrest at the time of the test. Therefore, the court found probable cause was developed after the test was administered, and the subsequent probable cause finding was too late to correct the unlawful search and seizure of the suspect's blood.

Vaughn v. State, 972 So. 2d 56, 60-61 (Miss. Ct. App. 2008); Wilkerson v. State, 731 So. 2d 1173, 1177 (Miss. 1999)("[B]lood searches based upon probable cause are admissible."); Setzer v. State, 54 So. 3d 226 (Miss. 2011)(citing Green v. State, 710 So. 2d 862, 865 (Miss. 1998)("[A]s long as there is probable cause to believe that the person is impaired by some substance... the results of the blood alcohol tests are admissible.")); *see also* Shaw v. State, 938 So. 2d 853, 858 (Miss. Ct. App. 2006)("[P]robable cause developed by an officer subsequent to an unlawful search and seizure of the defendant's blood could not retroactively cure such prior violation.").

In *Vaughn*, the Court of Appeals found ample probable cause:

> The lower court noted many factors which amounted to sufficient probable cause. Officer Henley testified that Vaughn was non-responsive, incoherent, and his eyes were dilated when the officer arrived at the scene of the accident. Officer Henley further testified he detected the smell of marijuana and possibly alcohol on Vaughn and in his car. Further, Henley testified he observed a bottle of alcohol in Vaughn's car. In addition, witnesses to the accident relayed information regarding how the accident occurred and about Vaughn's behavior immediately after the accident.

Vaughn v. State, 972 So. 2d 56, 60 (Miss. Ct. App. 2008).

- When exigent circumstances exist:

In *Vaughn*, the Court of Appeals also found exigent circumstances:

> In addition to having probable cause, the officers were working under exigent circumstances. . . . Vaughn's blood needed to be tested quickly in order to preserve the evidence of drugs or alcohol in his system. Therefore, exigent circumstances existed to permit a search.

Vaughn v. State, 972 So. 2d 56, 60 (Miss. Ct. App. 2008).

Note that the blood sample taken in *Vaughn* was not pursuant to Miss. Code Ann. § 63-11-18. *See* McDuff v. State, 763 So. 2d 850, 856 (Miss. 2000)("Miss. Code Ann. § 63-11-18 is unconstitutional, insofar as it mandates search and seizure absent probable cause.").

The fact that alcohol rates begin to dissipate after drinking ceases is a crucial consideration of exigent circumstances, especially in accident cases involving serious injuries:

> [T]his Court is satisfied that exigent circumstances existed that justified taking a blood sample without first seeking a warrant. These circumstances include not only the undisputed fact that alcohol rates begin to dissipate after drinking ceases, but also the fact that the officers were involved in the investigation of a major vehicle accident involving serious injuries to multiple people, requiring their transportation to nearby hospitals, as well as the time that would have been required to obtain a warrant before traveling to the hospital to obtain the samples.

Deeds v. State, 27 So. 3d 1135, 1145 (Miss. 2009).

➤ **Civil and criminal immunity of testers**

Qualified persons who properly administer a blood test at the request of a law enforcement officer are afforded criminal and civil immunity:

Miss. Code Ann. § 63-11-17 provides:

> No qualified person, hospital, clinic or funeral home shall incur any civil or criminal liability as the result of the proper administration of a test or chemical analysis of a person's breath, blood or urine when requested in writing by a law enforcement officer to administer such a test or perform such chemical analysis.

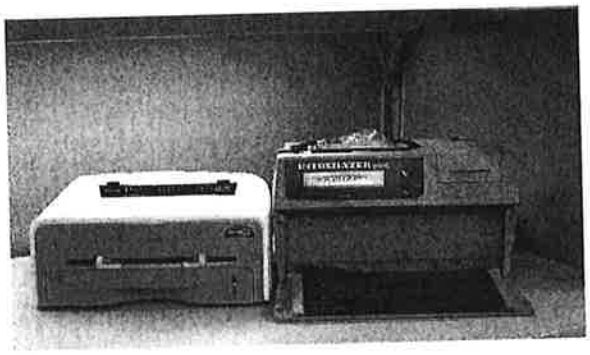
Miss. Code Ann. § 63-11-9 provides:

> Under Section 63-11-7 [which pertains to unconscious or dead accident victims], any qualified person acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of breath or urine specimens.

INTOXILYZER 8000

➤ **Manuals**

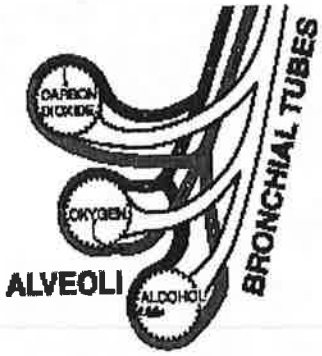
Mississippi uses the Intoxilyzer 8000 for breath testing. A copy of the Implied Consent Breath Alcohol Testing Training Manual and the Implied Consent Policy Manual are available at http://www/dps.state.ms.us.



Intoxilyzer 8000 with External Printer

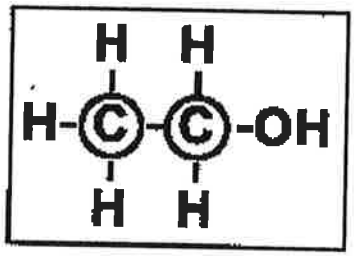
➤ **Intoxilyzer 8000 measures "deep lung air"**

The Intoxilyzer 8000 accurately and precisely measures alcohol in a person's breath or, technically speaking, alveolar air. Alveolar air is "deep lung air"–air from the alveolar sacs–where blood is oxygenated and carbon dioxide and other toxins, such as alcohol, are eliminated. The eliminated toxins are then exhaled.

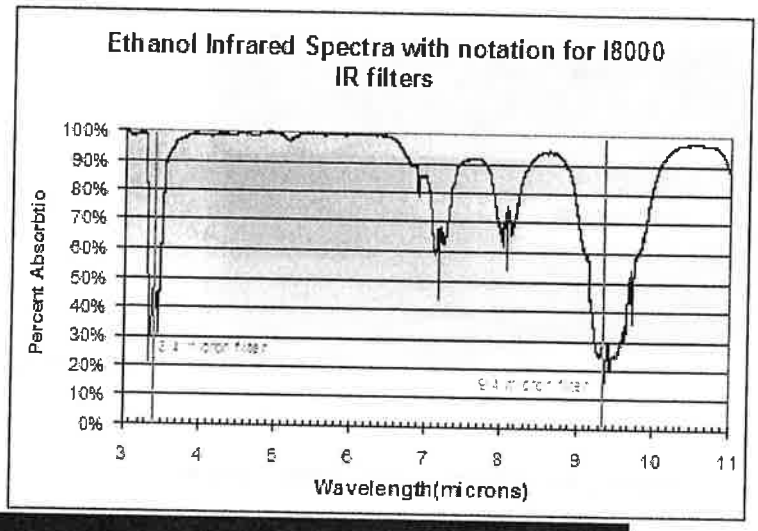


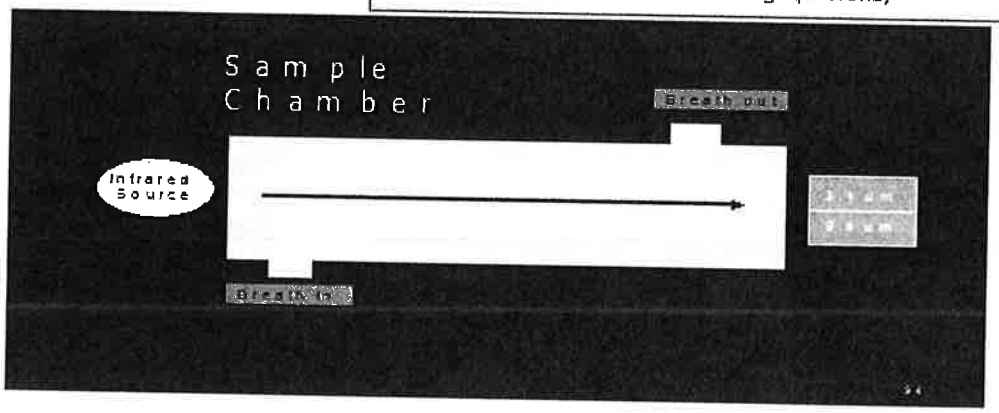
➤ **Irradiating "deep lung air" sample with infrared light**

The Intoxilyzer 8000 measures the blood alcohol content from a sample of "deep lung air." In a breath test, a person provides a "deep lung air" sample into the sample chamber by blowing into the machine. This sample is then irradiated with infrared light filtered to specific wavelengths (3.4 microns and 9.4 microns) for alcohol. The concentration of alcohol within the sample is proportional to the amount of infrared light absorbed. *See* Lambert-Beers law of physics.



Molecular Bonds in Ethanol

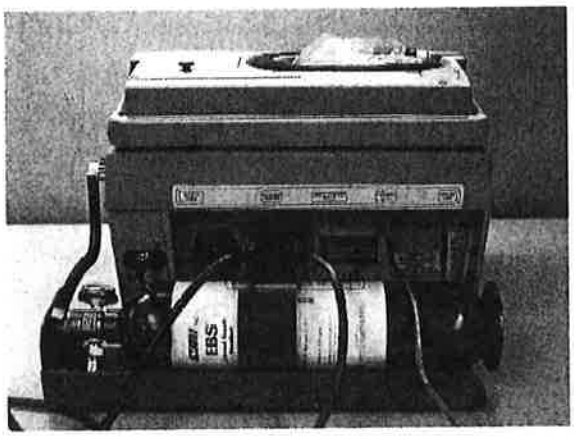




➤ **Features of the Intoxilyzer 8000**

The Intoxilyzer 8000, the approved breath alcohol instrument for Mississippi, features:

- a dry gas delivery system, which allows calibration checks for each breath test sequence;
- dry gas cylinders, with N.I.S.T. traceable certificates of analysis on ethanol concentrations;
- the use of barometric pressure compensation when analyzing the dry gas standard;
- dual detectors, which eliminate the need of a chopper motor and cooling fan;
- portability, weighing just over 20 pounds and operating on a 12 volt system;
- a COBRA connection (by direct connection, Ethernet, or a phone modem), which allows for remote calibration checks, diagnostic monitoring, download of test results, flash updates of software, monitoring of tank pressure for the dry gas cylinder, and real-time monitoring of breath testing; and
- a keyboard, magnetic card reader and 2D-bar scanner reader, which allows the operator to type, swipe or scan information from the operator's permit and the subject's driver's license for automatic transfer to appropriate forms and test records.



Dry Gas Alcohol Standard and Delivery System

➤ **Intoxilyzer 8000 testing procedures**

Procedures for collecting and analyzing a breath sample are:

1. The operator conducts a 20-minute observation period of the person being tested to make sure there is no mouth or residual alcohol in the mouth. The glossary to the Intoxilyzer 8000 manual defines observation period as: "A period during which the person being tested has been observed to determine that he has not ingested alcohol or other fluids, regurgitated, vomited, eaten, smoked, or placed anything into his mouth in the 20 minutes immediately prior to the collection of a breath sample."
2. During the 20-minute observation period, the operator enters the necessary information pertaining to the test into the Intoxilyzer 8000.
3. After the necessary information is entered, the Intoxilyzer 8000 will prompt the operator to read the Implied Consent warning to the person being tested.
4. If the person refuses to take the test, the instrument will perform a calibration check and print the refusal documentation. If the person agrees to take the test, the instrument will continue to count down the 20-minute observation period.
5. Once the required 20-minute observation period has passed, the instrument will begin the breath-test sequence which consists of 7 air blanks, 2 diagnostics, 2 calibration checks, and 2 breath samples. A test result is only possible if all of the air blanks read 0.000, all of the diagnostics pass, the calibration checks are ± 0.005 of 0.080 g/210 L, and the two breath samples have a difference less than 0.02 g/210 L. (The breath-test sequence order is: air blank; diagnostics; air blank; calibration check; air blank; subject test; air blank; air blank; subject test; air blank; calibration check; air blank; diagnostics.)
6. After the completion of the breath-test sequence, the Intoxilyzer 8000 is programmed to print the appropriate forms based on the breath alcohol concentration, age of driver, type of driver's license, and the type of vehicle. For example, if a person under 21 had a BrAC of 0.03 with a regular driver's license and was driving a non-commercial vehicle, the instrument would print an IP-01E (test results and warnings) and an IP-12E (3 part form, receipt for the driver's license, officer's copy and the affidavit).

➤ **Periodic testing to ensure accuracy of test results**

In accordance with the Mississippi Implied Consent Law, the State Crime Lab conducts periodic testing of the Intoxilyzer 8000s in use across the state of Mississippi. Maintaining these instruments in the field has been made easier through the use of the COBRA management system, which allows for remote diagnostics and calibration checks, and the portability of the Intoxilyzer 8000, which allows for mobile testing. The Intoxilyzer 8000 self-calibrates twice each time a test is conducted.

See also Matthies v. State, No. 2010-KM-00783-COA, 2011 WL 2120060 (Miss. Ct. App. 2011), where the Court found the admission of the calibration records nontestimonial in nature and the Confrontation Clause did not require the testimony of their preparer. "The certificates at issue here do nothing more than verify the accuracy of the equipment. Though the intoxilyzer was calibrated for use in criminal prosecutions, the certificates were not specifically prepared with an eye on prosecuting Matthies." The Court specifically held that the recent United States Supreme Court case of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), does not always require the person who calibrated an intoxilyzer to testify for the proper admission of the calibration records.

COLLECTION KITS

➤ **Submitting collection kits to State Crime Lab**

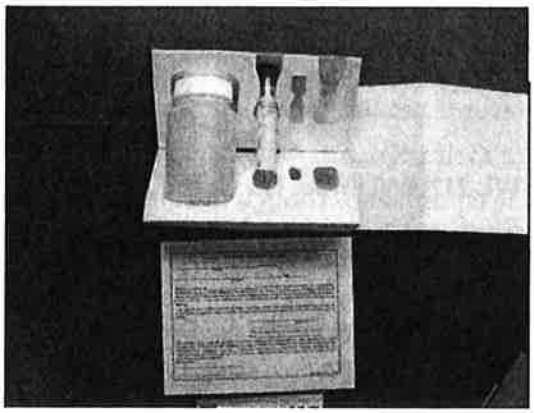
All blood and urine samples collected and submitted to the State Crime Lab must be properly:

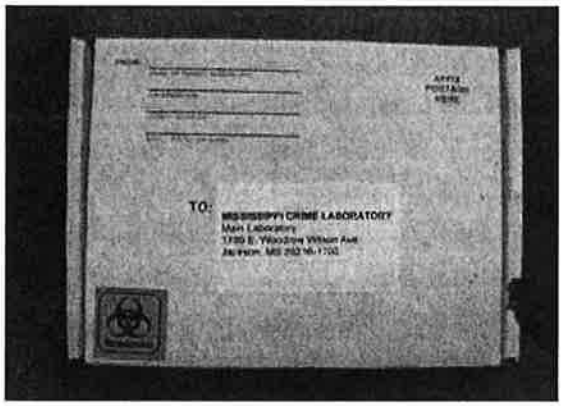
- labeled;
- sealed in leak-proof containers; and
- initialed and dated by the person who sealed the containers.

All forms should be filled out legibly and completely. Any information as to alcoholic beverages, medicines, drugs, chemicals or other substances found at the scene should be properly recorded. Any personal observations that might indicate the possibility of some other source of impairment–a leaky exhaust, possible CO poisoning, a diabetic ID bracelet–should be documented.

➤ **Biological Collection Kits**

Biological Collection Kits are used for collecting and submitting urine samples to the State Crime Lab for analysis.





Biological Collection Kit

➤ **Post-mortem Collection Kits**

Post-mortem Collection Kits are used for collecting and submitting biological samples when there is a vehicular accident that results in the death of a driver or occupant.

Post-mortem Collection Kit

➤ **Analysis and reporting test results**

Forensic quality control procedures ensure the authenticity and accuracy of test results by:

- analyzing commercially prepared control samples and participating in outside and in-house proficiency tests;
- requiring technical and administrative review by forensic scientists of all crime lab reports;
- using chemical reagents with traceable lot numbers and certificates of analyses; and
- calibrating and maintaining instruments in compliance with State Crime Lab policies.

Official forensic analytical reports are available to those agencies, their designees, and district attorneys who have authorized access to Mississippi Crime Laboratory iResults™. Analytical reports are no longer mailed out but are accessible through an online database information system. Access requires: preauthorization by a JusticeTrax™ Administrator and a personal computer, a Web browser, and Adobe software. All samples submitted for forensic DUI toxicological examination are routinely disposed of six months after the completed analyses.

Other policies and considerations include:

- The State Crime Lab needs to be contacted by the submitting agency if the evidence needs to be returned.
- The State Crime Lab does not store evidence and may charge storage fees.
- The State Crime Lab must have written authority from the submitting agency before releasing the evidence to another agency.
- State Crime Lab analysts may be subpoenaed to testify. A copy of the certified subpoena must be mailed or faxed to the analyst being subpoenaed to be effective.
- State Crime Lab analysts do not transport evidence when traveling to offer court testimony.

Head Space Gas Chromatograph Blood and Urine Alcohol Analysis

CHAPTER 5

PROVING DUI

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DUI TICKET IS NOTICE OF MISDEMEANOR DUI

The DUI ticket is notice of DUI, whether common law or per se, despite which particular box is checked. *See* Deloach v. City of Starkville, 911 So. 2d 1014, 1018 (Miss. Ct. App. 2005)("[We] find the argument to be without merit that the State failed to mark both box (a) and (c) since the charge of DUI is the same regardless of the State's method of proving it."). DUI is the charged offense:

> Leuer refused the intoxilyzer according to Officer Harper, and Leuer testified contrarily that the machine would not register. The record reveals that no test results were obtained. Since no BAC analysis was available, subsection (1)(a) is the offense committed as it is a different method of proving the same crime - DUI.

Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999).

The good practice, though, is for the officer to check all the applicable boxes on the DUI ticket. Such allows the prosecutor to go forward on the DUI charge without pause or distraction. *See* Turner v. State, 910 So. 2d 598, 602 (Miss. Ct. App. 2005)("In securing Turner's conviction for violation of § 63-11-30(1)(a) and (b), the State did not have to prove that Turner's blood alcohol content was .08 percent or more when he operated the vehicle."); Bates v. State, 950 So. 2d 220, 223 (Miss. Ct. App. 2006)("Bates's argument concerning the lack of an intoxilyzer or sobriety test would only be relevant had he been indicted under [Section 63-11-30(1)(c)]."). The ticket displaying the clerk's signature is substantial evidence that it was in fact sworn to. *See* Clark v. City of Aberdeen, 764 So. 2d 508, 510 (Miss. Ct. App. 2000). A DUI ticket, which is an affidavit, may be amended as long as the defendant is not unfairly surprised and afforded a fair opportunity to prepare a defense in the face of the amendment. See Rule 3.07 of the Uniform Rules of Procedure for Justice Court.

UNIFORM TRAFFIC TICKET LAW

➤ **Requirements**

Miss. Code Ann. § 63-8-21(c) provides in part:

> Every traffic ticket shall show, among other necessary information, the name of the issuing officer, the name of the court in which the cause is to be heard, and the date and time such person is to appear to answer the charge. The ticket shall include information which will constitute a complaint charging the offense for which the ticket was issued, and when duly sworn to and filed with a court of competent jurisdiction, prosecution may proceed thereunder.

See *CHAPTER 6 "PROVING DUI CAUSING MUTILATION OR DEATH"* for a discussion on amending DUI tickets in misdemeanor cases.

➤ **Failure to timely file does not require dismissal**

Miss. Code Ann. § 63-9-21(6) provides in part:

> [I]f a ticket is issued and the person is incarcerated based upon the conduct for which the ticket was issued, the ticket shall be filed with the clerk of the court to which it is returnable no later than 5:00 p.m. on the next business day, excluding weekends and holidays, after the date and time of such incarceration.

However, failure to timely file does not require dismissal of the DUI case:

> Bond argued that his ticket was untimely filed requiring dismissal of his case. However, Bonds bonded out of jail the same day as his arrest, and was not prejudiced by the late filing. The Court found no authority for the proposition that a timely filing was jurisdictional, and affirmed the circuit judge's denial of his motion for directed verdict.

Bonds v. State, No. 2010-KM-01371-COA, 2011 WL 5027166 (Miss. Ct. App. 2011).

INDICTMENT REQUIRED FOR FELONY DUI

An indictment, not a traffic citation, is the charging instrument for felony DUI. *See* Williams v. State, 708 So. 2d 1358, 1364 (Miss. 1998)("Section 27 of the Mississippi Constitution requires that a grand jury return an indictment before a prosecution for a felony may be had."). It is sufficient that the indictment enumerate all the essential elements of the offense:

> Harris contends that because the traffic citation issued to him charged him with driving while having a blood alcohol content of .10% or greater, the State was required to prove this fact as an essential element of the offense. . . . In this case, the indictment simply charged Harris with operating "a motor vehicle while under the influence of intoxicating liquor," which is the exact language of the offense codified at Mississippi Code Section 63-11-30(1)(a)(Supp.2001). This statement adequately informed Harris of the elements that the State was required to prove. There is no merit to this assignment of error.

Harris v. State, 830 So. 2d 681, 683 (Miss. Ct. App. 2002).

An indictment may be amended without action of the grand jury so long as it does not alter the elements of the crime of which the indictment gives notice. *See* Spann v. State, 771 So. 2d 883, 898 (Miss. 2000).

REDUCTION OF CHARGES PROHIBITED

Miss. Code Ann. § 63-11-39 provides:

> The court having jurisdiction or the prosecutor shall not reduce any charge under this chapter to a lesser charge.

See Ostrander v. State, 803 So. 2d 1172, 1176 (Miss. 2002)("The sole function of § 63-11-39 is to prohibit reduction of DUI charges to non-DUI charges."); Mississippi Commission on Judicial Performance v. Chinn, 611 So. 2d 849, 853 (Miss. 1992)("The statutes do not allow a judge to reduce a DUI to reckless driving.").

Mississippi Attorney General Opinions:

Lesser charge means non-DUI offense.
"The "lesser charge" referred to in Section 63-11-39 means non-DUI offenses. A charge of DUI second or DUI third may be changed by amendment to a DUI first or a DUI second, if the facts warrant." Op. Att'y Gen. No. 93-0437 (July 19, 1993).

Section 63-11-39 not applicable to dismissals or final verdicts.
"Section 63-11-39 does not limit the court at the trial on the merits on the ultimate disposition of the case. It prohibits a reduction of such a charge at any stage of the proceeding, but not dismissals or final verdicts. . . . If the state fails to introduce sufficient evidence to establish guilt, then the municipal judge could find the defendant not guilty or dismiss the case." Op. Att'y Gen. No. 93-0239 (June 9, 1993).

DISMISSAL OF ACTION UPON SUCCESSFUL COMPLETION OF CERTAIN COURT IMPOSED CONDITIONS NOT ALLOWED

Conditional sentencing does not apply to offenses under the Mississippi Implied Consent Law.

Miss. Code Ann. § 99-15-26(1) provides in part:

> In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section. . . . A person shall not be eligible to qualify for release in accordance with this section if such person has been charged . . . (c) with an offense under the Mississippi Implied Consent Law.

Mississippi Attorney General Opinions:

Mississippi Implied Consent Law offenses excepted from statute.

"[Section 99-15-26] provides that certain offenses are excepted from its terms. Traffic offenses are misdemeanors, and other than offenses under the Mississippi Implied Consent Law, they are not excepted from the statute." Op. Att'y. Gen. No. 2005-0199 (June 3, 2005).

VARIETY OF WAYS TO PROVE DUI

Miss. Code Ann. § 63-11-30(1) provides:

> It is unlawful for any person to drive or otherwise operate a vehicle within this state who
> (a) is under the influence of intoxicating liquor;
> (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle;
> (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter;
> (d) is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law; or
> (e) has an alcohol concentration of four one-hundredths percent (.04%) or more in the person's blood, based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's blood, breath or urine, administered as authorized by this chapter for persons operating a commercial motor vehicle.

DUI can be proven by showing that a person was driving or otherwise operating a vehicle:

- under the influence of intoxicating liquor (sometimes referred to as common law DUI);
- under the influence of any other substance which has impaired the person's ability to operate a motor vehicle;
- under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law; or
- with a blood alcohol concentration above the legal limit (illegal "per se" DUI).

See Young v. City of Brookhaven, 693 So. 2d 1355, 1358 (Miss. 1997)("Miss. Code Ann. § 63-11-30 merely sets forth numerous methods of committing the same crime."); Lewis v. State, 831 So. 2d 553, 556 (Miss. Ct. App. 2002)("The fact that the State may establish a violation of this statute in a variety of ways does not constitute double jeopardy.").

But the court may only impose a single conviction and sentence for the violation of § 63-11-30(1):

> This Court previously has examined Miss. Code Ann. § 63-11-30(1)(a) and (c) to determine whether the prosecution may proceed to trial under both subsections. The Court interpreted the two subsections as merely providing two different ways to prove a single violation. The Court affirmed Young's conviction, finding no error in the prosecution's choice to proceed under both subsections rather than electing to proceed under just one. The Court stated that "Miss. Code Ann. § 63-11-30 merely sets forth numerous methods of committing the same crime." However, unlike the case at hand, the Court in Young did not convict and impose sentence under both subsections of Miss. Code Ann. § 63-11-30. Accordingly, Kramm is correct that his conviction and sentence under Count I and Count II amounted to being convicted and sentenced twice for the same crime.

Kramm v. State, 949 So. 2d 18, 23 (Miss. 2007).

WHEN IS A PERSON DRIVING OR OTHERWISE OPERATING A VEHICLE?

➤ **May be proven through direct or circumstantial evidence**

The State must show that the person was driving or operating the vehicle within the state to sustain a conviction for DUI. This can be proven through direct or circumstantial evidence:

- Direct proof is where the officer (or other witnesses) actually observed the person driving the vehicle or the person admitted driving the vehicle to the location.
- Circumstantial evidence is where the officer did not observe the person drive the vehicle, but there are other observations that give rise to a logical inference that the person had driven the vehicle to the location.

➤ **Proof if officer is investigating a parked vehicle**

A person is driving or otherwise operating a vehicle if there is direct proof or reasonable inferences that the defendant drove the vehicle while under the influence. But,

> [b]eing intoxicated and being at the wheel of a parked motor vehicle with the motor off do not by themselves form sufficient facts for conviction for driving under the influence. This would mean that a person who becomes intoxicated outside of his vehicle and then returns to "sleep it off" is guilty of operating under the influence if he chooses the driver's seat for his sleep. We find no precedent interpreting this statute that makes the mere potential that an intoxicated person may decide at some time to start the engine and start driving is adequate to prove the offense.

Lewis v. State, 831 So. 2d 553, 558 (Miss. Ct. App. 2002).

Instead it must be shown:

> [that the vehicle is at least] capable of being moved by the defendant, whether the accused was then in the act of causing it to move or not. Both the accused and the vehicle must have a present ability to cause the hazards against which the

statute attempts to protect. That hazard is a moving vehicle with an intoxicated person in control.

Lewis v. State, 831 So. 2d 553, 558 (Miss. Ct. App. 2002).

This is clearly established if the driver is behind the steering wheel of a vehicle that is situated on a public highway with the motor running. *See* Jones v. State, 461 So. 2d 686, 694 (Miss. 1984)("[The officer] found Jones slumped over the steering wheel of his truck sitting in the middle of a well-traveled highway at night. The truck engine was running, and the headlights had been turned off."); McDonald v. City of Aberdeen, 906 So. 2d 774, 775 (Miss. Ct. App. 2004)("[The officer] was dispatched to the intersection of Commerce Street and Highway 45 where he found a vehicle sitting in the road blocking traffic. He stated that the car's engine was running and that McDonald was lying over the steering wheel asleep.").

➤ **Proof required if no one actually viewed the defendant driving the vehicle**

While it is not necessary to present an eyewitness who actually viewed the defendant operating the vehicle, there must be other sufficient evidence–such as an admission of driving or significant circumstantial evidence. *See* Goforth v. City of Ridgeland, 603 So. 2d 323, 326 (Miss. 1992)("Significantly, Goforth admitted to Officer Grissett he had been driving the automobile."); Stuckey v. State, 975 So. 2d 271, 273 (Miss. Ct. App. 2008)("Stuckey admitted that he was headed home."); Travis v. State, 972 So. 2d 674, 679 (Miss. Ct. App. 2007)("Travis told Sergeant Henderson that 'he was on his way to his girlfriend's house.'"); Holloway v. State, 860 So. 2d 1244, 1247 (Miss. Ct. App. 2003)("[When asked why his car was parked in the road] Holloway indicated that he heard something pop on his vehicle and just stopped in the road. "). If the defendant admits having driven the vehicle to its present location, no additional proof of its ability to be driven is required. *See* Stuckey v. State, 975 So. 2d 271, 273 (Miss. Ct. App. 2008); Turner v. State, 910 So. 2d 598, 601 (Miss. Ct. App. 2005)("sufficient credible evidence from which it could be reasonably inferred that Turner had been operating the vehicle prior to being stopped by Officer Riggs."); Holloway v. State, 860 So. 2d 1244, 1246 (Miss. Ct. App. 2003).

If there are no eyewitnesses to the driving or an admission of driving, the State must present circumstantial evidence–such as:

- the defendant's proximity to the vehicle;
- the location of the keys;
- the warmth of the engine;
- the vehicle registration;
- any of the defendant's personal items found in the vehicle;
- any injuries consistent with the accident;
- the defendant's blood or fluids taken from the driver's side of the vehicle;
- observations of EMS and rescue workers;
- observations of witnesses who had driven or walked by the accident scene;
- the insurance claim on the accident; and
- unprivileged statements made to others.

See Travis v. State, 972 So. 2d 674, 680 (Miss. Ct. App. 2007)("While there was no eyewitness testimony that Travis, in fact, drove the car that hit Garrett, there was sufficient circumstantial evidence to convict Travis. 'Our system of justice allows the jury to make logical and reasonable inferences and presumptions.'"(quoting Broomfield v. State, 878 So. 2d 207 (Miss. Ct. App. 2004)).

"One who drives a motor vehicle is, of course, operating it, though he may operate a motor vehicle without driving it." Ferguson v. State, 23 So. 2d 687, 688 (Miss. 1945). What about a disabled vehicle?

> What we find required by the statute is that the vehicle at least be capable of being moved by the defendant, whether the accused was then in the act of causing it to move or not. . . . In one older case that we find still to be a reasonable interpretation, guilt was shown when an accused caused a motor vehicle, which was temporarily inoperable because its engine was flooded, roll down a driveway to a public highway. Farley v. State, 170 So. 2d 625, 626 (1965). The dangers inherent in allowing gravity to cause the vehicle to move are just as great

if shorter-term as when the motor is running, the vehicle is in gear, and the defendant's foot is on the gas pedal.

Lewis v. State, 831 So. 2d 553, 557 (Miss. Ct. App. 2002).

PROVING DUI UNDER § 63-11-30(1)(a) – UNDER THE INFLUENCE OF ALCOHOL

Miss. Code Ann. § 63-11-30(1)(a) provides:

> It is unlawful for any person to drive or otherwise operate a vehicle within this state who
>
> (a) is under the influence of intoxicating liquor;

This is often referred to as common law DUI:

> Common law DUI is proven when a defendant's blood alcohol results are unavailable or the defendant's BAC tests under the legal limit, but there is sufficient evidence that the defendant operated a vehicle under circumstances indicating his ability to operated the vehicle was impaired by the consumption of alcohol.

Gilpatrick v. State, 991 So. 2d 130, 133 (Miss. 2008);

See also Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999)("Miss. Code Ann. § 63-11-30(1)(a) is not void for vagueness and does sufficiently provide fair notice of the proscribed conduct. [T]he average person is put on notice that drinking intoxicating liquors and subsequently driving a motor vehicle is prohibited.").

Does the State need to show impairment under § 63-11-30(1)(a)? Apparently not:

> Christian was charged with driving while under the influence of intoxicating liquor. The applicable statute distinguishes this charge from driving while under the influence of another substance that impairs driving ability. Given the distinction in statutory language, we hold that the State was not obligated to offer proof on impairment of Christian's driving ability only proof of his driving under the influence of intoxicating liquor.

Christian v. State, 859 So. 2d 1068, 1073 (Miss. Ct. App. 2003).

But the court noted that the State had proven impairment anyway:

> Despite the fact that the State was not required to offer proof of Christian's impaired driving ability, the State offered this proof anyway. Officer Adams testified that Christian ran a stop sign and failed to turn off his high beams as he passed the officer. Clearly Christian's actions were evidence of his driving impairment.

Christian v. State, 859 So. 2d 1068, 1073 (Miss. Ct. App. 2003).

Whereas *Gilpatrick* speaks of being "impaired by the consumption of alcohol," a prosecutor should always show impairment if the facts are there. *See also* Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999)("[C]ourts have recognized for over half a century that driving "under the influence" is commonly understood to mean driving in a state of intoxication that lessens a person's normal ability for clarity and control. Government of Virgin Islands v. Steven, 134 F.3d 526, 528 (3rd Cir. 1998).").

May the State introduce Intoxilyzer results? In a case where the indictment alleged a violation of section 63-11-30(1)(a) and not section 63-11-30(1)(c), the Mississippi Court of Appeals held:

> [T]he Intoxilyzer result was just one of several pieces of evidence the prosecution used to prove Ali was "under the influence" as required in sub-part (1)(a). Officer

> Cline testified about the results of two field sobriety tests, the odor of an intoxicating beverage and his initial observation of Ali's driving. When considering the evidence of the Intoxilyzer result in conjunction with the overall proof presented against Ali, it is our opinion that it was not an abuse of the trial court's discretion to admit the evidence.

Ali v. State, 928 So. 2d 237, 241 (Miss. Ct. App. 2006).

PROVING DUI UNDER § 63-11-30(1)(b) – IMPAIRED BY ANY OTHER SUBSTANCE

Miss. Code Ann. § 63-11-30(1)(b) provides:

> It is unlawful for any person to drive or otherwise operate a vehicle within this state who
>
> (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle;

Under this subsection, the State is required to prove that the accused was operating a vehicle under the influence of a substance which impaired the ability to operate a motor vehicle. It doesn't need to prove that the accused had a certain blood alcohol content. Bates v. State, 950 So. 2d 220, 223 (Miss. Ct. App. 2006). "Any other substance" would include lawfully prescribed drugs and over-the-counter medications. *See* Turner v. State, 910 So. 2d 598, 603 (Miss. Ct. App. 2005)("Turner's admissions to drinking six to seven beers that night, consuming three Xanax pills within the last twenty-four hours, and driving from Memphis constituted admissions on the elements of impaired operation of a motor vehicle as defined by § 63-11-30(1)(a) and (b), and were direct evidence of his guilt.").

But, it may also include illegal drugs:

> Officer Sturm testified that he smelled a strong odor of burnt marijuana coming from Weil's vehicle. He also testified that Weil had poor balance, bloodshot eyes,

> slurred speech, and dilated pupils, which Sturm opined were consistent with signs of someone under the influence of marijuana. Most importantly, Sturm testified that when he asked Weil if he had been smoking marijuana that evening, Weil indicated that he had smoked a small amount. Officer Jason Brockman, who assisted Sturm with the arrest, also testified that he smelled a strong odor of marijuana emerging from the vehicle. He also observed that Weil had a difficult time standing and balancing. Additionally, both officers testified as to their training at the regional counter drug training academy and other programs in which they were trained to recognize the signs of intoxication from alcohol and narcotic drugs. Both officers testified that, based on their training and experience, they believed that Weil was under the influence of marijuana. We find that a rational juror could have found that the State proved the second element of the offense beyond a reasonable doubt.

Weil v. State, 936 So. 2d 400, 403-04 (Miss. Ct. App. 2006).

In this particular case, the State had specifically charged the defendant with violating Mississippi Code Annotated § 63-11-30(1)(b). Instead, it could have charged him under Miss. Code Ann. § 63-11-30(1)(d) thereby dispensing with the need to prove that the substance impaired his ability to operate a motor vehicle. Toxicological test results are not necessary to sustain a conviction under either of these subsections–especially if there is an admission.

PROVING DUI UNDER § 63-11-30(1)(d) – UNDER THE INFLUENCE OF ILLEGAL DRUGS

Miss. Code Ann. § 63-11-30(1)(d) provides:

> It is unlawful for any person to drive or otherwise operate a vehicle within this state who
>
> (d) is under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law;

This subsection applies to illegal narcotics – cocaine, crystal methamphetamine, marijuana, etc. But it also covers "any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law." To sustain a conviction, the State is only required to prove that the defendant was "under the influence" of the drug while operating the vehicle:

> At the scene, Officer Tartleton observed marijuana on Beals' clothing, noted that Beals eyes were bloodshot, and remarked that Beal appeared to be particularly nervous. Furthermore, Officer Tartleton testified that Beal stated that he had smoked marijuana a short time before the stop. Clearly, this evidence is sufficient to sustain Beal's conviction.

Beal v. State, 958 So. 2d 254, 256 (Miss. Ct. App. 2007).

See also Holloman v. State, 820 So. 2d 52, 58-59 (Miss. Ct. App. 2002)("[That the defendant] had ingested illegal narcotics that were still present in measurable quantities in his body, together with evidence of remarkably unusual behavior and his demonstrably reckless operation of a motor vehicle were enough [to] support a reasonable inference [of being] under the influence of a narcotics substance.").

PROOF OF BEING UNDER THE INFLUENCE OR IMPAIRED

➤ "Under the influence" requires less proof than impairment

The threshold for determining whether a driver is under the influence is notably low:

> On the related question of determining whether a person was under the influence of alcohol, the Mississippi Supreme Court has granted substantial leeway to the finders of fact in making such a determination and has placed the threshold for such a determination notably low, taking judicial notice that the presence of even small amounts of alcohol can cause an almost imperceptible impairment that,

nevertheless, "may spell the difference between accident or no accident. . . ." Allen v. Blanks, 384 So. 2d 63, 67 (Miss. 1980).

Holloman v. State, 820 So. 2d 52, 58 (Miss. Ct. App. 2002).

See also Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999)("[C]ourts have recognized for over half a century that driving 'under the influence' is commonly understood to mean driving in a state of intoxication that lessens a person's normal ability for clarity and control. Government of Virgin Islands v. Steven, 134 F.3d 526, 528 (3rd Cir. 1998).").

➤ **Evidence of DUI under § 63-11-30(1)(a), (b), and (d)**

In proving DUI under Miss. Code Ann. § 63-11-30(1)(a), (b), and (d), the prosecutor may present testimony of:

- the driver's drinking or using drugs prior to operating vehicle;
- erratic driving;
- the driver's conduct, demeanor, or statements;
- the presence of intoxicating liquors, drugs, or containers;
- the performance of non-scientific field sobriety tests; and
- a refusal to submit to a chemical test for alcohol or drugs.

➤ **Witnesses to drinking or using drugs prior to operating vehicle**

The State may subpoena to testify those persons who witnessed the accused drinking or using prior to driving away in the vehicle. *See* Bates v. State, 950 So. 2d 220, 223 (Miss. Ct. App. 2006)("The State presented several witnesses, all of whom testified that everyone in attendance at the gathering was drinking beer, including Bates. The State also presented evidence that Johnny Wilson was following Bates home in case Bates needed help.").

➤ **Erratic driving**

Impaired driving ability can be shown by erratic driving. *See* Christian v. State, 859 So. 2d 1068, 1073 (Miss. Ct. App. 2003)("Officer Adams testified that Christian ran a stop sign and failed to turn off his high beams as he passed the officer. Clearly Christian's actions were evidence of his driving impairment.").

➤ **Driver's conduct, appearance, demeanor, and statements**

Observations relevant to whether a person is under the influence or impaired include:

- the driver's conduct. *See* Weil v. State, 936 So. 2d 400, 404 (Miss. Ct. App. 2006)("Officer Sturm testified that when he approached Weil's vehicle at the checkpoint, Weil sped off. From this, a reasonable inference can be made that Weil's judgment was impaired and thus his driving ability was also impaired.").

- the driver's appearance. *See* Floyd v. City of Crystal Springs, 749 So. 2d 110, 120 (Miss. 1999)("When Floyd exited the vehicle, he staggered, almost fell into the highway, could not stand properly, almost fell over when he tried to fix his pants leg, and spoke with slurred speech, alternating between mumbling and loud speech."); Weil v. State, 936 So. 2d 400, 404 (Miss. Ct. App. 2006)("We also find that a reasonable juror could have inferred from the testimony of the officers regarding Weil's poor balance, bloodshot eyes, slurred speech, and dilated pupils that his driving ability was impaired.").

- the driver's demeanor. *See* Christian v. State, 859 So. 2d 1068, 1071 (Miss. Ct. App. 2003)("[Officer] Harper also testified to Christian's hostile, vulgar demeanor. Harper testified that he had sufficient opportunity to observe Christian and to form an opinion that he was under the influence. Harper stated, "In my opinion there was sufficient evidence that he [Christian] was drunk.").

- the presence of alcohol, drugs or paraphernalia. *See* Floyd v. City of Crystal Springs, 749 So. 2d 110, 120 (Miss. 1999)("There was an opened bottle of vodka, one-fourth of which was missing, on the passenger seat of Floyd's car and a glass on the console of the car."); Knight v. State, 14 So. 3d 76, 80 (Miss. Ct. App. 2009)("[The] unopened beer cans in Knight's vehicle were located in the cab of his truck, within reach of the passengers, and were still cold. Also, Knight admitted that he had recently consumed at least "a couple" of beers.").

- the driver's volunteered statements. *See* Floyd v. City of Crystal Springs, 749 So. 2d 110, 120 (Miss. 1999)("Floyd stated that he had been to the County Line beer joint where, by Floyd's own admission, he had been drinking. Floyd also told Officer Palmer that he had been drinking on the way home."); Watson v. State, 835 So. 2d 112, 117-18 (Miss. Ct. App. 2003)("Watson made the following unsolicited statement, "I blew on the machine for my three other DUIs, but you're going to have to work to prove this one.").

➤ **Performance of standardized field sobriety tests, other tasks, or observations**

An officer may request a motorist suspected of driving under the influence of alcohol or drugs to perform non-scientific field sobriety tests. Such tests are simply psychophysical tasks designed to aid officers in forming an opinion of whether a person is under the influence of alcohol or drugs. *See* Pennsylvania v. Bruder, 488 U.S. 9, 11 (1988). These are admissible under M.R.E. 701, but not M.R.E. 702.

Rule 701 of the Mississippi Rules of Evidence provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are
>
> (a) rationally based on the perception of the witness,
>
> (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Psychophysical tasks that are based upon coordination and ability to concentrate, and which rely upon common experiences to develop an opinion whether a person is intoxicated, are admissible as circumstantial evidence of driving under the influence. Such tasks allow an officer to observe whether the person is slurring words, stumbling, staggering, or otherwise appearing intoxicated or impaired. *See* Young v. City of Brookhaven, 693 So. 2d 1355, 1360 (Miss. 1997); Capler v. City of Greenville, 207 So. 2d 339, 340 (Miss. 1968). When field sobriety tests are not administered or completed, the officer may still testify to general observations that point to being under the influence. *See* Loveless v. City of Booneville, 958 So. 2d 230, 234 (Miss. Ct. App. 2007)("After Loveless stumbled more than once the officer did not perform any further field sobriety tests for fear that Loveless would fall and injure himself."); Ouzts v. State, 947 So. 2d 1005, 1008 (Miss. Ct. App. 2006)("Officer Merril at trial testified that . . . Ouzts smelled of alcohol, was unsteady on his feet, had slurred speech and had blood-shot eyes.").

The lay opinion may even go to ultimate issues in the case–Was the accused under the influence of or impaired by alcohol or drugs?

> According to Rule 701, both officers could give testimony as to their personal observations of Christian. The officers did not have to be tendered as experts to testify to those details. Rules 701 and 704 also give the officers the ability to testify to opinions and inferences, even on ultimate issues, as long as the opinions are otherwise admissible. Because the opinions were rationally based on the perceptions of the officers, helpful to the trier of fact, and not based on scientific knowledge, they are admissible. M.R.E. 701 and 704.

Christian v. State, 859 So. 2d 1068, 1071 (Miss. Ct. App. 2003).

Lay opinions, of course, are not limited to officers. *See* McCool v. State, 930 So. 2d 465 (Miss. Ct. App. 2006)("The remaining witnesses' testimony buttressed [Officer] Shaw's testimony that McCool was indeed intoxicated."); George v. State, 812 So. 2d 1103, 1105-06 (Miss. Ct. App. 2001)("Blount testified that George's walk was "wobbly" and that, in her opinion, he was "obviously intoxicated."); Havard v. State, 800 So. 2d 1193, 1196 (Miss. Ct. App. 2001)("Both opinions that Havard had too much to drink were based on the witnesses' perceptions and observations, which were fully described in their testimony. This testimony was helpful to the

jurors and within the proper scope of lay testimony."). But under Rule 701 "lay witnesses may not offer opinions which require the witness to "possess some experience or expertise beyond that of the average, randomly selected adult," because those opinions stray into the realm of expert testimony." Dunway v. State, 919 So. 2d 67 (Miss. Ct. App. 2005).

- **Horizontal Gaze Nystagmus (HGN) admissible to show probable cause, but not to prove intoxication or impairment**

HGN is a scientific test. Its results are admissible to show probable cause to arrest and administer the intoxilyzer or blood test, but not to prove intoxication or impairment:

> We find that the HGN test is a scientific test. The potential of a juror placing undue weight upon testimony about the administration of the test is high. Whereas most other field sobriety tests arise out of a juror's common experiences, i.e., one stumbles, slurs words, and staggers when drunk, the HGN test relies upon a scientifically or at least professionally relevant set of observations.
>
> Therefore, this Court finds that the HGN test is not generally accepted within the scientific community and cannot be used as scientific evidence to prove intoxication or as a mere showing of impairment.

Young v. City of Brookhaven, 693 So. 2d 1355, 1360-61 (Miss. 1997).

In Young v. City of Brookhaven, the Court had followed the *Frye/Polk* standard for the admissibility of scientific evidence. Rule 702 of the Mississippi Rules of Evidence has since been revised. It now provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
>
> (1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, *Daubert/Kumho Tire* is the new standard for the admissibility of scientific evidence. *See* Tunica County v. Matthews, 926 So. 2d 209, 213 (Miss. 2006); Jones v. State, 918 So. 2d 1220, 1226-27 (Miss. 2005). *Daubert* requires the trial court at the outset to determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. In other words, it must be relevant and reliable.

Factors the trial judge may consider, with respect to a particular theory or technique, include:

- whether it enjoys general acceptance in a relevant scientific community;
- whether it has been tested;
- whether it has been subjected to peer review and publication; and
- whether it has a known or potential rate of error.

See Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579, 592 (1993).

Kumho Tire extended *Daubert* to expert testimony based on "technical" and "other specialized" knowledge. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); *see also* Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31, 38 (Miss. 2003)("The modified *Daubert* rule is not limited to scientific expert testimony– rather, the rule applies equally to all types of expert testimony."). To qualify as an expert under M.R.E. Rule 702, the witness must possess some experience or expertise beyond that of the average, randomly selected adult. In other words, the witness must possess peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by a layman. *See* Crawford v. State, 754 So. 2d 1211, 1215 -1216 (Miss. 2000); Cowart v. State, 910 So. 2d 726, 730 (Miss. Ct. App. 2005).

Albeit, Young v. City of Brookhaven has not been overturned. It is still the law as to permissible uses of HGN test results. But there is some leeway given:

> [T]he officer did not testify regarding the technical and scientific aspects of the HGN test. He did not attempt to use the HGN test to establish that Graves was intoxicated or to determine his level of intoxication as in Young; he only used the test in its permissible manner, to establish probable cause. . . . [T]he officer testified to giving the HGN test along with several other field sobriety tests and that these tests led him to believe Graves may be intoxicated; therefore, he took him to the patrol office to administer the intoxilyzer. We hold that this was not error.

Graves v. State, 761 So. 2d 950, 954 (Miss. Ct. App. 2000).

➤ **Portable breath test admissible to show probable cause, but not to prove intoxication or impairment**

The portable breath test (PBT) is a scientific test. Its results are admissible to show probable cause to arrest and administer the intoxilyzer or blood test, but not to prove intoxication or impairment. *See* Price v. State, 752 So. 2d 1070, 1077 (Miss. Ct. App. 1999).

See *CHAPTER 3 "DUI ARRESTS"*(Scientific field sobriety tests) for a discussion on portable breath tests.

➤ **Refusal admissible as evidence of DUI**

Miss. Code Ann. § 63-11-41 provides:

> If a person under arrest refuses to submit to a chemical test under the provisions of this chapter, evidence of refusal shall be admissible in any criminal action under this chapter.

A refusal under the Implied Consent Law is admissible to prove DUI:

> [Brewer] refused a request to submit to an intoxilyzer test-a fact which the Mississippi Supreme Court has said may be considered by the jury as evidence of guilt.

Brewer v. State, 812 So. 2d 1153, 1155 (Miss. Ct. App. 2002).

See also South Dakota v. Neville, 459 U.S. 553, 564 (1983)("[A] refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."); Starkey v. State, 941 So. 2d 899, 901 (Miss. Ct. App. 2006)("While the consequences of a refusal are admittedly harsh to a defendant facing a DUI trial, a prosecutor's choice to exploit the defendant's refusal is not of "constitutional dimension."); Price v. State, 752 So. 2d 1070, 1074 (Miss. Ct. App. 1999)("[Section 63-11-41] clearly vitiates Price's argument that his refusal to submit to the intoxilyzer test was improperly admitted into evidence against him in violation of his federal and state constitutional rights against self-incrimination.").

But to sustain a conviction for DUI there must be some indication of being under the influence beyond the mere the smell of alcohol and a refusal to blow into the intoxilyzer. *See* Richbourg v. State, 744 So. 2d 352, 357 (Miss. Ct. App. 1999); *but compare* Knight v. City of Aberdeen, 881 So. 2d 926, 929 (Miss. Ct. App. 2004)("Unlike *Richbourg*, there was strong evidence in this case that Knight was driving under the influence of alcohol.").

PROVING DUI UNDER § 63-11-30(1)(c) – BAC OF 0.08 OR HIGHER

See *CHAPTER 4 "CHEMICAL TESTING FOR ALCOHOL OR DRUGS"* for a discussion on: approved methods for chemical testing for alcohol or drugs; when officer is to administer chemical tests for alcohol or drugs; conducting chemical tests for alcohol and drugs; the Intoxilyzer 8000; and biological and post-mortem collection kits.

➤ **Illegal "per se" violation**

Miss. Code Ann. § 63-11-30(1) provides:

> It is unlawful for any person to drive or otherwise operate a vehicle within this state who
>
> (c) has an alcohol concentration of eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's breath, blood or urine administered as authorized by this chapter;

A BAC 0.08 % or higher is an illegal "per se" violation–that is, it gives rise to a presumption that the person was under the influence of an intoxicating liquor. *See* Porter v. State, 749 So. 2d 250 (Miss. Ct. App. 1999).

➤ ***Johnston* three-prong test for admitting DUI test results**

Intoxilyzer test results are deemed valid if performed:

- according to approved methods;
- by a person certified to do so; and
- on a machine certified to be accurate.

See McIlwain v. State, 700 So. 2d 586, 590 (Miss. 1997). "Where one of the safeguards is deficient the State bears the burden of showing that the deficiency did not affect the accuracy of the result." Johnston v. State, 567 So. 2d 237, 238 (Miss. 1990).

Johnston's three prong analysis for admissibility of test results applies to Intoxilyzer results, not blood and urine tests. Jones v. State, 858 So. 2d 139, 143 (Miss. 2003). Even so, "substantial compliance" with § 63-11-19 is sufficient for admitting any chemical analysis of a person's breath, blood, or urine:

> The record does not reflect that the Mississippi Crime Lab precisely followed the tenets of § 63-11-19 [in collecting blood samples]. Nevertheless, the State showed that the Crime Lab did substantially comply with the statute and under Estes that is all that is required.

Bearden v. State, 662 So. 2d 620, 625 (Miss. 1995).

See also Estes v. State, 605 So. 2d 772, 776 (Miss. 1992)(intoxilyzer test results); Lawrence v. State, 931 So. 2d 600, 606 (Miss. Ct. App. 2005)(gas chromatograph test results).

But if "substantial compliance" is lacking, the State must show that the deficiency did not affect the test results:

> Once it was made manifest to the Court that the blood collection kit used in this case had been expired for over nine months, the State at the very least had the burden of explaining that this lapse of time did not impair the integrity of the results of the test.

Gibson v. State, 458 So. 2d 1046, 1047 (Miss. 1984).

FIRST PRONG – ACCORDING TO APPROVED METHODS:

The first prong requires that DUI tests be performed according to approved methods of the State Crime Laboratory and the Commissioner of Public Safety.

See Dobbins v. State, 938 So. 2d 296, 297 (Miss. Ct. App. 2006)("[T]he particular Intoxilyzer machine used to test Dobbins was calibrated thirteen days prior to its use upon Dobbins. . . . The trial court found that the machine was working properly on the date in question. . . . [T]his issue is without merit."); Langdon v. State, 798 So. 2d 550, 558 (Miss. Ct. App. 2001)("[The defense objected] that certain blanks on the test form relating to time of detention and time of testing were not filled in. That information, necessary to prove the interval between time of last consumption and time of testing necessary to give the test validity, was provided by other evidence besides the form itself and we do not find the incomplete form to be sufficient ground to exclude the test evidence altogether.").

SECOND PRONG – BY A PERSON CERTIFIED TO DO SO:

The second prong requires that DUI tests be performed by a person certified by the State Crime Laboratory to do so.

> The results of a breath-analysis test are only valid if performed by a person certified to give such a test. To prove that the operator is certified, the State must show that the breath test was "performed by an individual possessing a valid permit issued by the State Crime Laboratory for making such analysis." Miss.Code Ann. § 63-11-19 (Rev.2004). "This statute, however, 'is not a rule of evidence,' so that evidence 'otherwise admissible' will not be excluded because of failure to comply with the statute."
>
> . . .
>
> Deputy Campbell testified that he was certified to perform a breath test, and he was subjected to cross-examination on his knowledge and experience on the matter.
>
> Therefore, we find that the trial court did not abuse its discretion in finding sufficient proof was presented by Deputy Campbell's testimony that he was certified to perform the test on the date of the accident.

Hudspeth v. State, 28 So.3d 600, 603-04 (Miss. Ct. App. 2009).

See also Johnston v. State, 567 So. 2d 237, 238 (Miss. 1990)("Thompson testified that he was certified to operate an intoxilyzer. Although no evidence was introduced to show that the intoxilyzer used was a 4011-A & AS model, the statute only requires that the person performing the test be certified to do so."); Henley v. State, 885 So. 2d 89, 91 (Miss. Ct. App. 2004)("The fact that the copy of Officer Clarke's permit was not certified is inconsequential because the same result was effectuated by him testifying at trial.").

THIRD PRONG – ON A MACHINE CERTIFIED TO BE ACCURATE:

The third prong requires that DUI tests be performed on a machine certified to be accurate.

This prong is satisfied if:

- the State presents the testimony and allows cross-examination of the calibrating officer along with the records of the results of the tests performed. *See* Young v. City of Brookhaven, 693 So. 2d 1355, 1362 (Miss. 1997); Johnston v. State, 567 So. 2d 237, 239 (1990). Or,

- the State introduces the original or a certified copy of the original calibration certificate. *See* McIlwain v. State, 700 So. 2d 586, 591 (Miss. 1997)("[T]he State must present the testimony and allow for cross-examination of the calibrating officer only in the absence of the certification of the intoxilyzer or where there is a genuine issue as to authenticity of certification . . . ."); Meeks v. State, 800 So. 2d 1281, 1283 (Miss. Ct. App. 2001)("Proper calibration of this machine could have been established by the direct testimony of [the calibrating officer] or introduction of a certified copy of the certificate of calibration, attested to by the custodian of records, consistent with M.R.E. 902. Neither of these was done.").

The original calibration certificate may normally be authenticated by the method set out in Rule 901(b)(7). *See* Zoerner v. State, 725 So. 2d 811, 814 (Miss. 1998); McIlwain v. State, 700 So. 2d 586, 591 (Miss. 1997).

It may also be considered self-authenticating pursuant to M.R.E. 902(1). *See* Pulliam v. State, 856 So. 2d 461, 465 (Miss. Ct. App. 2003)("The exhibits bore both the seal of [the Mississippi Crime Laboratory] as well as the signature of one attesting the truth of their contents."). Certified copies of the original calibration certificate are self-authenticating as set out in Rule 902(4). *See* Callahan v. State, 811 So. 2d 420, 422-23 (Miss. Ct. App. 2001).

Another consideration is the business records exception:

> [A]dmission of calibration certificates without testimony from the calibration officer does not, in general, violate either the hearsay rule or the confrontation clauses in the Mississippi or United States constitutions, as long as the proper foundation [under the business records exception to the hearsay rule in Rule

803(6)] is laid.

Harkins v. State, 735 So. 2d 317, 321 (Miss. 1999).

See also Matthies v. State, No. 2010-KM-00783-COA, 2011 WL 2120060 (Miss. Ct. App. 2011), where the Court found the admission of the calibration records nontestimonial in nature and the Confrontation Clause did not require the testimony of their preparer. "The certificates at issue here do nothing more than verify the accuracy of the equipment. Though the intoxilyzer was calibrated for use in criminal prosecutions, the certificates were not specifically prepared with an eye on prosecuting Matthies." The Court specifically held that the recent United States Supreme Court case of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), does not always require the person who calibrated an intoxilyzer to testify for the proper admission of the calibration records.

See *CHAPTER 6 "PROVING DUI CAUSING MUTILATION OR DEATH"* for a discussion on *Johnston's* three prong analysis for admissibility of test results applies to Intoxilyzer results, not blood and urine tests.

Intoxilyzer 8000 Is Self-Calibrating

Mississippi currently uses the Intoxilyzer 8000, an instrument attached to a centralized computer database that tracks the function and calibration of these instruments. For each test conducted two calibration checks occur automatically. Most of the above cited cases involved Intoxilyzer results from instruments that did not have this feature.

➤ **Miss. Code Ann. § 63-11-19 is not a rule of evidence**

"[Section 63-11-19] is not a rule of evidence and evidence otherwise admissible will not be excluded because of failure to comply with its requirements." Jones v. State, 858 So. 2d 139, 143 (Miss. 2003)("Johnston v. State is distinguishable as it dealt with an intoxilyzer, which must be tested at least quarterly by the State Crime Lab under § 63-11-19, and not hospital procedures and personnel, as in this case.").

Instead, "the question of whether evidence may be admitted hinges in the first instance on whether the information is relevant to the matter being tried." Acklin v. State, 722 So. 2d 1264, 1266 (Miss. Ct. App. 1998). That is,

> Admissibility of evidence is governed by the Mississippi Rules of Evidence, not by statutory enactment.

Deeds v. State, 27 So. 3d 1135, 1141 (Miss. 2009).

See also Murphy v. State, 798 So. 2d 609, 614 (Miss. Ct. App. 2001)("[M]atters [on] the admissibility of evidence in a judicial proceeding are to be decided by judicial rather than legislative pronouncement.").

➤ **Subpoena duces tecum to produce the intoxilyzer machine**

The defense must provide the proper predicate for admissibility to enforce a subpoena duces tecum to produce the intoxilyzer machine in the courthouse:

> Section 26 of our Constitution provides that an accused of right may have compulsory process for obtaining witnesses in his favor, but this does not mean he may subpoena anybody or anything as he pleases. He must show the evidence sought would arguably be "in his favor." Before we may reverse, we must find that the accused at some point provided a proper predicate for admissibility. That the trial court may in its discretion have enforced the

subpoena is no reason why we must reverse for its failure to do so.

As the report of an intoxilyzer test is a powerful weapon in the hand of the prosecution, the accused is entitled to a fair and reasonable opportunity to confront and rebut it. The record does not reflect Goforth was denied this opportunity. It is certainly clear that Goforth wanted the machine brought to the courthouse. On the other hand, he has provided us nothing in this record which shows that he and his expert witness would have been unable to do what they needed to do in order properly to defend the case by examining and testing the machine at the police station. He certainly made no showing he could reproduce the conditions of the night in question, nor offer relevant evidence that might have aided his cause. Moreover, the trial judge was hardly out of bounds in considering that moving the machine to the courthouse would be substantially disruptive and inconvenient to the City of Ridgeland law enforcement authorities.

Goforth v. City of Ridgeland, 603 So. 2d 323, 327 (Miss. 1992).

➤ **Retrograde extrapolation**

"Retrograde extrapolation" is the mathematical formula used to determine the rate of "ethanol ingestion in the body." Evans v. State, 25 So. 3d 1061, 1069 (Miss. Ct. App. 2008). Our Courts allow expert testimony on "retrograde extrapolation" to rebut a BAC of .08%, but not to disprove impairment:

> Evans was not offering Dr. Rosenhan's testimony on retrograde extrapolation to prove she was not impaired when she was pulled over. Instead, she offered it to prove that she did not have a BAC of .08% or more when she was pulled over; thus, she did not violate Section 63-11-30(1)(c).

Evans v. State, 25 So. 3d 1054, 1059 (Miss. 2010)

The admissibility of such evidence is primarily governed by Rule 702 of the Mississippi Rules of Evidence, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
>
> (1) the testimony is based upon sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial judge is vested with the gatekeeping responsibility of determining whether a witness is qualified and whether the testimony is reliable under this Rule:

> For expert testimony to be admissible, it must be both relevant and reliable. The party offering the testimony must show that the expert based his opinion not on opinions or speculation, but rather on scientific methods and procedures. The trial judge enjoys a role as a gatekeeper in assessing the value of the testimony. To be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue.

Tunica County v. Matthews, 926 So. 2d 209, 213 (Miss. 2006).

See also Evans v. State, 25 So. 3d 1054, 1061 (Miss. 2010)(J. Kitchens concurring)("I do concur with the majority's conclusion that Evans is entitled to present evidence in an effort to disprove the State's contention that her blood alcohol level was over the legal limit at the time she was driving an automobile."); Smith v. State, 942 So. 2d 308, 318 (Miss. Ct. App. 2006)("The trial judge's role as gatekeeper does not require that he become a scientist or expert himself. In deciding whether or not a scientific method, such as retrograde extrapolation, is reliable, the trial judge may rely on the body of knowledge and research available in the field and

discoverable through both expert testimony and independent research. ").

But a judge may allow testimony of opposing experts:

> [Crime Lab Expert] was allowed to explain her application of retrograde extrapolation to the jury, and give her expert opinion that Smith's BAC would have been higher at the time of the accident than the .13% present when his blood was drawn. However, [Crime Lab Expert] was precluded from quantifying what Smith's BAC would have been at the time of the accident. The trial judge further ruled that [Defendant's Expert's] testimony would be admitted to counter the testimony of [Crime Lab Expert], and the jury, as the finder of fact, would be allowed to decide which of the qualified expert opinions to accept.
>
> . . .
>
> [T]he trial judge determined that the testimony of both experts would aid the jury in determining whether Smith was under the influence of alcohol at the time of the accident. Accordingly, we find no failure of the trial judge to properly exercise his Rule 702 gatekeeping responsibilities, ...

Smith v. State, 942 So. 2d 308, 317-18 (Miss. Ct. App. 2006).

Retrograde extrapolation may extend to substances other than alcohol. Teston v. State, 44 So. 3d 977, 991 (Miss. Ct. App. 2008)("[I]n this case, the trial court determined that Dr. Barbieri's testimony [on the estimated level of hydrocodone in the defendant's system prior to the administration of the blood test] was relevant and reliable.").

PROVING DUI UNDER § 63-11-30(1)(e) – BAC OF 0.04 OR HIGHER WHILE OPERATING A COMMERCIAL VEHICLE

See *CHAPTER 12 "COMMERCIAL MOTOR VEHICLES"* for a discussion on DUI when operating a commercial vehicle.

PROVING DUI 2ND AND DUI 3RD OFFENSES

➤ **DUI 2nd offense**

Miss. Code Ann. § 63-11-30(2)(b) provides in part:

> Except as otherwise provided in subsection (3), upon any second conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not less than Six Hundred Dollars ($600.00) nor more than One Thousand Five Hundred Dollars ($1,500.00), shall be imprisoned not less than five (5) days nor more than one (1) year and sentenced to community service work for not less than ten (10) days nor more than one (1) year.

See Smith v. State, 950 So. 2d 1056, 1058 (Miss. Ct. App. 2007)("Evidence of only the conviction, which does not also contain the date the offense was committed, is not sufficient.").

Mississippi Attorney General Opinions:

When a second DUI offense occurs prior to the disposition of the first DUI offense.

"[A] defendant who has been charged with two separate DUI charges, the second offense occurring prior to the disposition of the first charge, may be charged with a DUI 2nd for the latter offense upon the conviction of the defendant on the initial charge." Op. Att'y Gen. No. 2002-0518 (September 9, 2002).

➤ **DUI 3rd or subsequent offense**

Miss. Code Ann. § 63-11-30(2)(c) provides in part:

> Except as otherwise provided in subsection (3), for any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not less than Two Thousand Dollars ($2,000.00) nor more than Five Thousand Dollars ($5,000.00), shall serve not less than one (1) year nor more than five (5) years in the custody of the Department of Corrections; provided, however, that for any such offense which does not result in serious injury or death to any person, any sentence of incarceration may be served in the county jail rather than in the State Penitentiary at the discretion of the circuit court judge.

See Williams v. State, 708 So. 2d 1358, 1362 (Miss. 1998)("[T]hree DUIs within a five year time frame will subject the violator to a felony charge."); McIlwain v. State, 700 So. 2d 586, 589 (Miss. 1987)("[It is not required] that the indictment . . . specifically show a previous conviction for D.U.I. First prior to being convicted for D.U.I. Second and a conviction of D.U.I. Second prior to being convicted for D.U.I. Third. The obvious intent of this statute is to remove repeat D.U.I. offenders from our streets. This goal will be better accomplished by simply reading the clear language of the statute. Therefore, it is irrelevant whether McIlwain had been charged with a D.U.I. First and a D.U.I. Second.").

➤ **Proof required to sustain conviction**

The State must prove:

- the present DUI charge;
- the prior DUI conviction(s); and
- that the date of the prior DUI offense(s) occurred within five years of the charged offense.

See McCool v. State, 930 So. 2d 465, 467 (Miss. Ct. App. 2006); Heidelberg v. State, 976 So. 2d 948, 950 (Miss. Ct. App. 2007).

See also Smith v. State, 950 So. 2d 1056, 1058 (Miss. Ct. App. 2007)("The [statutory phrase "the offenses being committed within a period of five (5) years"] requires that the offenses must have been committed within a period of five years of each other, not the convictions."); Mason v. State, 799 So. 2d 884, 885 (Miss. Ct. App. 2001)("[The record] fails to clearly reflect any evidentiary basis that prior convictions were ever formally put into evidence. Therefore, there is nothing . . . to support sentencing Mason as a DUI second time offender."); Nelson v. State, 69 So. 3d 50 (Miss. Ct. App. 2011)(The evidence was sufficient that Nelson's two priors occurred within five years. Although the abstract did not state the date of the offense, it did include the date of arrest. A reasonable juror could infer that the date of arrest was the same date that the offense occurred.).

➤ **Proof of prior DUI conviction(s) and date of offense(s)**

Proof of the prior DUI conviction(s) and the date of the offense(s) may be proved by putting into evidence a certified abstract or certified copy of the prior conviction or by a sworn written stipulation. *See* McIlwain v. State, 700 So. 2d 586, 589 (Miss. 1987)("Abstracts of court records, when properly certified, are clearly allowed to prove prior convictions."). Such applies to out-of-state convictions, too. *See* Watkins v. State, 910 So. 2d 591, 596 (Miss. Ct. App. 2005)("The abstracts in question in the present case were properly certified; therefore, it was permissible for them to be used . . . to prove [the] prior convictions. [T]he fact that the prior convictions occurred out-of-state does not affect their validity or applicability in Mississippi."). Our courts do not differentiate between a conviction entered after a nolo contendere plea and a conviction entered after any other plea. *See* Bailey v. State, 728 So. 2d 1070, 1073 (Miss. 1997)("Bailey's prior convictions for DUI-first offense and DUI-second offense (even though based upon pleas of nolo contendere) are convictions for purposes of sentence enhancement in this subsequent DUI case, prosecuted under Mississippi's implied consent statute.").

➤ **DUI convictions in other states to be counted**

Miss. Code Ann. § 63-11-30(7) provides:

> Convictions in other states of violations for driving or operating a vehicle while

> under the influence of an intoxicating liquor or while under the influence of any other substance that has impaired the person's ability to operate a motor vehicle occurring after July 1, 1992, shall be counted for the purposes of determining if a violation of subsection (1) of this section is a first, second, third or subsequent offense and the penalty that shall be imposed upon conviction for a violation of subsection (1) of this section.

➤ **Using prior uncounseled convictions**

A prior uncounseled misdemeanor conviction may be considered in sentencing a defendant for a subsequent offense so long as it did not result in a sentence of imprisonment. *See* Nichols v. U.S., 511 U.S. 738, 748-49 (1994); Ghoston v. State, 645 So. 2d 936, 938 (Miss. 1994). Thus, a conviction with stand-alone probation counts:

> A defendant who receives a suspended sentence is given a term of imprisonment, while a defendant who receives a stand-alone sentence of probation is not. Perez-Macias was sentenced to probation, not to prison, and thus his previous uncounseled misdemeanor conviction may be used to enhance his current offense.

United States v. Perez-Macias, 335 F.3d 421, 428 (5th Cir. 2003).

Pretrial incarceration does not count. *See* Nicholson v. State, 761 So. 2d 924, 931 (Miss. Ct. App. 2000)("[A] conviction which is valid at the time it was entered cannot be retroactively invalidated by some time spent jail before a guilty plea."); McLaurin v. State, 882 So. 2d 268, 272 (Miss. Ct. App. 2004)("The record supports the conclusion that McLaurin received no further jail time after having pled guilty.").

DOUBLE JEOPARDY

➤ **Constitutional provisions**

U.S. Const. amend. V provides in part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

Miss. Const. art. III § 22 provides:

> No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

See United States v. Dinitz, 424 U.S. 600, 606 (1976)("The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense."); Thomas v. State, 711 So. 2d 867, 870 (Miss. 1998)("Double jeopardy embodies three separate constitutional protections. "'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'"(citing White v. State, 702 So. 2d 107, 109 (Miss. 1997)(quoting North Carolina v. Pearce, 395 U.S.711, 717 (1969))).

➤ **When jeopardy attaches**

"Jeopardy attaches when a jury is impaneled or a trial commences where a determination of guilt may be imposed. Probable cause is neither tantamount or necessary to that process." Lee v. State, 759 So. 2d 390, 393 (Miss. 2000). Otherwise jeopardy does not attach:

> [J]eopardy had not attached when the municipal court dismissed Deed's DUI charge in the Olive branch Municipal Court. It is undisputed that the municipal judge received no evidence and heard no witnesses before dismissing the DUI charge. Stated otherwise, Deeds was never "put to trial before the trier of facts" before the charge was dismissed.

Deeds v. State, 27 So.3d 1135, 1139 (Miss. 2009).

See also Serfass v. United States, 420 U.S. 377, 388 (1974)("[J]eopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.'"); McGraw v. State, 688 So. 2d 764, 767 (Miss. 1997)("A double jeopardy right "attaches" when the jury is sworn and empaneled to hear the case."); King v. State, 527 So. 2d 641, 643 (Miss. 1988)("[J]eopardy attaches for a bench trial when the first witness is sworn."); Thomas v. State, 845 So. 2d 751, 753 (Miss. Ct. App. 2003)("[A] petition to revoke probation or to revoke suspension of a sentence is not a criminal case and not a trial on the merits of the case. Therefore, double jeopardy protection does not apply to such hearings.")

➤ ***Blockburger* "same elements" test**

The following test is used to determine whether a second prosecution is precluded by the double jeopardy prohibition:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger v. United States, 284 U.S. 299, 304 (1932).

In other words, the double jeopardy prohibition does not apply if each crime contains at least

one element the other lacks. *See* United States v. Dixon, 509 U.S. 688, 711 (1993)(overruled Grady "same conduct" test); Brown v. State, 731 So. 2d 595, 599 (Miss. 1999)("The test for determining whether a defendant has been subjected to double jeopardy is the "same elements" test as set out in *Blockburger*.").

➤ ***Blockburger* applicable to DUI and traffic offenses**

Blockburger is applicable to DUI and traffic offenses:

> Clearly, under the authority of Blockburger, the three crimes at issue [i.e., first offense DUI, second offense DUI, and felony DUI] in this assignment of error are separate and distinct. . . . Although the three statutory [offenses] are similar in that they all require proof that the defendant operated a vehicle while under the influence of intoxicants, they also differ in that each . . . requires proof of an additional element.

Smith v. State, 736 So. 2d 381, 383 (Miss. Ct. App. 1999).

See also Lee v. State, 759 So. 2d 390, 393 (Miss. 2000)("[I]t can be readily seen that proof of reckless driving is not necessary to prove felony DUI or felony murder.").

➤ **Double jeopardy concerns if State fails to prove the prior conviction(s)**

A prior conviction is a necessary element of DUI second and third offenses. Thus, proof of the prior convictions should be presented at trial–and not after the close of the evidence. But sometimes the omission is excusable:

> In this case, the trial judge initially instructed the parties that proof of previous DUI convictions should be submitted after the close of the evidence. However, prior convictions are elements of a felony DUI charge. . . . [I]t appears that the

> omission of the essential element was due to the trial judge's misunderstanding of the law. Because this failure was "mere inadvertence," it was not a double-jeopardy violation to allow the state to reopen its case and present evidence of the defendant's prior conviction.

Lyle v. State, 987 So. 2d 948, 950-51 (Miss. 2008).

If the defendant is charged with DUI second offense and the State fails to prove a prior DUI conviction, the court is required to give a directed verdict as to the DUI second offense. The prosecution, though, may still proceed on the lesser-included DUI first offense. *See* Ostrander v. State, 803 So. 2d 1172, 1177 (Miss. 2002). But if the judge dismisses the DUI charge without expressly limiting the directed verdict to only the DUI second offense, then double jeopardy attaches to both the DUI second offense and the lesser-included DUI first offense:

> Although the municipal judge could have dismissed only that part of the affidavit charging DUI second and allowed the City to proceed on DUI first, the judge dismissed the entire DUI charge against Jamison. When the judgment was entered, jeopardy attached. *Ostrander* is therefore distinguished from the case at bar. Such dismissal is inclusive of both the offense charged in the affidavit, as well as any lesser-included offenses. Any further proceedings would amount to a violation of the double jeopardy provisions of the Mississippi and United States Constitutions.

Jamison v. City of Carthage, 864 So. 2d 1050, 1053 (Miss. Ct. App. 2004).

➤ **Applicability to mistrials**

The double jeopardy prohibition does not mean that every time a trial aborts or does not end with a final judgment the defendant must be set free. However, if a mistrial is granted upon the court's own motion, or upon the state's motion, a second trial is barred because of double jeopardy unless there was a manifest necessity for the mistrial, taking into consideration all the

circumstances. Some examples of manifest necessity are:

- failure of a jury to agree on a verdict;
- biased jurors;
- an otherwise tainted jury;
- improper separation of jury; or
- when jurors demonstrate their unwillingness to abide by the instructions of the court.

See Watts v. State, 492 So. 2d 1281, 1284 (Miss. 1986).

See also U. S. v. Dinitz, 424 U.S. 600, 611 (1976)("The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions."); Roberson v. State, 856 So. 2d 532, 535 (Miss. Ct. App. 2003)("There was no persuasive evidence that the State intended to "goad" or "provoke" Roberson into seeking a mistrial.").

➤ **Civil sanctions ordinarily do not invoke the double jeopardy prohibition**

The following two-step approached is used to determine if the sanction imposed rises to the level of criminal punishment:

1. Did the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other?
2. If legislature indicated an intention to establish a civil penalty–Was the statutory scheme so punitive either in purpose or effect as to negate that intention?

See Hudson v. U.S., 522 U.S. 93, 99 (1997).

Administrative driver's license suspension, even though it may have punitive aspects, is viewed

as a remedial measure. *See* Keyes v. State, 708 So. 2d 540, 548 (Miss. 1998)("[T]he Double Jeopardy Clauses of the United States and Mississippi Constitutions do not preclude criminal prosecution for violation of Miss. Code Ann. § 63-11-30 subsequent to administrative license suspension pursuant to § 63-11-23(2).").

CHAPTER 6

PROVING DUI CAUSING MUTILATION OR DEATH

PROVING DUI CAUSING MUTILATION OR DEATH

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PROVING DUI CAUSING MUTILATION OR DEATH

➤ **Elements of the offense**

Miss. Code Ann. § 63-11-30(5) provides in part:

> Every person who operates any motor vehicle in violation of the provision of subsection (1) of this section and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another shall, upon conviction, be guilty of a separate felony for each such death, mutilation, disfigurement or other injury . . . .

DUI causing mutilation or death can be proven by showing:

- that the person was driving or otherwise operating a vehicle in violation of § 63-11-30; and
- who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose or any other limb, organ or member of another.

But there is no requirement to prove that the intoxicating liquor or impairing drug caused or contributed to the accident. *See* Campbell v. State, 858 So. 2d 177, 180 (Miss. Ct. App. 2003); Murphy v. State, 798 So. 2d 609, 613 (Miss. Ct. App. 2001). That is, section 63-11-30(5) "contains no requirement that the negligence has to be caused by the alcohol." Joiner v. State, 835 So. 2d 42, 43 (Miss. 2003); Ware v. State, 790 So. 2d 201, 216 (Miss. Ct. App. 2001). Nor does the statute require proving culpable negligence. Simple negligence–a failure to exercise reasonable care under the circumstances–is enough where all the other elements are met. *See* Taylor v. State, No. 2009-KA-01846-COA, 2011 WL 1549239 (Miss. Ct. App. 2011); Turner v. State, 726 So. 2d 117, 131 (Miss. 1998); Smith v. State, 956 So. 2d 997, 1007 (Miss. Ct. App. 2007); Murphy v. State, 798 So. 2d 609, 615 (Miss. Ct. App. 2001).

Also, mutilation is not limited to the tongue, eye, lip or nose:

> [Miss. Code Ann. § 63-11-30(5)] does not specifically include the forehead and teeth among the listed body parts. However, the statute includes "any other limb, organ or member of another" person's body. Certainly, the forehead comes under this latter delineation. We do not believe that the legislature intended to limit the scope of the statute to the mutilation or disfigurement of only those parts specifically named, those being the tongue, eye, lip or nose. Such an interpretation would be nonsensical.

Crowley v. State, 791 So. 2d 249, 252 (Miss. Ct. App. 2000).

See also McDonald v. State, 39 So. 3d 22 (Miss. Ct. App. 2010)("[T]he ability to "carry on" does not prevent a finding [of being maimed]. We find that the jury's determination that Smith's testimony as to his injuries and their lasting effects was of such weight and credibility to find that he was maimed or disfigured as defined by the trial court.").

➤ **Admissibility of blood and urine tests**

Johnston's three prong analysis for admissibility of test results applies to Intoxilyzer results, not blood and urine tests:

> [Miss. Code Ann. § 63-11-19] is not a rule of evidence and evidence otherwise admissible will not be excluded because of failure to comply with its requirements. Johnston v. State is distinguishable as it dealt with an intoxilyzer, which must be tested at least quarterly by the State Crime Lab under § 63-11-19, and not hospital procedures and personnel, as in this case.

Jones v. State, 858 So. 2d 139, 143 (Miss. 2003).

Instead, the procedures used in the analysis must pass a test of reasonableness.

See Cutchens v. State, 310 So. 2d 273, 278 (Miss. 1975)("It is unquestioned that Cutchens' blood was withdrawn and the test performed by persons qualified to perform such functions. . . . [T]he test was reasonable and the results thereof admissible . . . ."); Lepine v. State, 10 So. 3d 927, 935 (Miss. Ct. App. 2009)("There was extensive testimony about the forensic toxicologist's qualifications to perform the tests and about the lab's procedures and protocols. . . . The only requirement was one of proof that the procedure was reasonable, and we find that it was adequately established through the trial testimony."); Jones v. State, 881 So. 2d 209, 216 (Miss. Ct. App. 2003)("We find that the [urine] test was administered by a person qualified by experience, training and education. . . . [T]he test was reasonable and the results admissible.").

Also, consent alone is sufficient to permit the taking of a blood sample:

> [T]he deputy sheriff warned Sumrall about his rights, including that he could remain silent and could have the assistance of an attorney. Sumrall nonetheless consented to having blood drawn and signed a consent form. The trial judge had adequate support for denying Sumrall's motion to exclude evidence from the blood test.

Sumrall v. State, 955 So. 2d 332, 334 (Miss. Ct. App. 2006).

The officer's motive in obtaining consent is irrelevant:

> [Deputy Sheriff] Ivey testified that Irby was conscious and capable of giving consent as well as informed of his right to withhold consent. [T]he trial judge properly ruled that Ivey's "motive" or "intent" for obtaining consent from Irby was irrelevant, and evidence of it should not be presented to the jury.

Irby v. State, 49 So. 3d 94 (Miss. 2010).

➤ **When blood draw allowed despite a refusal**

See *CHAPTER 4 "CHEMICAL TESTING FOR ALCOHOL OR DRUGS"* for a discussion on when a blood draw is allowed despite a refusal.

➤ **What constitutes a legally sufficient indictment?**

An indictment must comport with both Article 6, Section 169 of the Mississippi Constitution and URCCC 7.06. *See* Feemster v. State, 763 So. 2d 198, 200 (Miss. Ct. App. 2000); Blanch v. State, 760 So. 2d 820, 826 (Miss. Ct. App. 2000).

MS Const. Art. 6, § 169 provides:

> The style of all process shall be "The State of Mississippi," and all prosecutions shall be carried on in the name and by authority of the "State of Mississippi," and all indictments shall conclude "against the peace and dignity of the state."

Rule 7.06 of the Uniform Rules of Circuit and County Court Practice provides:

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:
>
> 1. The name of the accused;
>
> 2. The date on which the indictment was filed in court;
>
> 3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
>
> 4. The county and judicial district in which the indictment is brought;

> 5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
>
> 6. The signature of the foreman of the grand jury issuing it; and
>
> 7. The words "against the peace and dignity of the state."
>
> The court on motion of the defendant may strike from the indictment any surplusage, including unnecessary allegations or aliases.

An indictment provides sufficient notice if it includes the seven enumerated items in URCCC 7.06 and contains a concise statement of the essential facts constituting the charged offense. *See* Roberson v. State, 595 So. 2d 1310, 1318 (Miss. 1992). The latter requisite is ordinarily satisfied if it tracks a statute that fully and clearly defines the offense. *See* Starns v. State, 867 So. 2d 227, 233 (Miss. 2004); Jones v. State, 856 So. 2d 285, 289 (Miss. 2003). Formal and technical words are not necessary if there is otherwise a substantial description of the offense. *See* Swann v. State, 806 So. 2d 1111, 1118 (Miss. 2002). "So long as from a fair reading of the indictment taken as a whole the nature and cause of the charge against the accused are clear, the indictment is legally sufficient." McDonald v. State, 717 So. 2d 715, 716 (Miss. 1998).

Key to this inquiry is whether the indictment afforded an adequate opportunity to prepare a defense. *See* Weaver v. State, 713 So. 2d 860, 862 (Miss. 1997)("Like McIlwain, the attachments of the abstracts provide a clear and concise statement of the charges as required by both DUI indictment case law and the URCCC 7.06."). Of course, the State must still prove each essential element of the charged offense:

> [T]he fact that the State is permitted to charge manslaughter with conclusory and essentially fact-free language does not permit the State to convict without some coherent theory of its case supported by the underlying evidence to support that theory.

Edwards v. State, 755 So. 2d 443, 446 (Miss. Ct. App. 1999).

It is inconsequential, though, whether the defendant may have been charged with a lesser offense:

> Sumrall [who was charged under Miss. Code Ann. § 63-11-30(5)] argues that the language of the indictment raises the possible offense of culpable negligence manslaughter which carries a lesser sentence. . . . The State has discretion when deciding upon which charge to seek indictment.

Sumrall v. State, 955 So. 2d 332, 336 (Miss. Ct. App. 2006).

An amendment to an indictment is permissible if it "does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." Wilson v. State, 935 So. 2d 945, 948 (Miss. 2006); Lepine v. State, 10 So. 3d 927, 934 (Miss. Ct. App. 2009).

Amending DUI Tickets in Misdemeanor Cases

The DUI ticket, which is an affidavit, may be amended as long as the defendant is not unfairly surprised and afforded a fair opportunity to prepare a defense in the face of the amendment. *See* Rule 3.07 of the Uniform Rules of Procedure for Justice Court.

➤ **Penalties**

Miss. Code Ann. § 63-11-30(5) provides in part:

> [The offender] . . . shall, upon conviction, be guilty of a separate felony for each such death, mutilation, disfigurement or other injury and shall be committed to the custody of the State Department of Corrections for a period of time of not less than five (5) years and not to exceed twenty-five (25) years for each such death, mutilation, disfigurement or other injury, and the imprisonment for the second or each subsequent conviction, in the discretion of the court, shall commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction. Any person charged with causing the death of another as described in this subsection shall be required to post bail before being released after arrest.

PROVING MANSLAUGHTER

➤ **Elements of the offense**

Miss. Code Ann. § 97-3-47 provides:

> Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter.

"[M]anslaughter requires culpable negligence, "which is the moral equivalent of willfulness," whereas aggravated DUI requires only simple negligence." Smith v. State, 956 So. 2d 997, 1008 (Miss. Ct. App. 2007).

➤ **What is culpable negligence?**

> The term culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and that this shall be so clearly evidenced as to place it beyond every reasonable doubt.

Grinnell v. State, 230 So. 2d 555, 558 (Miss. 1970).

Driving under the influence, though a crime, does not by itself constitute culpable negligence. But it may be considered as an element constituting gross and careless disregard for the value of human life and as a factor indicating criminally culpable negligence if the influence of intoxicants proximately contributed both to the negligence of the defendant and to the resulting death. *See* Hopson v. State, 615 So. 2d 576, 578 (Miss. 1993); Ramage v. State, 914 So. 2d 274, 277 (Miss. Ct. App. 2005).

If the State alleges that the ingestion of alcohol or drugs were contributing factors, then the defendant has a right to refute it:

> Where the State is allowed to allege the existence of a cause and effect relationship, the defendant has an equal right to question the existence of that cause and effect relationship. The State's forensic toxicologist testified that the drugs found in Hudson's urine did not indicate that he was under the influence. Also, she testified that the amount of barbiturates found in his blood stream was a low amount. [W]e find that there was a foundation in the evidence for Hudson's defense jury instruction D3.

Hudson v. State, 45 So. 3d 1193, 1198 (Miss. Ct. App. 2009).

See also Gandy v. State, 373 So. 2d 1042, 1046 (Miss. 1979)("This record supports a jury verdict of culpable negligence; namely, Gandy drove into the wrong lane of traffic on a straight stretch of road with an unobstructed view. The abundant evidence of his intoxication obviously led the jury reasonably to believe, as we think it did believe, there existed a causal connection between his intoxication and his automobile being in the wrong lane of traffic."); Tate v. State, 16 So. 3d 699, 704 (Miss. Ct. App. 2008)("[T]here was no evidence that Tate had been drinking on the day of the crash. All the evidence showed was that Tate, who may have had a cooler of beer and two open beers in his vehicle, lost control of his vehicle while coming through the curve and crossed into Brooks's lane, thereby causing her death. We find that the State failed to show that Tate's actions rose the level of "wanton or reckless conduct," or that Tate was negligent to such a degree that he was "totally indifferent to the safety of human life.").

➤ **Penalties**

Miss. Code Ann. 97-3-25 provides:

> Any person convicted of manslaughter shall be fined in a sum not less than five hundred dollars, or imprisoned in the county jail not more than one year, or both, or in the penitentiary not less than two years, nor more than twenty years.

MEDICAL RECORDS

Rule 503 of the Mississippi Rules of Evidence sets forth the physician and psychotherapist-patient privilege. This privilege applies in criminal as well as civil trials. Cotton v. State, 675 So. 2d 308, 311 (Miss. 1996). A patient, however, can waive the privilege:

> Hopkins waived his physician-patient privilege where he took steps which made the information available to the public and put his health at issue at trial.

Hopkins v. State, 799 So. 2d 874, 881 (Miss. 2001).

And once the privilege has been waived, it cannot be reinstated. *See* Hopkins v. State, 799 So. 2d 874, 881 (Miss. 2001). Also, the privilege does not apply if the evidence is necessary to the proper administration of justice. *See* Jones v. State, 858 So. 2d 139, 142 (Miss. 2003)("A defendant in a criminal case may not rely on this privilege to exclude incriminating evidence. [It is] not be used as a "cloak for a crime.""); State v. Baptist Memorial Hospital-Golden Triangle, 726 So. 2d 554, 560 (Miss. 1998)("Where there is an investigation into a serious and/or dangerous felony, public policy must override the rights of an individual.").

CHAPTER 7

DISCOVERY

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DISCOVERY IN CIRCUIT AND COUNTY COURT CASES

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BRADY TEST

A prosecutor may not suppress evidence favorable to the accused:

> [S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland, 373 U.S. 83, 87 (1963).

In determining whether a *Brady* violation has occurred the defendant must prove:

1) that the State possessed evidence favorable to the defendant (including impeachment evidence);

2) that the defendant does not possess the evidence nor could obtain it with any reasonable diligence;

3) that the prosecution suppressed the favorable evidence; and

4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

See Carr v. State, 873 So. 2d 991, 999 (Miss. 2004); King v. State, 656 So. 2d 1168, 1174 (Miss. 1995).

Failure to do so defeats a *Brady* violation challenge. *See* Montgomery v. State, 891 So. 2d 179, 184 (Miss. 2004)("Montgomery fails to show that the evidence was favorable or that the State even possessed the same."). Notably, *Brady* does not require the State to search and discover all possible exculpatory evidence. *See* Randle v. State, 827 So. 2d 705, 712 (Miss. 2002). Nor does it require, absent bad faith, the State to preserve potentially useful evidence. *See* Illinois v. Fisher, 540 U.S. 544, 545-49 (2004); Northup v. State, 793 So. 2d 618, 623 (Miss. 2001). Rather, it must be evidence which might be expected to play a significant role in the suspect's defense. *See* Cox v. State, 849 So. 2d 1257, 1266 (Miss. 2003).

ACCESS TO INFORMATION ON TEST

Miss. Code Ann. § 63-11-15 provides:

> Upon the written request of the person tested, or his attorney, full information concerning the test taken at the direction of the law enforcement officer shall be made available to him or to his attorney.

Mississippi Attorney General Opinions:

Section 63-11-15 only applies to the intoxilyzer test.

"[W]e have consistently held the opinion that Mississippi Code Annotated Section 63-11-15 is the only statute that addresses discovery in justice court. In that regard, Section 63-11-15 only applies to the information concerning the intoxilyzer test taken by the defendant. Any other information sought by the defense attorney in not subject to discovery in justice court." Op. Att'y Gen. No. 2004-0216 (May 21, 2004).

Assessing costs under Section 63-11-15.

"If the information is determined to be covered by Section 63-11-15, and is requested by the defendant, such information should be provided to the defendant at no cost to the defendant. The cost of providing this information is a cost of prosecution and should be borne by the municipality." Op. Att'y Gen. No. 2004-0039 (Feb. 13, 2004).

Defendant may seek to use public records.

"If the defendant seeks information that is not covered by Section 63-11-15, the prosecutor (or law enforcement agency that has the information) is not required to provide the information to the defendant. However, the defendant may seek to use the public records laws to obtain some of the information. If the information is contained in public records, the defendant may have a right to request those public records pursuant to Mississippi Code Annotated Sections 25-61-1 et seq. In such a case, the defendant would have to pay a fee to cover the actual expense of providing the records as allowed by the public records act." Op. Att'y Gen. No. 2004-0039 (Feb. 13, 2004).

Section 63-11-15 not applicable to field sobriety tests.

"Mississippi Code Annotated Section 63-11-15 does not apply to field sobriety tests which are not required to be documented on paper. Although law officers may document these tests on paper, they are not required to do so by any law." Op. Att'y Gen. No. 1999-0521 (Oct. 15, 1999).

What "full information concerning the test taken" pertains to.

"[F]ull information concerning the test taken" only pertains to the actual test and information related to the taking of that particular test and, if asked for, information concerning the procedures and equipment used in the test and the calibration and accuracy of the instruments." Op. Att'y Gen. No. 97-0687 (Oct. 24, 1997).

To whom written request should be made.

"To whom should a written request for discovery under Section 63-11-15 be made? . . . [T]he defense attorney should make a written request to the law enforcement agency that is in possession of the information at issue." Op. Att'y Gen. No. 97-0252 (June 6, 1997).

A cost of prosecution.

"[T]he cost of producing information under Mississippi Code Annotated Section 63-11-15 is a cost of prosecution . . . ." Op. Att'y Gen. No. 97-0241 (May 2, 1997).

"Full information concerning the test taken" does not include field sobriety tests or video tapes.

"Does "full information concerning the test taken" under Section 63-11-15 include field sobriety tests or video tapes? . . . This term does not include field sobriety tests or video tapes." Op. Att'y Gen. No. 96-0740 (Oct. 25, 1996).

➤ What the prosecution must disclose

URCCC 9.04(A) provides:

> A. Subject to the exceptions of subsection "B", below, the prosecution must disclose to each defendant or to defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order the following which is in the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecution:
>
> 1. Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by any such witness;
>
> 2. Copy of any written or recorded statement of the defendant and the substance of any oral statement made by the defendant;
>
> 3. Copy of the criminal record of the defendant, if proposed to be used to impeach;
>
> 4. Any reports, statements, or opinions of experts, written, recorded or otherwise preserved, made in connection with the particular case and the substance of any oral statement made by any such expert;
>
> 5. Any physical evidence and photographs relevant to the case or which may be offered in evidence; and
>
> 6. Any exculpatory material concerning the defendant.
>
> Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to the defense attorney as justice may require.

- **What information is not subject to disclosure**

URCCC 9.04(B) provides:

> B. The court may limit or deny disclosure authorized by subsection "A" if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense attorneys.
>
> The following is not subject to disclosure:
>
> 1. Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of legal staff.
>
> 2. Informants. Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose his/her identity will infringe the constitutional rights of the accused or unless the informant was or depicts himself/herself as an eyewitness to the event or events constituting the charge against the defendant.

- **Defendant to provide reciprocal discovery**

URCCC 9.04(C) provides:

> C. If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, promptly disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph the following information and material which corresponds to that which the defendant sought and which is in the possession, custody, or control of the defendant or the defendant's attorney, or the existence of which is known, or by the exercise of due diligence may become known, to the defendant or defendant's counsel:

1. Names and addresses of all witnesses in chief which the defendant may offer at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by any such witness;

2. Any physical evidence and photographs which the defendant may offer in evidence;

3. Any reports, statements, or opinions of experts, which the defendant may offer in evidence.

- **Attorneys are not to impede the investigation of the case**

URCCC 9.04(D) provides:

> D. Except as is otherwise provided or in cases where the witness would be forced to reveal self-incriminating evidence, neither the attorney for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information, except the accused, to refrain from discussing the case with the opposing attorneys or showing the opposing attorneys any relevant material, nor shall they otherwise impede the opposing attorney's investigation of the case.

- **Duty to timely supplement discovery**

URCCC 9.04(E) provides:

> E. Both the state and the defendant have a duty to timely supplement discovery. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's attorney of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

See Lepine v. State, 10 So. 3d 927, 935 (Miss. Ct. App. 2009)("Lepine was not prejudiced [after receiving late discovery that the State's toxicology expert was going to offer an opinion on retrograde extrapolation] because he actually had three months before the trial to consult a toxicologist to prepare for cross-examination of the State's toxicology expert. . . . Lepine cannot show any injury that resulted from the denial of his motion for a continuance.").

➤ **Discovery materials not to be distributed to third parties**

URCCC 9.04(F) provides:

> F. The attorney receiving materials on discovery is responsible for those materials and shall not distribute them to third parties.

➤ **Court may restrict or defer disclosure upon a showing of cause**

URCCC 9.04(G) provides:

> G. Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's attorney to make beneficial use thereof.
>
> When some parts of certain material are discoverable under these rules, and other parts are not discoverable, as much of the material should be disclosed as is consistent with the rules.
>
> Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.
>
> In the event there are matters arguably within the scope of a party's discovery request or an order for discovery, and the opposing party is of the opinion that the requesting party is not entitled to discovery of same, the opposing party shall, as soon as is reasonably practicable, file with the clerk of the court a written

statement describing the nature of the information or the materials at issue as fully as is reasonably possible without disclosure of same and stating the grounds for objection to disclosure. Subject to the limitations otherwise provided in these rules, determinations such as whether the matters requested in discovery are relevant to the case, exculpatory, possible instruments of impeachment, and the like, may be made only by the party requesting or to receive the discovery.

➤ **Preserving the showing of cause for the record**

URCCC 9.04(H) provides:

> H. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a hearing in camera, the entire record of such hearing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

➤ **Actions court may take for noncompliance with discovery rules**

URCCC 9.04(I) provides:

> I. If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.
>
> If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:

1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and

2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

The court shall follow the same procedure for violation of discovery by the defense.

Discovery material shall not be filed with the clerk unless authorized by the court.

Willful violation by an attorney of an applicable discovery rule or an order issued pursuant thereto may subject the attorney to appropriate sanctions by the court.

See Johnson v. State, 760 So. 2d 33, 36 (Miss. Ct. App. 2000)("[*Box v. State*, 437 So. 2d 19 (Miss. 1983) sets forth] procedures for trial courts to follow when faced with a discovery violation . . . These guidelines are now codified in URCCC 9.04(I) . . . [But] the *Box* analysis only applies when the State withholds inculpatory evidence and then attempts to introduce that

inculpatory evidence at trial."); Bankston v. State, 907 So. 2d 966, 971 (Miss. Ct. App. 2005)("As in *Johnson*, we recognize that the State never attempted to introduce Myers' testimony into evidence. Therefore, a review under *Box* was simply not mandated.").

CHAPTER 8

EXAMINING WITNESSES

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DIRECT EXAMINATION

➤ **What is direct examination?**

Direct examination is "the first questioning of a witness in a trial or other proceeding, conducted by the party who called the witness to testify." Black's Law Dictionary 577 (8th ed. 1999). Direct examination ordinarily precludes the use of leading questions. But M.R.E. 611(c) sets forth a few exceptions to this rule:

> (c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

➤ **Sample direct examination questions**

Below are sample direct-examination questions in proving DUI.

QUALIFICATION AND BACKGROUND OF OFFICER:

What is your name and occupation?

How long have you been employed as a law enforcement officer?

What is your training and experience as a law enforcement officer?

If applicable: Do you provide training to other law enforcement officers?

If applicable: Do you have any command responsibilities within your department?

What special training do you have in detecting impaired drivers? (Answer to be specific and detailed.)

ESTABLISHING VENUE:

Were you on duty on (*date*) at approximately (*time*) in (*city or county*), Mississippi?

Did the events that you will be describing occur at approximately that time and date in (*city or county*), Mississippi?

REASONABLE SUSPICION FOR TRAFFIC STOP:

On (*date*) at approximately (*time*), did you come into contact with (*name of accused*), the defendant?

Please tells us the facts and circumstances of this contact.

Were you in a patrol car? Was there another officer with you?

Was this a marked or unmarked patrol car?

Where did you first spot the defendant's vehicle?

Where is this location within the city or county?

What drew your attention to the vehicle? Please describe what you observed.

After making these observations, what did you do?

Did you follow the vehicle? What did you observe when you followed the vehicle?

Did you turn on your blue lights and siren?

What did you observe after turning on your blue lights and siren?

While following the vehicle, did you observe any erratic diving, swerving, speeding, or other traffic violations? Please describe what you observed.

What were the road conditions?

Was it a marked or unmarked highway?

Was there any gravel, tree limbs, or other debris?

What were the weather conditions?

Was there any road or weather condition at the time that caused you difficulty in driving your patrol car?

How far did you follow the vehicle before it came to a complete stop?

Did the vehicle have any difficulty in coming to a complete stop?

Where did the vehicle come to a complete stop?

PROBABLE CAUSE FOR DUI ARREST:

After the vehicle had come to a complete stop, what did you do next?

As you approached the vehicle, what did you observe?

Is the driver of the vehicle in the courtroom today? Please point to that person and describe what he (or she) is wearing.

Your Honor, may the record reflect that the witness has identified the defendant.

Did you request the driver to produce a driver's license and registration?

Was he (or she) able to produce these?

If applicable: Did you request that the driver produce another form of identification? Was he (or she) able to produce one? What was it?

Did you observe whether the driver had difficulty in producing the driver's license and registration (or another form of identification)? Please describe what you observed.

Did you observe the defendant's appearance? Please describe that appearance.

Did you observe the defendant's eyes? Please describe what you observed.

Did you smell any odor on the driver's breath? Please describe what you smelled.

Did you smell any odor from inside the vehicle? Please describe what you smelled.

Did you see any open liquor bottles or open beer cans within the vehicle?

Did you observe any drugs or paraphernalia within the vehicle?

Were there any passengers? Please describe their behavior.

Did you talk with the defendant? What was the nature of the conversation? Was the defendant slurring his (or her) words?

Did you ask the defendant if he (or she) had been drinking? What was the defendant's response?

Upon making these observations, did you request the defendant to step out of the vehicle?

How did the defendant respond to this request?

Did the defendant have any difficulties stepping out of the vehicle? Please describe what you observed.

STANDARDIZED FIELD SOBRIETY TESTS:

Did you ask the defendant to perform any standard field sobriety tests?

What was the defendant's response?

What is the purpose of standardized field sobriety tests?

Who developed these tests? (National Highway Traffic Safety Administration).

Have you received any special training in administering these tests? Please describe that special training. (Who conducts it? What does it consist of? How many class hours? Is there a proficiency test?).

Are you certified to give these tests?

What tests are used?

Which test did you request that the defendant take first?

Did the defendant agree to perform this test?

Where was it given?

Was anyone else present? Who?

What was the condition of the surface? Was it level?

How was the lighting?

Did you give instructions for taking the test? Please describe those instructions.

Did you demonstrate how to perform the test?

Did you ask the defendant whether he/she understood the instructions and demonstrations?

How did the defendant respond?

Did you ask the defendant if he/she had any physical disabilities that might interfere with taking these tests?

What was his/her response?

HORIZONTAL GAZE NYSTAGMUS TEST (HGN):

Only admissible to show probable cause for arrest and not as evidence of DUI.

What is Horizontal Gaze Nystagmus?

What causes it?(alcohol, certain drugs, neurological disorders, inner ear problems)

What is the purpose of the Horizontal Gaze Nystagmus test? (What are you looking for?)

Have you been trained in administering and evaluating HGN?

Are you certified to give this test?

Did the defendant agree to perform this test?

Describe how this test was administered to the defendant.

What did you observe when the defendant performed the test?

Is there any way to "practice" this test? (Involuntary muscles–can't be practiced)

Can you show the judge (or jury) how you demonstrated this test?

Your Honor, I request that the officer be allowed to step down from the witness chair for this purpose.

WALK AND TURN (WAT) & ONE LEG STAND (OLS):

Which test did you request that the defendant take next?

Did the defendant agree to perform this test?

Was this test given in the same location?

Were the same persons present?

Was the surfacing and lighting the same?

Did you give instructions for taking the test? Please describe those instructions.

Did you demonstrate how to perform the test?

Are these substantially the same instructions and demonstration given to the defendant?

Did you ask whether the defendant understood the instructions and demonstration?

How did he (or she) respond?

Did you observe if the defendant had any physical disabilities that might interfere with taking this test?

Are you trained to evaluate a person's performance of this test? Please describe the evaluation process (How do you evaluate the test?).

Did the defendant perform the test? Please describe the defendant's performance of this test.

Can you show the judge (or jury) how you demonstrated this test?

Your Honor, I request that the officer be allowed to step down from the witness chair for this purpose.

As a result of the defendant's performance on the standardized field sobriety tests, did you form an opinion as to the defendant's state of sobriety?

What was that opinion?

Were there any other factors, in addition to the defendant's performance on the standardized field sobriety tests, which you considered in reaching your opinion?

What were those other factors?

ARREST AND TRANSPORT TO STATION:

What did you do after the standardized field sobriety tests?

Did you place the defendant under arrest? Please describe the arrest procedures.

Were Miranda rights given? Were they given from a card or memory? What are these rights?

Did the defendant understand them?

If applicable: Did he (or she) sign a waiver? Introduce signed waiver.

What was the defendant's conduct and demeanor on the way to the station?

Did the defendant make any statements?

When you arrived at the station, did the defendant have any difficulty exiting the patrol car?

Upon exiting the patrol car, did the defendant have any difficulty standing or walking?

INTOXILYZER TEST:

What is your name and occupation? How long have you been employed as a law enforcement officer?

Are you familiar with the Intoxilyzer 8000?

What is the purpose of Intoxilyzer 8000?

Have you received training in its operation? Please describe that special training. (Who conducts it? What does it consist of? How many class hours? Is there a proficiency test?).

Do you hold a valid permit issued by the State Crime Lab and Department of Public Safety to conduct test using the Intoxilyzer 8000? When was it issued? Was it valid on (*date of test*). Is it currently valid?

Do you have your certification card with you? Would you please show it to the judge.

Your Honor, the State moves that a true and correct copy of that certificate, but with the officer's Social Security Number redacted, be admitted into evidence. (*See* M.R.E. 1003 "Admissibility of Duplicates").

On (*date*), did you administer an Intoxilyzer 8000 test on the (*name of accused*), the defendant?

Where was the test administered?

What was the defendant's reaction to being tested?

What was the defendant's conduct and demeanor at this time?

Did the defendant make any unusual actions or incriminating statements during this time?

Were implied consent rights given? What are these rights? (Note: Implied consent rights are not required to be given for DUI arrests on private property).

Did the defendant understand them?

Did the defendant agree to submit to the Intoxilyzer 8000 test?

Prior to administering the test, did you observe the defendant for at least 20 minutes?

How long did you observe the defendant?

Was this a constant and continuous surveillance?

During this observation period, did the defendant consume any foods or liquids? regurgitate? belch? burp? hiccup? or put anything in the mouth?

Did you ask the defendant if he (or she) had any medical problems or was on any medications? What was the defendant's response?

Is there an automated screen on the Intoxilyzer 8000 that prompts you in the steps to administer?

Are these the steps that you followed when administering the Intoxilyzer 8000 test to the defendant?

Did the defendant submit two (2) samples of his (or her) breath?

Did the Intoxilyzer 8000 function properly?

If applicable: Introduce the Intoxilyzer Calibrations (Remote Cal Check IP16E)(Note: There are some courts that still require separate calibration certificates even though the Intox. 8000 is self-calibrating. Other courts allow the IP-01E to suffice to meet the calibration requirement.).

Introduce test results (IP01E).

After completing the test, did you advise him (or her) of the right to seek legal or medical assistance?

OFFICER'S OPINION AS TO WHETHER DEFENDANT WAS DUI:

Have you observed persons under the influence of alcoholic beverages before? How many times? What were the circumstances?

How long had you observed the defendant on (*date*)?

Do you have an opinion as to whether the defendant was operating a motor vehicle on that date while under the influence of and impaired by alcohol or drugs (depending on whether it was alcohol or what kind of drug would determine the legal requirement of having to prove "under the influence" or "impairment")?

What is that opinion?

What is the basis of this opinion? (Officer should specify all relevant and admissible observations for proving DUI, including: any erratic driving; the defendant's conduct, demeanor, and appearance; the presence of alcohol, drugs or paraphernalia; any incriminating statements; and the performance of field sobriety tests).

DEMONSTRATIVE EVIDENCE

➤ **What is demonstrative evidence?**

Demonstrative evidence is "[p]hysical evidence that one can see and inspect (i.e., an explanatory aid, such as a chart, map, and some computer simulations) and that, while of probative value and usu. offered to clarify testimony, does not play a direct part in the incident in question. This term sometimes overlaps with and is used as a synonym of real evidence." Black's Law Dictionary 577 (9th ed. 2009).

➤ **Admissibility of demonstrative evidence**

Demonstrative evidence may be admitted at the trial court's discretion if it is 'reasonably necessary and material'–which ordinarily means 'appropriate and relevant.' Seal v. Miller, 605 So. 2d 240, 248 (Miss. 1992); Gandy v. State, 373 So. 2d 1042, 1047 (Miss. 1979). Because "the types of demonstrative evidence and the purposes for which it is sought to be introduced are extremely varied, it is generally viewed as appropriate to accord the trial judge broad discretion in ruling upon the admissibility of many types of demonstrative evidence." Murriel v. State, 515 So. 2d 952, 956 (Miss. 1987); Lewis v. State, 725 So. 2d 183, 189 (Miss. 1998).

➤ **Types of demonstrative evidence used in DUI cases**

Demonstrative evidence often used in DUI cases include:

- photographs;
- videotapes;
- diagrams; and
- physical evidence.

PHOTOGRAPHS:

Pictures immediately convey the scene to a judge or jury:

- the impaired driver;
- the injured person;
- the broken windshield;
- beer cans strewn inside the vehicle;
- seat-belt burns or steering-wheel burns in accident cases; and
- roadway conditions.

To be admitted into evidence, the photograph must be relevant and authenticated. *See* M.R.E. 401, 401, and 901.

For example, the State might introduce a photograph for illustrative use as follows:

I hand you what has been marked State's Exhibit #___. What is it?

Do you recognize it?

What is it a picture of?

Did you take the picture? (It's not necessary that the witness actually took the picture.)

Are you familiar with the subject matter depicted therein?

Does it fairly and accurately represent the subject matter depicted therein as it appeared on the date and time in question?

Would the use of this photograph help you in explaining and illustrating your testimony to jury?

Your Honor, the State moves that State's Exhibit #___ be admitted into evidence for the sole purpose of illustrating the witness's testimony.

VIDEOTAPES:

Videotapes, taken either from the patrol car or at the station, are effective to show:

- careless or reckless driving;
- the driver slurring words;
- the driver stumbling, staggering, or otherwise appearing intoxicated or impaired; and
- a poor performance on the field sobriety tests.

"The same standards used in determining the admissibility of photographs are applicable to the admission of videotapes." Thames v. State, 5 So. 3d 1178, 1187 (Miss. Ct. App. 2009). To be admissible the videotape must be an accurate representation of the person or items being depicted and not be altered in any way. Defense counsel should be permitted to view the videotape prior to its introduction. Statements on the videotape are subject to *Miranda* objections, but only if there is a custodial interrogation:

> Moore contends that he should have been given Miranda warnings before the videotape and its resulting audio were permitted to record his words and behavior. According to the record, Moore was not arrested until he refused to submit to the Intoxilyzer breath test at the police station. The recorded conversation between Moore and the police officer was investigatory in nature and conducted on the scene. Miranda warnings do not have to be given in that situation.

Moore v. State, 806 So. 2d 308, 312 (Miss. Ct. App. 2001).

For example, the State might introduce the video as follows (assuming camera is mounted in patrol car):

Have you received any training in the operation of video cameras?

Have you had the opportunity to use a video camera as part of your employment in law

enforcement?

What type of camera do you use?

How long have you been using a video camera?

On how many occasions have you used it?

How have you used a video camera?

Is your patrol car equipped with a video camera?

How does it work?

How is it powered?

Is it portable?

Describe the camera.

On the date and time in question, was your vehicle equipped with a video camera?

What type of camera was it?

How did it become operational?

Was it working properly?

Can you observe what the camera is recording while it is recording? How?

Was what you saw an accurate depiction of the events as they were occurring?

Was there a videotape in the camera?

Who placed the videotape in the camera?

When was the videotape placed in the camera?

Is the videotape placed in the camera or a separate unit?

Where is that unit located?

Was the videotape blank when it was placed in the unit?

At some point on the date in question, did you activate the camera?

What did you do?

When did you activate the camera?

How did you operate the camera?

What were the lighting conditions at that time?

Did you use any artificial light while operating the camera?

If so, what did you use?

Where was the camera located?

How far was the camera from _____?

Did you use any special lens while operating the camera?

If so, what did you use?

How long was the camera activated?

At some point was the videotape removed from the unit? When? By whom?

What was done with the videotape?

Has it been in your care and custody or the custody of you department since it was removed from the unit?

I hand you what has been marked State's Exhibit____. What is it?

At my request, did you bring it to court today?

Have you had the opportunity to review the videotape?

How many times have you reviewed the tape?

Is the videotape a fair and accurate representation of the events you observed on the date and time in question?

Is it an actual recording of the events or a reconstruction?

Have you operated this VCR or a similar VCR in the past?

Please place State's Exhibit #___ in the VCR and play it for the court/jury.

Watch videotape (have officer or witness describe the videotape while viewing it - identify people and places depicted).

Is that videotape a fair and accurate representation of the events you observed on the date and time in question?

Has it been altered or edited in any way?

Your Honor, the state moved that State's Exhibit #___ be admitted into evidence [(if for illustrative purposes only) for the sole purpose of illustrating the witness's testimony].

DIAGRAMS:

Diagram are helpful in explaining or illustrating:

- distances traveled by the defendant in failing to heed the blue lights and sirens;
- road conditions (e.g., to corroborate the officer's testimony that the road is not curvy); and
- the area of collision.

To be admitted into evidence, the photograph must be relevant and authenticated. *See* M.R.E. 401, 401, and 901.

For example, the State might introduce a diagram for illustrative use as follows:

I hand you what has been marked State's Exhibit #1. What is it?

What is it a diagram of?

Are you familiar with the area (or object) depicted?

If applicable: Did you prepare the diagram?

If applicable: When did you prepare the diagram?

If applicable: How did you prepare the diagram?

Is it drawn to scale?

Does it fairly and accurately depict the area (or object)?

Would the use of this diagram help you in explaining and illustrating your testimony to jury?

Your Honor, the State moves that State's Exhibit #___ be admitted into evidence for the sole purpose of illustrating the witness's testimony.

PHYSICAL EVIDENCE:

Physical evidence are tangible items or documents, such as:

- liquor bottles, beer cans, and pill bottles;
- seized drugs and paraphernalia;
- documentation of chemical test results;
- vehicle wreckage in accident cases; and
- hair removed from the broken windshield.

To be admitted into evidence, the physical evidence must be relevant and authenticated. *See* M.R.E. 401, 401, and 901. If the evidence is fungible (e.g., blood, hair, or drugs) the State must show the chain of custody and that the item is substantially similar to how it appeared on the date in question. Any break in the chain of custody goes to weight of the evidence, not its admissibility.

For example, the State might introduce a physical item for illustrative use as follows:

I hand you what has been marked State's Exhibit #___. What is it?

Have you seen it before?

When and where did you first see it?

If applicable: From whom did you receive it?

Do you recognize it? How?

If applicable: Did you mark it? When?

If applicable: Did you package it? When?

What did you do with it?

To your knowledge, has it been tampered with in any way?

Is State's Exhibit #___ in the same or substantially the same condition now as when you first saw it?

Your Honor, the State moves that State's Exhibit #___ be admitted into evidence for the sole purpose of illustrating the witness's testimony.

EXPERT WITNESSES

Rule 702 of the Mississippi Rules of Evidence, which covers testimony by experts, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if
>
> (1) the testimony is based upon sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.

In other words, the testimony must be both relevant and reliable.

> To meet the relevance prong, the evidence must assist the trier of fact. In assessing the reliability prong, the trial court must focus "solely on principles and methodology, not on the conclusions they generate." Reliability is to be determined with reference to "a non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony," including: whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. The reliability inquiry is a flexible one, with the applicability of the factors being dependent upon "the nature of the issue, the expert's particular expertise, and the subject of the testimony.

Lepine v. State, 10 So. 3d 927, 937-38 (Miss. Ct. App. 2009).

Rule 705 of the Mississippi Rules of Evidence, which covers the disclosure of facts or data underlying an expert's opinion, provides:

> The expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

An appellate court, of course, can only review an expert's testimony if it is part of the official record. *See* Nicholson v. State, 761 So. 2d 924, 929 (Miss. Ct. App. 2000).

DEFENDANT'S RIGHT TO CONFRONT WITNESSES

The Sixth Amendment's Confrontation Clause provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . To be confronted with the witnesses against him.

Such guarantees a defendant's right to confront those who 'bear testimony' against him. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004). The core class of testimonial statements to which this guarantee applies include:

- ex parte in-court testimony or its functional equivalent–that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

- extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and

- statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

See Crawford v. Washington, 541 U.S. 36, 51-52 (2004).

Thus, admitting affidavits of forensic results without giving the defendant the opportunity to cross-examine the analyst violated the Confrontation Clause:

> The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence [is error].

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2542 (2009).

See also Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 (2009)("Many States have already adopted the constitutional rule we announce today [e.g.,] . . . *Barnette v. State*, 481 So. 2d 788, 792 (Miss. 1985)."); Barnette v. State, 481 So. 2d 788, 792 (Miss. 1985)("We now hold that the certificate [of analysis] cannot be admitted without the in-court testimony of the analyst unless the defendant gives his pre-trial consent and waives his right to confront."); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)(In a criminal case, the prosecution may not introduce a forensic lab report containing a testimonial certification through the in-court testimony of another scientist who did not sign the certification. The defendant has a right to be confronted with the analyst who made the certification, unless the analyst who made the certification is unavailable at trial, and the defendant has had an opportunity to cross examine him or her prior to trial.).

This does not mean that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case:

> Officer Gibbs testified that he personally observed the attending nurse draw blood from Deed and label the sample and that he then took the sample from the nurse. Subsequently the blood sample was delivered to the Mississippi Crime Laboratory and tested by J.C. Smiley. Both Officer Gibbs and Smiley testified at trial and were subject to cross-examination. Neither the procedure to draw Deed's blood, nor the physical blood specimen itself, are statements, nor do they constitute nonverbal conduct intended as an assertion. Contrary to the defendant's claims, the unidentified nurse was not a witness against Deeds.

Deeds v. State, 27 So. 3d 1135, 1143 (Miss. 2009).

Additionally, some certificates are not considered testimonial:

> The *Melendez-Diaz* decision anticipates that not all lab certificates are testimonial in nature, including those that speak to routine testing of the accuracy of the

laboratory machines.

U.S. v. Bacas, 662 F. Supp. 2d 481, 484 (E.D.Va. 2009).

See also Matthies v. State, No. 2010-KM-00783-COA, 2011 WL 2120060 (Miss. Ct. App. 2011)(Court found the admission of the calibration records nontestimonial in nature and the Confrontation Clause did not require the testimony of their preparer. "The certificates at issue here do nothing more than verify the accuracy of the equipment. Though the intoxilyzer was calibrated for use in criminal prosecutions, the certificates were not specifically prepared with an eye on prosecuting Matthies."); Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 (2009)("[D]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."); United States v. Griffin, Crim. No. 3:09 MJ 308., 2009 WL 3064757 (E.D. Va. 2009)("[A] Certificate of Accuracy, introduced only to verify the calibration of a testing device used by law enforcement, does not constitute testimony "against" a defendant in the same way as a certificate of analysis offered to establish an element of the offense."); Oregon v. Bergin, 217 P.3d 1087, 1090 (Or. Ct. App.,2009)("[W]e conclude that *Melendez-Diaz* either rejects, or at least leaves open, the question of whether Intoxilyzer certificates used in Oregon DUII prosecutions are "testimonial.")

The Confrontation Clause does not apply to probable cause hearings, sentencing, and bail. *See* M.R.E. 1101(b); Wilson v. State, 21 So. 3d 572, 587-88 (Miss. 2009).

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MINIMUM PENALTIES NOT TO BE SUSPENDED OR REDUCED

Miss. Code Ann. § 63-11-30(2)(b) provides in part:

> The minimum penalties shall not be suspended or reduced by the court and no prosecutor shall offer any suspension or sentence reduction as part of a plea bargain.

A DUI offender is subject to the DUI laws in effect at the time of the offense. Boyd v. State, 751 So. 2d 1050, 1054 (Miss. Ct. App. 1998)(Boyd was convicted and sentenced under the Implied Consent Law as amended. He was arrested on March 22, 1996, at which time the amended Implied Consent Law was in effect. Therefore, he was sentenced pursuant to the statute which was in effect at the time his offense was committed.").

DISMISSAL OF ACTION UPON SUCCESSFUL COMPLETION OF CERTAIN COURT IMPOSED CONDITIONS NOT ALLOWED

Conditional sentencing does not apply to offenses under the Mississippi Implied Consent Law.

Miss. Code Ann. § 99-15-26(1) provides in part:

> In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section. . . . A person shall not be eligible to qualify for release in accordance with this section if such person has been charged . . . (c) with an offense under the Mississippi Implied Consent Law.

Mississippi Attorney General Opinions:

Mississippi Implied Consent Law offenses excepted from statute.

"[Section 99-15-26] provides that certain offenses are excepted from its terms. Traffic offenses are misdemeanors, and other than offenses under the Mississippi Implied Consent Law, they are not excepted from the statute." Op. Att'y Gen. No. 2005-0199 (June 3, 2005).

EXPUNGEMENT NOT ALLOWED IF CONVICTED OF DUI

A municipal court judge may not expunge a DUI conviction:

Miss. Code Ann. § 21-23-7(6) provides:

> Upon prior notice to the municipal prosecuting attorney and upon a showing in open court of rehabilitation, good conduct for a period of two (2) years since the last conviction in any court and that the best interest of society would be served, the court may, in its discretion, order the record of conviction of a person of any or all misdemeanors in that court expunged, and upon so doing the said person thereafter legally stands as though he had never been convicted of the said misdemeanor(s) and may lawfully so respond to any query of prior convictions. This order of expunction does not apply to the confidential records of law enforcement agencies and has no effect on the driving record of a person maintained under Title 63, Mississippi Code of 1972, or any other provision of said Title 63.

Nor may any court expunge a conviction for a traffic violation, which includes a driving under the influence offense:

Miss. Code Ann. § 99-19-71(1) provides:

> Any person who has been convicted of a misdemeanor, excluding a conviction for a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court in which the conviction was had for an order to expunge any such conviction from all public records.

Additionally, Miss. Code Ann. § 99-15-26 prohibits an expungement of a person charged with a DUI; *See* Eubanks v. State, 53 So. 3d 846 (Miss. Ct. App. 2011)(Despite Eubanks's plea for the Court to adopt a balancing test or create a judicial power of expungement, §99-15-26 expressly prohibits a person charged with an offense under the Mississippi Implied Consent Law to be eligible for expungement.

But a court may expunge a misdemeanor charge if the person arrested has not been formally charged within twelve (12) months of arrest:

Miss. Code Ann. § 99-15-59 provides:

> Any person who is arrested, issued a citation, or held for any misdemeanor and not formally charged or prosecuted with an offense within twelve (12) months of arrest, or upon dismissal of the charge, may apply to the court with jurisdiction over the matter for the charges to be expunged.

A DUI ticket properly lodged with the court is a formal charge.

Mississippi Attorney General Opinions:

DUI convictions may not be expunged.

"It is our opinion that the above statutory language [i.e., "excluding conviction for a traffic violation"] specifically excludes traffic violations, and therefore said law is not applicable to DUI convictions under Section 63-11-30 of the Mississippi Code." Op. Att'y Gen. No. 2004-0417 (Sept. 3, 2004).

EXPUNGEMENT UNDER ZERO TOLERANCE FOR MINORS

See *CHAPTER 11 "ZERO TOLERANCE FOR MINORS"* for a discussion on: when Zero Tolerance for Minors is applicable; the penalties upon a first, second or third conviction; when a hardship is available; and when a minor is eligible for nonadjudication.

DUI 1ST OFFENSE

➤ **General penalties**

Miss. Code Ann. § 63-11-30(2)(a) provides:

> Except as otherwise provided in subsection (3), upon conviction of any person for the first offense of violating subsection (1) of this section where chemical tests provided for under Section 63-11-5 were given, or where chemical test results are not available, such person shall be fined not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00), or imprisoned for not more than forty-eight (48) hours in jail or both; and the court shall order such person to attend and complete an alcohol safety education program as provided in Section 63-11-32. The court may substitute attendance at a victim impact panel instead of forty-eight (48) hours in jail. In addition, the Department of Public Safety, the Commissioner of Public Safety or his duly authorized agent shall, after conviction and upon receipt of the court abstract, suspend the driver's license and driving privileges of such person for a period of not less than ninety (90) days and until such person attends and successfully completes an alcohol safety education program as herein provided. Commercial driving privileges shall be suspended as provided in Section 63-1-83.

➤ Mississippi Alcohol Safety Education Program (MASEP)

Miss. Code Ann. Section 63-11-30(2)(a) requires the court to order the offender to attend and complete an alcohol safety education program upon conviction as provided in Section 63-11-32.

Miss. Code Ann. 63-11-32 provides in part:

> (1) The State Department of Public Safety in conjunction with the Governor's Highway Safety Program, the State Board of Health, or any other state agency or institution shall develop and implement a driver improvement program for persons identified as first offenders convicted of driving while under the influence of intoxicating liquor or another substance which had impaired such person's ability to operate a motor vehicle, including provision for referral to rehabilitation facilities.
>
> (2) The program shall consist of a minimum of ten (10) hours of instruction. Each person who participates shall pay a nominal fee to defray a portion of the cost of the program.

What is MASEP?

> MASEP is Mississippi's statewide driver improvement program. Under the authority of the Mississippi Implied Consent Law, the program is court mandated for first-time offenders convicted of driving under the influence of alcohol or another substance which has impaired their ability to operate a motor vehicle. The program consists of two interrelated units: the Operations Unit, and the Research & Development Unit. The objectives of MASEP are to increase the knowledge and understanding of traffic safety and substance abuse through research and analysis of existing modalities and use its research findings to improve its DUI intervention program.

http://www.ssrc.msstate.edu/divisions/masep

An offender must complete MASEP to get their driver's license reinstated:

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> [T]he Department of Public Safety, the Commissioner of Public Safety or his duly authorized agent shall, ***after conviction*** and upon receipt of the court abstract, suspend the driver's license and driving privileges of such person for a period of not less than ninety (90) days ***and until such person attends and successfully completes an alcohol safety education program as herein provided.*** (emphasis added).

Completion of MASEP cannot be used as a condition under Miss. Code Ann. § 99-15-26 since MASEP occurs *after conviction*. Conditional sentencing does not apply to offenses under the Mississippi Implied Consent Law. See *CHAPTER 5 "PROVING DUI"* for a discussion on conditional sentencing restrictions.

MASEP'S Mission Statement

1. To provide education, rehabilitation, and referral information for the first-time DUI offender.

2. To create a DUI control system by integrating the enforcement, judicial, and rehabilitation / education functions.

3. To design and evaluate the effectiveness of various education / rehabilitation modalities.

4. To conduct research in order to design, implement, and test the effectiveness of intervention / prevention strategies.

(MASEP) http://www.ssrc.msstate.edu/divisions/masep/mission.html

DUI 2ND OFFENSE

➤ **General penalties**

Miss. Code Ann. § 63-11-30(2)(b) provides in part:

> Except as otherwise provided in subsection (3), upon any second conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not less than Six Hundred Dollars ($600.00) nor more than One Thousand Five Hundred Dollars ($1,500.00), shall be imprisoned not less than five (5) days nor more than one (1) year and sentenced to community service work for not less than ten (10) days nor more than one (1) year.

See Smith v. State, 950 So. 2d 1056, 1058 (Miss. Ct. App. 2007)("The [statutory phrase "the offenses being committed within a period of five (5) years"] requires that the offenses must have been committed within a period of five years of each other, not the convictions.").

➤ **In-depth diagnostic assessment and treatment**

Miss. Code Ann. § 63-11-30(2)(d) provides:

> Except as otherwise provided in subsection (3), any person convicted of a second violation of subsection (1) of this section ***shall*** receive an in-depth diagnostic assessment, and if as a result of such assessment is determined to be in need of treatment of his alcohol and/or drug abuse problem, such person shall successfully complete treatment of his alcohol and/or drug abuse problem at a program site certified by the Department of Mental Health. Such person shall be eligible for reinstatement of his driving privileges upon the successful completion of such treatment after a period of one (1) year after such person's driver's license is suspended. Each person who receives a diagnostic assessment shall pay a fee representing the cost of such assessment. Each person who participates in a treatment program shall pay a fee representing the cost of such treatment. (emphasis added).

Mississippi Attorney General Opinions:

In-depth diagnostic assessment to be performed by qualified individual.

"The in-depth diagnostic assessment should be performed by a qualified individual who has been certified by the Department of Mental Health to perform such an assessment." Op. Att'y Gen. No. 2000-0487 (Sept. 29, 2000).

Court may require in-depth diagnostic assessment be delivered to court.

"The court may require the results of such an assessment be delivered to the court or the court's designee in order to insure compliance." Op. Att'y Gen. No. 2000-0487 (Sept. 29, 2000).

Court to determine whether treatment is "necessary" base on reports.

"The determination of whether treatment is necessary will be made by the court based on the reports of the individual administering the assessment." Op. Att'y Gen. No. 2000-0487 (Sept. 29, 2000).

See also in this chapter *"CONDUCTING AN IN-DEPTH DIAGNOSTIC ASSESSMENT AND TREATMENT."*

➤ **Vehicle impoundment, immobilization, and ignition locks**

Miss. Code Ann. § 63-11-30(2)(b) provides in part:

> For any second or subsequent conviction of any person under this section, the person ***shall*** also be subject to the penalties set forth in Section 63-11-31. (emphasis added).

See also in this chapter *"ORDERING VEHICLE IMPOUNDMENT, IMMOBILIZATION, AND IGNITION LOCKS."*

DUI 3RD OFFENSE OR OTHER SUBSEQUENT OFFENSE

➤ **General penalties**

Miss. Code Ann. § 63-11-30(2)(c) provides in part:

> Except as otherwise provided in subsection (3), for any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not less than Two Thousand Dollars ($2,000.00) nor more than Five Thousand Dollars ($5,000.00), shall serve not less than one (1) year nor more

than five (5) years in the custody of the Department of Corrections; provided, however, that for any such offense which does not result in serious injury or death to any person, any sentence of incarceration may be served in the county jail rather than in the State Penitentiary at the discretion of the circuit court judge.

See Williams v. State, 708 So. 2d 1358, 1362 (Miss. 1998)("[T]hree D.U.Is within a five year time frame will subject the violator to a felony charge."); McIlwain v. State, 700 So. 2d 586, 589 (Miss. 1997)("[It is not required] that the indictment . . . specifically show a previous conviction for D.U.I. First prior to being convicted for D.U.I. Second and a conviction of D.U.I. Second prior to being convicted for D.U.I. Third. The obvious intent of this statute is to remove repeat D.U.I. offenders from our streets. This goal will be better accomplished by simply reading the clear language of the statute. Therefore, it is irrelevant whether McIlwain had been charged with a D.U.I. First and a D.U.I. Second.").

➤ **In-depth diagnostic assessment and treatment**

Miss. Code Ann. § 63-11-30(2)(e) provides:

> (e) Except as otherwise provided in subsection (3), any person convicted of a third or subsequent violation of subsection (1) of this section ***shall*** receive an in-depth diagnostic assessment, and if as a result of such assessment is determined to be in need of treatment of his alcohol and/or drug abuse problem, such person shall enter an alcohol and/or drug abuse program approved by the Department of Mental Health for treatment of such person's alcohol and/or drug abuse problem. If such person successfully completes such treatment, such person shall be eligible for reinstatement of his driving privileges after a period of three (3) years after such person's driver's license is suspended. (emphasis added).

See also in this chapter *"CONDUCTING AN IN-DEPTH DIAGNOSTIC ASSESSMENT AND TREATMENT."*

➤ **Vehicle forfeiture procedure**

Mississippi's vehicle forfeiture procedure is statutory.

- Seizure and forfeiture of vehicle

Miss. Code Ann. § 63-11-49 provides:

> (1) When a vehicle is seized under Section 63-11-30(2)(c) or (d), the arresting officer shall impound the vehicle and the vehicle shall be held as evidence until a court of competent jurisdiction makes a final disposition of the case and the vehicle may be forfeited by the administrative forfeiture procedures provided for in this section upon final disposition as provided in Section 63-11-30(2)(c).
>
> (2) The attorney for the law enforcement agency shall provide notice of intention to forfeit the seized vehicle administratively, by certified mail, return receipt requested, to all persons who are required to be notified pursuant to Section 63-11-51.
>
> (3) In the event that notice of intention to forfeit the seized vehicle administratively cannot be given as provided in subsection (2) of this section because of refusal, failure to claim, insufficient address or any other reason, the attorney for the law enforcement agency shall provide notice by publication in a newspaper of general circulation in the county in which the seizure occurred for once a week for three (3) consecutive weeks.
>
> (4) Notice pursuant to subsections (2) and (3) of this section shall include the following information:
>
> (a) A description of the vehicle;
>
> (b) The approximate value of the vehicle;
>
> (c) The date and place of the seizure;
>
> (d) The connection between the vehicle and the violation of Section 63-11-30;
>
> (e) The instructions for filing a request for judicial review; and
>
> (f) A statement that the vehicle will be forfeited to the law enforcement agency if

a request for judicial review is not timely filed.

(5) In the event that a spouse of the owner of the seized vehicle makes a showing to the department that the seized vehicle is the only source of transportation for the spouse, the chief law enforcement officer shall declare that the vehicle is thereby forfeited to such spouse. A written declaration of forfeiture of a vehicle pursuant to this subsection shall be sufficient cause for the title to the vehicle to be transferred to the spouse. The provisions of this subsection shall apply only to one (1) forfeiture per vehicle; if the vehicle is the subject of a subsequent forfeiture proceeding by virtue of a subsequent conviction of either spouse, the spouse to whom the vehicle was forfeited pursuant to the first forfeiture proceeding may not utilize the remedy provided herein in another forfeiture proceeding.

(6) Persons claiming an interest in the seized vehicle may initiate judicial review of the seizure and proposed forfeiture by filing a request for judicial review with the attorney for the law enforcement agency within thirty (30) days after receipt of the certified letter or within thirty (30) days after the first publication of notice, whichever is applicable.

(7) If no request for judicial review is timely filed, the attorney for the law enforcement agency shall prepare a written declaration of forfeiture of the subject vehicle and the forfeited vehicle shall be disposed of in accordance with the provisions of Section 63-11-53.

(8) Upon receipt of a timely request for judicial review, the attorney for the law enforcement agency shall promptly file a petition for forfeiture and proceed as provided in Section 63-11-51.

- <u>Vehicle forfeiture procedure</u>

Miss. Code Ann. § 63-11-51 provides:

(1) Except as otherwise provided in Section 63-11-49, when a vehicle is seized under Section 63-11-30(2)(c) or (d), proceedings under this section shall be instituted promptly upon final conviction.

(2) A petition for forfeiture shall be filed promptly in the name of the State of

Mississippi, the county or the municipality and may be filed in the county in which the seizure is made, the county in which the criminal prosecution is brought or the county in which the owner of the seized vehicle is found. Forfeiture proceedings may be brought in the circuit court or the county court if a county court exists in the county and the value of the seized vehicle is within the jurisdictional limits of the county court as set forth in Section 9-9-21. A copy of such petition shall be served upon the following persons by service of process in the same manner as in civil cases:

(a) The owner of the vehicle, if address is known;

(b) Any secured party who has registered his lien or filed a financing statement as provided by law, if the identity of such secured party can be ascertained by the law enforcement agency by making a good faith effort to ascertain the identity of such secured party as described in subsections (3), (4), (5), (6) and (7) of this section;

(c) Any other bona fide lienholder or secured party or other person holding an interest in the vehicle in the nature of a security interest of whom the law enforcement agency has actual knowledge;

(d) Any person in possession of the vehicle subject to forfeiture at the time that it was seized.

(3) If the vehicle is susceptible of titling under the Mississippi Motor Vehicle Title Law and if there is any reasonable cause to believe that the vehicle has been titled, the law enforcement agency shall inquire of the State Tax Commission as to what the records of the State Tax Commission show regarding who is the record owner of the vehicle and who, if anyone, holds any lien or security interest which affects the vehicle.

(4) If the vehicle is not titled in the State of Mississippi, then the law enforcement agency shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed, and if the vehicle is licensed in a state which has in effect a certificate of title law, the agency shall inquire of the appropriate agency of that state as to what the records of the agency show regarding who is the record owner of the vehicle and who, if anyone, holds any lien, security interest or other instrument in the nature of a security device which affects the vehicle.

(5) In the event the answer to an inquiry states that the record owner of the vehicle is any person other than the person who was in possession of it when it

was seized, or states that any person holds any lien, encumbrance, security interest, other interest in the nature of a security interest, which affects the vehicle, the law enforcement agency shall cause any record owner and also any lienholder, secured party, other person who holds an interest in the vehicle in the nature of a security interest, to be named in the petition of forfeiture and to be served with process in the same manner as in civil cases.

(6) If the owner of the vehicle cannot be found and served with a copy of the petition of forfeiture, the law enforcement agency shall file with the clerk of the court in which the proceeding is pending an affidavit to such effect, whereupon the clerk of the court shall publish notice of the hearing addressed to "the Unknown Owner of . . .," filling in the blank space with a reasonably detailed description of the vehicle subject to forfeiture. Service by publication shall contain the other requisites prescribed in Section 11-33-41, and shall be served as provided in Section 11-33-37 for publication of notice for attachments at law.

- Disposal of revenues and vehicles

Miss. Code Ann. § 63-11-53 provides:

(1) All money derived from the seizure and forfeiture of vehicles under Section 63-11-30(2)(c) and (d) and Sections 63-11-49 and 63-11-51 by the Mississippi Highway Safety Patrol shall be forwarded to the State Treasurer and deposited in a special fund which is hereby created for use by the Department of Public Safety upon appropriation by the Legislature. Unexpended amounts remaining in such special fund at the end of a fiscal year shall not lapse into the State General Fund, and any interest earned on amounts in such special fund shall be deposited to the credit of the special fund. All other law enforcement agencies shall establish a special fund which is to be used for law enforcement purposes to purchase equipment for the law enforcement agency, and any interest earned on the amount in such special fund shall be deposited to the credit of the special fund.

(2) Except as otherwise provided in subsection (3), all vehicles that have been forfeited shall be sold at a public auction for cash by the law enforcement agency, to the highest and best bidder after advertising the sale for at least once each week for three (3) consecutive weeks, the last notice to appear not more than ten

(10) days nor less than five (5) days prior to such sale, in a newspaper having a general circulation in the county in which the vehicle was seized. Such notices shall contain a description of the vehicle to be sold and a statement of the time and place of sale. It shall not be necessary to the validity of such sale either to have the vehicle present at the place of sale or to have the name of the owner thereof stated in such notice. The proceeds of the sale shall be disposed of as follows:

(a) To any bona fide lienholder, secured party, or other party holding an interest in the vehicle in the nature of a security interest, to the extent of his interest; and

(b) The balance, if any, remaining after deduction of all storage, court costs and expenses of liquidation shall be deposited in the manner described in subsection (1) of this section.

(3) The law enforcement agency may maintain, repair, use and operate for official purposes all vehicles that have been forfeited if the vehicles are free from any interest of a bona fide lienholder, secured party or other party who holds an interest in the nature of a security interest. The agency may purchase the interest of a bona fide lienholder, secured party or other party who holds an interest so that the vehicle can be released for its use. If the vehicle is susceptible of titling under the Mississippi Motor Vehicle Title Law, the agency shall be deemed to be the purchaser, and the certificate of title shall be issued to it as required by subsection (4) of this section.

(4) The State Tax Commission shall issue a certificate of title to any person who purchases vehicles under the provisions of this section when a certificate of title is required under the laws of this state.

Mississippi Attorney General Opinions:

Forfeiture if vehicle is titled jointly

"[I]f the vehicle is titled jointly in the name of the defendant and the spouse, and the spouse shows that the vehicle is the only source of transportation, the vehicle shall be forfeited to the spouse. However, if the vehicle is titled jointly to the defendant and someone other than the spouse, the vehicle may be forfeited subject to the interested party seeking a judicial review of the seizure and proposed forfeiture. It would then be within the discretion of a court with

competent jurisdiction to determine whether the vehicle should be forfeited or not." Op. Att'y Gen. No. 2002-0762 (Jan. 10, 2003).

To whom vehicle forfeiture provisions apply

"[T]he seizure and forfeiture provisions of Section 63-11-30(2)(c) should only apply to a vehicle that is owned by the driver who is charged with a third DUI violation." Op. Att'y Gen. No. 96-0831 (Dec. 13, 1996).

➤ **Habitual criminals**

Miss. Code Ann. § 99-19-81 provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Miss. Code Ann. § 99-19-83 provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Felony DUIs are to be considered by the court under these provisions:

> The indictment charging Cummings as a habitual offender listed previous convictions of burglary of a dwelling, aggravated assault, and felony DUI. . . . In total, Cummings had been convicted of five prior felony DUIs. In light of the gravity of Cummings's 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.

Cummings v. State, 29 So. 3d 859, 861 (Miss. Ct. App. 2010).

CONDUCTING AN IN-DEPTH DIAGNOSTIC ASSESSMENT AND TREATMENT[2]

An in-depth diagnostic assessment is conducted by a licensed treatment provider or other qualified individual who has been certified by the Mississippi Department of Mental Health (MDMH) to conduct such an assessment. It consists of two parts:

1. Diagnostic interview.
2. Diagnostic instrument, which may include any of the following:

    - Substance Abuse Subtle Screening Inventory (SASSI).
    - Mortimer-Filkins.
    - Other MDMH approved instrument.

The person being assessed must sign the following release documents:

---

[2]Interview by William Charlton with James Tyson, Director of Substance Abuse/EAP Services, Region 2 CMHC/Communicare, in Oxford, MS (October 9, 2009).

- A consent authorizing the Mississippi Department of Public Safety (MDPS) to release the person's Motor Vehicle Report (MVR) and other specified records.

- A consent authorizing MDMH to release medical records and information to MDPS for the specific purpose of verifying the completion of alcohol and drug treatment at the certified treatment program.

- *If the court orders the in-depth diagnostic assessment and treatment recommendation and completion of alcohol and drug treatment to be delivered to the court or the court's designee:* A consent authorizing the treatment provider to release medical records and information to the court or the court's designee for such purposes.

Treatment recommendations vary according to the need of the individual, which may include any of the following:

1. Residential treatment for a period of thirty (30) days. This is for persons who have an alcohol and/or drug dependency and who are in need of residential treatment. It requires individual therapy and group meetings conducted within a protective residential environment. A fourteen (14) day detoxification program does not constitute residential treatment.

2. Intensive out-patient. This is for persons who have an alcohol and/or drug dependency but who do not appear in need of residential treatment. It requires attending group meetings moderated by an Intensive Out-patient Therapist for three (3) hours per night for three (3) nights per week for ten (10) weeks–a total of ninety (90) hours. Additionally, it requires attending individual therapy for one (1) hour per week for ten (10) weeks–a total of ten (10) hours.

3. Early intervention group. This is for persons who do not appear to have an alcohol or drug dependency but who have shown poor judgment with respect to alcohol or drugs. It requires group meetings moderated by an Intensive Out-patient Therapist for two (2) hours per night for one (1) night per week for ten (10) weeks–a total of twenty (20)

hours.

Treatment providers will usually reserve the right to conduct, if deemed appropriate based upon receiving new information of a person's alcohol or drug use, a reevaluation of the original in-depth diagnostic assessment and treatment recommendation. Occasionally, it is discovered through individual therapy, group meetings or outside sources that a person who had been assessed as needing intensive out-patient actually needs residential treatment or that a person who had been assessed as needing early intervention group actually needs intensive out-patient or even residential treatment. Any person who refuses to be reevaluated is out of the program and, consequently, not eligible for early reinstatement of his or her driving privileges.

Upon successful completion of the treatment program, the treatment provider sends the "Certification of DUI In-Depth Diagnostic Assessment and Treatment Program Completion" to MDMH which, in turn, forwards a certified copy to MDPS.

VEHICLE IMPOUNDMENT, IMMOBILIZATION, AND IGNITION LOCKS

- **Court shall order the impoundment or immobilization of all vehicles registered to offender**

Miss. Code Ann. § 63-11-31(1) provides:

> In addition to the penalties authorized for any second or subsequent convictions of Section 63-11-30, the court shall order either the impoundment or immobilization of all vehicles registered to the person convicted for the entire length of license suspension to commence upon conviction and persist during the entire driver's license suspension period. However, a county, municipality, sheriff's department or the Department of Public Safety shall not be required to keep, store, maintain, serve as a bailee or otherwise exercise custody over a motor vehicle impounded under the provisions of this section.

Mississippi Attorney General Opinions:

Vehicle registration information may be obtained from State Tax Commission.

"In order to obtain vehicle registration information regarding vehicles subject to impoundment as a result of a second offense DUI, neither the Federal Driver's Privacy Protection Act or the Mississippi State Tax Commission Revenue Rule #3 prohibit the release of information to a court or a law enforcement agency. Therefore, such information may be obtained from the State Tax Commission by the local law enforcement agency by following the steps prescribed in Revenue Rule #3." Op. Att'y Gen. No. 2001-0153 (March 30, 2001).

Manner of immobilization.

"The court has wide discretion in the manner that immobilization may be accomplished, i.e., wheel locking devices, removal of necessary operating parts, etc. The defendant is responsible for all costs associated with impounding or immobilizing the vehicle." Op. Att'y Gen. No. 2000-0508 (Sept. 15, 2000).

Confiscation of license plate does not constitute immobilization or impoundment.

"It is the opinion of this office that confiscation of a vehicle license plate does not constitute immobilization or impoundment. Further, although the federal regulation would allow this,

our statute, as passed by the legislature, does not provide for revocation or suspension of a tag." Op. Att'y Gen. No. 2000-0662 (Nov. 27, 2000).

Vehicle may be immobilized rather than impounded.

"[Under Section 63-11-31] the vehicle may be immobilized rather than impounded if impound facilities are not available." Op. Att'y Gen. No. 2000-0471 (Aug. 28, 2000).

➤ **Ordering an ignition interlock system in lieu of impoundment or immobilization**

Miss. Code Ann. § 63-11-31(2)(a) provides in part:

> If other licensed drivers living in the household are dependent upon the vehicle subject to impoundment or immobilization for necessary transportation, the court may order the installation of an ignition interlock system on the vehicle in lieu of impoundment or immobilization. Additionally, the court shall order the installation of an ignition interlock system on all vehicles registered to the person for a minimum period of six (6) months to occur upon reinstatement of the person's driver's license if the court determines it is a vehicle to which the person has access and which should be subject to ignition interlock. . . . For the purpose of this section, "ignition interlock device" means a device which connects a motor vehicle ignition system to a breath-alcohol analyzer and prevents a motor vehicle ignition from starting if the driver's blood alcohol level exceeds the calibrated setting on the device.

Mississippi Attorney General Opinions:

Ignition interlock system may be installed on all vehicle registered to offender.

"A justice court judge may order a defendant who has been convicted of DUI second offense to have an ignition interlock system installed on all vehicles registered in the name of the defendant or to have such vehicles impounded or immobilized, even if those vehicles are physically located outside the county, and if the defendant fails to comply with the court's order, the defendant may be held in contempt, as the order is directed to the defendant and not to a law enforcement agency." Op. Att'y Gen. No. 2000-0516 (Sept. 15, 2000).

➤ **Costs to be paid by person convicted**

Miss. Code Ann. § 63-11-31(2)(a) provides in part:

> The cost associated with impoundment, immobilization or ignition interlock shall be paid by the person convicted.

Mississippi Attorney General Opinions:

Costs to be paid by offender.

"[T]he cost associated with impoundment, immobilization or ignition interlock shall be paid by the person convicted. Therefore, the authorities may charge an impound fee to the offender. Such a fee would be considered a cost of court and could be collected in the same manner as other court costs." Op. Att'y Gen. No. 2000-0471 (Aug. 28, 2000).

Judge may tailor the method of immobilization to contain the costs.

"[T]he cost associated with impoundment, immobilization or ignition interlock is a cost of court that should be paid by the defendant upon conviction. If the defendant is indigent, the cost may be borne by the prosecution and the defendant placed on a work program to satisfy the costs. The method of immobilization is not specified in the law and is left to the discretion of the judge. As such, the judge may tailor the method of immobilization in order to contain the costs incurred by the city or county, i.e., the removal of the tires or car battery or some other part so as to immobilize the vehicle." Op. Att'y Gen. No. 2000-0377 (July 14, 2000).

➤ **Court to establish specific calibration for ignition interlock device**

Miss. Code Ann. § 63-11-31(2)(c) provides:

> When a court orders a person to operate only a motor vehicle which is equipped with a functioning ignition interlock device, the court shall establish a specific calibration setting no lower than two one-hundredths percent (.02%) nor more than four one-hundredths percent (.04%) blood alcohol concentration at which the ignition interlock device will prevent the motor vehicle from being started.

- **Procedures upon ordering use of an ignition interlock device**

Miss. Code Ann. § 63-11-31(2)(d) provides:

> Upon ordering use of an ignition interlock device, the court shall:
>
> (i) State on the record the requirement for and the period of use of the device, and so notify the Department of Public Safety;
>
> (ii) Direct that the records of the department reflect that the person may not operate a motor vehicle that is not equipped with an ignition interlock device;
>
> (iii) Direct the department to attach or imprint a notation on the driver's license of any person restricted under this section stating that the person may operate only a motor vehicle equipped with an ignition interlock device;
>
> (iv) Require proof of the installation of the device and periodic reporting by the person for verification of the proper operation of the device;
>
> (v) Require the person to have the system monitored for proper use and accuracy by an entity approved by the department at least semiannually, or more frequently as the circumstances may require;
>
> (vi) Require the person to pay the reasonable cost of leasing or buying, monitoring, and maintaining the device, and may establish a payment schedule therefore.

- **Misdemeanor to tamper with the immobilization, impoundment, or ignition interlock**

Miss. Code Ann. § 63-11-31(2)(b) provides in part:

> A person may not tamper with, or in any way attempt to circumvent the immobilization or impoundment of vehicles ordered by the court. A violation of this paragraph (b) is a misdemeanor and upon conviction the violator shall be fined an amount not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) or imprisoned for not more than one (1) year or both.

Miss. Code Ann. § 63-11-31(2)(e) provides:

(i)1. A person prohibited under this section from operating a motor vehicle that is not equipped with an ignition interlock device may not solicit or have another person attempt to start or start a motor vehicle equipped with such a device.

2. A person may not attempt to start or start a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to a person who is prohibited under this section from operating a motor vehicle that is not equipped with an ignition interlock device.

3. A person may not tamper with, or in any way attempt to circumvent, the operation of an ignition interlock device that has been installed in a motor vehicle.

4. A person may not knowingly provide a motor vehicle not equipped with a functioning ignition interlock device to another person who the provider of such vehicle knows or should know is prohibited from operating a motor vehicle not equipped with an ignition interlock device.

(ii) A violation of this paragraph (e) is a misdemeanor and upon conviction the violator shall be fined an amount not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) or imprisoned for not more than one (1) year, or both.

(iii) A person shall not be in violation of this paragraph (e) if:

1. The starting of a motor vehicle equipped with an ignition interlock device is done for the purpose of safety or mechanical repair of the device or the vehicle, and the person subject to the court order does not operate the vehicle; or

2. The court finds that a person is required to operate a motor vehicle in the course and scope of the person's employment. If the vehicle is owned by the person's employer, the person may operate that vehicle during regular working hours for the purposes of employment without installation of an ignition interlock device if the employer has been notified of such driving privilege restriction and if proof of that notification is kept with the vehicle at all times. This employment exemption does not apply if the business entity that owns the vehicle is owned or controlled by the person who is prohibited from operating the motor vehicle not equipped with an ignition interlock device.

- **Ordering ignition interlock device on vehicles of family members**

Miss. Code Ann. § 63-11-31(2)(f) provides:

> (i) A judge may also order that the vehicle owned or operated by a person or a family member of any person who committed a violation of Section 63-11-30 be equipped with an ignition interlock device for all or a portion of the time the driver's license of the operator of such vehicle is suspended or restricted pursuant to this section, if:
>
> 1. The operator of the vehicle used to violate Section 63-11-30 has at least one (1) prior conviction for driving a motor vehicle when such person's privilege to do so is cancelled, suspended or revoked as provided by Section 63-11-30; or
>
> 2. The driver's license of the operator of such vehicle was cancelled, suspended or revoked at the time of the violation of Section 63-11-30.
>
> (ii) The provisions of this paragraph (f) shall not apply if the vehicle used to commit the violation of Section 63-11-30, was, at the time of such violation, rented or stolen.
>
> (3) The provisions of this section are supplemental to the provisions of Section 63-11-30.

- **Frequently asked questions on vehicle immobilization, impoundment, and ignition interlock**

1. When is the vehicle to be impounded?

RESPONSE: The court shall order the vehicle either impounded or immobilized for the period of time that the defendant's driver's license is suspended.

2. Who is responsible for determining all of the specific vehicles registered to a defendant convicted of a DUI 2nd or subsequent offense?

RESPONSE: [T]he court may inquire of the defendant any information concerning all of the vehicles registered in his name. Such information may be

verified by the local law enforcement agency (sheriff's department or police department).

3. Who is responsible for actually impounding the vehicle?

RESPONSE: [T]he court may order the defendant to have his vehicle delivered to the impoundment area at a specified time. Failure of the defendant to comply with the court's order would subject him to a contempt citation. In addition, the order of impoundment may be enforced by a law enforcement officer.

4. If the defendant is indigent and therefore unable to pay for the vehicle impoundment, who bears the cost? If the answer is that the cost is assessed to the indigent defendant, may the entity responsible for actually impounding the vehicle refuse to impound the vehicle because they believe they will never be reimbursed for such costs?

RESPONSE: The county may be required to absorb the costs of impoundment. These costs should be assessed against the defendant and may be included in an execution levied against the defendant's vehicle if the defendant does not pay them. If a third party is contracted with by the local governing authorities to provide an impound lot, such contract should specify who is to pay for the cost of impounding an indigent's vehicle.

5. If an indigent defendant is assessed the costs for vehicle impoundment but fails to pay such costs due to his indigent status, may he be held in contempt of court?

RESPONSE: No, an indigent defendant may not be held in contempt of court for failing to pay a cost imposed by the court.

6. If the Court orders a vehicle impounded, what remedy (as far as release of the vehicle) is available to a lien holder on such vehicle if the owner fails to pay any debt owed on such vehicle while the vehicle is impounded?

RESPONSE: A lienholder may repossess or file a suit to replevin a vehicle if the owner defaults upon the loan agreement with the lienholder. A court may order the impounded or immobilized vehicle released to a lienholder as a result of

replevin or some other debt collection procedure, i.e., execution order upon judgment.

7. Who is responsible for monitoring vehicle immobilization?

RESPONSE: The court has discretion in determining whether the immobilization or impoundment of a vehicle should be monitored and/or in what manner such monitoring should be done. However, Mississippi Code Annotated Section 63-11-31(1)(b) prohibits a person from tampering or circumventing the immobilization or impoundment of a vehicle and provides penalties for such action

8. Who is responsible for monitoring proof of ignition interlock device installation?

RESPONSE: [Section 63-11-31(1)(d)(iv)] does not specifically assign responsibility for monitoring. The Court may require proof of installation be sent to the court or the court's designee. Furthermore, Mississippi Code Annotated Section 63-11-31(1)(d)(v) requires that the system be monitored for proper use and accuracy by an entity approved by the Department of Public Safety at least semiannually.

Op. Att'y Gen. No. 2000-0487 (Sept. 29, 2000).

REPORTING DUI CONVICTIONS

Miss. Code Ann. § 63-11-30(6) provides:

Upon conviction of any violation of subsection (1) of this section, the trial judge shall sign in the place provided on the traffic ticket, citation or affidavit stating that the person arrested either employed an attorney or waived his right to an attorney after having been properly advised. If the person arrested employed an attorney, the name, address and telephone number of the attorney shall be written on the ticket, citation or affidavit. The judge shall cause a copy of the traffic ticket, citation or affidavit, and any other pertinent documents concerning

the conviction, to be sent to the Commissioner of Public Safety. A copy of the traffic ticket, citation or affidavit and any other pertinent documents, having been attested as true and correct by the Commissioner of Public Safety, or his designee, shall be sufficient proof of the conviction for purposes of determining the enhanced penalty for any subsequent convictions of violations of subsection (1) of this section.

Miss. Code Ann. § 63-11-37 provides:

It shall be the duty of the trial judge, upon conviction of any person under Section 63-11-30, to mail a true and correct copy of the traffic ticket, citation or affidavit evidencing the arrest that resulted in the conviction and a copy of the abstract of the court record within five (5) days to the Commissioner of Public Safety at Jackson, Mississippi. The trial judge in municipal and justice courts shall show on the docket and the trial judge in courts of record shall show on the minutes:

(a) Whether or not a chemical test was given and the results of the test;

(b) Where conviction was based in whole or in part on the results of such a test.

The abstract of the court record shall show the date of the conviction, the results of the test if there was one and the penalty so that a record of same may be made by the Department of Public Safety.

For the purposes of Section 63-11-30, a bond forfeiture shall operate as and be considered as a conviction.

APPEALS

Rule 1.25 of the Uniform Rules of Procedure for Justice Court provides:

> Appeals from justice court shall be governed by the rules approved by the Supreme Court for the governance of appeals to the county or circuit courts.

Rule 12.02 of the Uniform Rules of Circuit and County Court Practice provides:

> A. Notice and Filing:
>
> 1. Mandatory Bonds or Cash Deposits. Any person adjudged guilty of a criminal offense by a justice or municipal court may appeal to county court or, if there is no county court having jurisdiction, then to circuit court by filing simultaneously a written notice of appeal, and both a cost bond and an appearance bond (or cash deposit) as provided herein within 30 days of such judgment with the clerk of the circuit court having jurisdiction. This written notice of appeal and posting of the cost bond and the appearance bond or cash deposit perfects the appeal. The failure to post any bond or cash deposit required by this rule shall be grounds for the court, on its own motion or by motion of another, to dismiss the appeal with prejudice and with costs. The clerk of the court shall not accept, file and docket the written notice of appeal without the accompanying cost bond and appearance bond or cash deposit, unless the court has allowed the defendant to proceed in forma pauperis. After the filing of the written notice of appeal and the cost bond and the appearance bond or cash deposit, all further correspondence concerning the case by parties of either side shall be mailed directly to the circuit clerk for inclusion in the file.
>
> 2. Contents of Notice of Appeal. The written notice of appeal shall specify the party or parties taking the appeal; shall specify the current residence address and the current mailing address, if different, of each party taking the appeal; shall designate the judgment or order from which the appeal is taken; shall be addressed to county or circuit court, whichever appropriate; and shall state that the appeal is taken for a trial de novo. Upon a failure of the defendant to comply with the requirement of this rule as to content of the written notice of appeal, the

court, in its discretion, may order the notice amended or the case dismissed with prejudice and with costs. If the defendant fails to amend the notice as required by the court, the court shall dismiss the appeal with prejudice and with costs.

3. Record. The circuit clerk, upon receiving written notice of appeal, shall notify the lower court and the appropriate prosecuting attorney.

It shall be the duty of the judge from whose judgment the appeal is taken to deliver to the clerk of the circuit court, within 10 days after the filing of the appearance bond and the cost bond or cash deposit, as required herein, are given and approved, a certified copy of the record in the case with all the original papers in the case. The judge of the lower court may direct the clerk of the lower court to certify and transmit the copy of the record in the case and all the original papers in the case within the time allowed by this rule.

B. Bonds.

1. Appearance Bond. Unless excused by the making of an affidavit as specified in § 99-35-7 of the Mississippi Code of 1972, a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies), to be approved by the circuit clerk, shall be given and conditioned on appearance before the county or circuit court from day to day and term to term until the appeal is finally determined or dismissed. The amount of such cash deposit or appearance bond shall be determined by the judge of the lower court. If the defendant fails to appear at the time and place set by the court, the court may dismiss the appeal with prejudice and with costs and order forfeiture of the appearance bond or cash deposit.

2. Cost Bond. Unless excused by the making of an affidavit of poverty as specified above, every defendant who appeals under this rule shall post a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk, for all estimated court costs, incurred both in the appellate and lower courts (including, but not limited to fees, court costs, and amounts imposed pursuant to statute). The amount of such cash deposit or bond shall be determined by the judge of the lower court payable to the state in an amount of not less than One Hundred Dollars ($100) nor more than Twenty-Five Hundred Dollars ($2,500). Upon a bond forfeiture, the costs of lower court shall be recovered after the costs of the appellate court.

3. Time in Custody Credited. All time the defendant is in custody pending an appeal shall be credited against any sentence imposed by the court.

> C. Proceedings. Upon the filing with the circuit clerk of the notice of appeal and bonds or cash deposits required by this rule, unless excused therefrom with the clerk, the prior judgment of conviction shall be stayed.
>
> The appeal shall be a trial de novo. In appeals from justice or municipal court when the maximum possible sentence is six months or less, the case may be tried without a jury at the court's discretion. The record certified to the court on appeal from the lower court is competent evidence. However, no motions may be allowed which deprive the accused of the right to a trial on the merits. Amendments will be liberally allowed so as to bring the merits of a case fairly to trial.

See Reeves v. State, 54 So. 3d 322 (Miss. Ct. App. 2011)(No error in dismissing the appeal. URCCCP Rule 12.02(A)(1) requires an appeal from municipal court to be filed within 30 days. No error in allowing the city to submit the abstract of record to furnish Reeves's date of conviction.).

And, Miss. Code Ann. § 11-51-81 provides in part:

> All appeals from courts of justices of the peace, special and general, and from all municipal courts shall be to the county court under the same rules and regulations as are provided on appeals to the circuit court, but appeals from orders of the board of supervisors, municipal boards, and other tribunals other than courts of justice of the peace and municipal courts, shall be direct to the circuit court as heretofore. And from the final judgment of the county court in a case appealed to it under this section, a further appeal may be taken to the circuit court on the same terms and in the same manner as other appeals from the county court to the circuit court are taken: Provided that where the judgment or record of the justice of the peace, municipal or police court is not properly certified, or is not certified at all, that question must be raised in the county court in the absence of which the defect shall be deemed as waived and by such waiver cured and may not thereafter be raised for the first time in the circuit court on the appeal thereto;

But the remaining portion of § 11-51-81 has been declared unconstitutional:

> [W]e conclude that the "three-court rule" found in Mississippi Code Section 11-51-81 (Rev.2002) contravenes the constitutional mandates imposed upon the Legislature and the judiciary. The Legislature may not "exercise any power properly belonging" to the judiciary. Miss. Const. art. 1, § 2. We thus find this portion of Section 11-51-81 to be unconstitutional:
>
> [A]nd provided further that there shall be no appeal from the circuit court to the supreme court of any case civil or criminal which originated in a justice of the peace, municipal or police court and was thence appealed to the county court and thence to the circuit court unless in the determination of the case a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge or by a judge of the supreme court.

Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).

The Court held that it violated the separation-of-powers doctrine in Article 1, Sections 1 and 2, of the Mississippi Constitution:

> It is within this Court's power to determine the rules of practice and procedure, and we are of the opinion that the framers of the Constitution never intended that the Legislature determine which litigants may appeal to this Court and which litigants must end their pursuit of justice in the circuit court. Accordingly, we find today that this Court has jurisdiction to hear the merits of Jones's appeal.

Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010).

CHAPTER 10

SUSPENSION OF DRIVER'S LICENSE FOR DUI

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MISSISSIPPI DRIVER LICENSE COMPACT LAW 216

SEIZURE OF DRIVER'S LICENSE FOR OVER THE LIMIT BAC TEST RESULTS

➤ **When officer is to seize driver's license and give receipt**

Miss. Code Ann. § 63-11-23(2) provides in part:

> If the chemical testing of a person's breath indicates the blood alcohol concentration was eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's blood, or breath, or urine, the arresting officer shall seize the license and give the driver a receipt for his license on forms prescribed by the Commissioner of Public Safety and shall promptly forward the license together with a sworn report to the Commissioner of Public Safety.

See Keyes v. State, 708 So. 2d 540, 543-44 (Miss. 1998)("We note that seizure of a license does not constitute suspension. Temporary permits issued under § 63-11-23(2) do not bestow upon an individual the legal privilege to operate a motor vehicle, for this privilege is not suspended until the Commissioner takes certain affirmative steps. The permits serve merely as physical evidence of that person's legal status as a licensed driver, in the same manner as the driver's license itself.").

➤ **Receipt is valid permit to operate a motor vehicle for thirty (30) days**

Miss. Code Ann. § 63-11-23(2) provides in part:

> The receipt given a person as provided herein shall be valid as a permit to operate a motor vehicle for a period of thirty (30) days in order that the defendant be processed through the court having original jurisdiction and a final disposition had.

➤ **When court may extend driving privileges beyond thirty (30) day period**

Miss. Code Ann. § 63-11-23(2) provides in part:

> If the defendant requests a trial within thirty (30) days and such trial is not commenced within thirty (30) days, then the court shall determine if the delay in the trial is the fault of the defendant or his counsel. If the court finds that such is not the fault of the defendant or his counsel, then the court shall order the defendant's driving privileges to be extended until such time as the defendant is convicted.

➤ **License suspended if permit expires without a trial being requested**

Miss. Code Ann. § 63-11-23(2) provides in part:

> If a receipt or permit to drive issued pursuant to the provisions of this subsection expires without a trial having been requested as provided for in this subsection, then the Commissioner of Public Safety or his authorized agent shall suspend the license or permit to drive or any nonresident operating privilege for the applicable period of time as provided for in subsection (1) of this section.

See Keyes v. State, 708 So. 2d 540, 548 (Miss. 1998)("[T]he Double Jeopardy Clauses of the United States and Mississippi Constitutions do not preclude criminal prosecution for violation of Miss.Code Ann. § 63-11-30 subsequent to administrative license suspension pursuant to § 63-11-23(2).").

➤ **If person is a resident without a driver's license or permit**

Miss. Code Ann. § 63-11-23(3) provides:

> If the person is a resident without a license or permit to operate a motor vehicle

in this state, the Commissioner of Public Safety, or his authorized agent, shall deny to the person the issuance of a license or permit for a period of one (1) year beginning thirty (30) days after the date of notice of such suspension.

➤ **Nonresidents**

Miss. Code Ann. § 63-11-27 provides:

> When it has been finally determined under the procedures of sections 63-11-21 to 63-11-25, that a nonresident's privilege to operate a motor vehicle in this state has been suspended, the commissioner, or his duly authorized agent, shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

SUSPENSION FOR REFUSAL TO SUBMIT TO CHEMICAL TEST OF BREATH

➤ **Implied consent warnings to be given**

Miss. Code Ann. § 63-11-5(2) provides:

> If the officer has reasonable grounds and probable cause to believe such person to have been driving a motor vehicle upon the public highways, public roads, and streets of this state while under the influence of intoxicating liquor, such officer shall inform such person that his failure to submit to such chemical test or tests of his breath shall result in the suspension of his privilege to operate a motor vehicle upon the public streets and highways of this state for a period of ninety (90) days in the event such person has not previously been convicted of a violation of Section 63-11-30, or, for a period of one (1) year in the event of any previous conviction of such person under Section 63-11-30.

- **Delivery of driver's license to officer upon refusal**

Miss. Code Ann. § 63-11-21 provides in part:

> If a person refuses upon the request of a law enforcement officer to submit to a chemical test of his breath designated by the law enforcement agency as provided in Section 63-11-5, none shall be given, but the officer shall at that point demand the driver's license of the person, who shall deliver his driver's license into the hands of the officer. . . . The officer shall give the driver a receipt for his license on forms prescribed and furnished by the Commissioner of Public Safety.

- **Driver's license and sworn report forwarded to Department of Public Safety**

Miss. Code Ann. § 63-11-21 provides in part:

> The officer shall forward the driver's license together with a sworn report to the Commissioner of Public Safety stating that he had reasonable grounds and probable cause to believe the person had been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor, or any other substance which may impair a person's mental or physical ability, stating such grounds, and that the person had refused to submit to the chemical test of his breath upon request of the law enforcement officer.

➤ **Notice of suspension for refusal**

Miss. Code Ann. § 63-11-23(1) provides:

> The Commissioner of Public Safety, or his authorized agent, shall review the sworn report by a law enforcement officer as provided in Section 63-11-21. If upon such review the Commissioner of Public Safety, or his authorized agent, finds (a) that the law enforcement officer had reasonable grounds and probable cause to believe the person had been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor or any other substance which may impair a person's mental or physical ability; (b) that he refused to submit to the test upon request of the officer; and (c) that the person was informed that his license and/or driving privileges would be suspended or denied if he refused to submit to the chemical test, then the Commissioner of Public Safety, or his authorized agent, shall give notice to the licensee that his license or permit to drive, or any nonresident operating privilege, shall be suspended thirty (30) days after the date of such notice for a period of ninety (90) days in the event such person has not previously been convicted of a violation of Section 63-11-30, or, for a period of one (1) year in the event of any previous conviction of such person under Section 63-11-30. In the event the commissioner or his authorized agent determines that the license should not be suspended, he shall return the license or permit to the licensee. The notice of suspension shall be in writing and given in the manner provided in Section 63-1-52(2)(a).

➤ **When driver's license is effectively suspended**

Before the driver's license is effectively suspended, the Commissioner of Public Safety (or authorized agent) must:

1. administratively suspend the person's license or permit to drive; and
2. give the driver notice of the suspension by registered or certified mail as set forth in § 63-11-23(1).

The notice, if properly addressed, will be deemed given when deposited with the U.S. Postal Service. *See* State v. Martin, 495 So. 2d 501, 503 (Miss. 1986).

➤ **If person is a resident without a driver's license or permit**

Miss. Code Ann. § 63-11-23(3) provides:

> If the person is a resident without a license or permit to operate a motor vehicle in this state, the Commissioner of Public Safety, or his authorized agent, shall deny to the person the issuance of a license or permit for a period of one (1) year beginning thirty (30) days after the date of notice of such suspension.

➤ **Whose duty to represent state at hearing under the provisions of Section 63-11-25**

Miss. Code Ann. § 63-11-23(4) provides in part:

> It shall be the duty of the county prosecuting attorney, an attorney employed under the provisions of Section 19-3-49, or in the event there is no such prosecuting attorney for the county, the duty of the district attorney to represent the state in any hearing held under the provisions of Section 63-11-25, ...

➤ **Right to judicial review**

Miss. Code Ann. § 63-11-25 provides:

> If the forfeiture, suspension or denial of issuance is sustained by the Commissioner of Public Safety, or his duly authorized agent pursuant to subsection (1) of Section 63-11-23, upon such hearing, the person aggrieved may file within ten (10) days after the rendition of such decision a petition in the circuit or county court having original jurisdiction of the violation for review of such decision and such hearing upon review shall proceed as a trial de novo

before the court without a jury. Provided further, that no such party shall be allowed to exercise the driving privilege while any such appeal is pending.

- **Nonresidents**

Miss. Code Ann. § 63-11-27 provides:

> When it has been finally determined under the procedures of sections 63-11-21 to 63-11-25, that a nonresident's privilege to operate a motor vehicle in this state has been suspended, the commissioner, or his duly authorized agent, shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

SUSPENSION FOR REFUSAL TO RELEASE CERTAIN BLOOD TEST RESULTS

See also *CHAPTER 4 "CHEMICAL TESTING FOR ALCOHOL OR DRUGS"* for a discussion on conducting chemical tests for alcohol and drugs.

> Cautionary note: Miss. Code Ann. § 63-11-7 purports to limit the evidentiary use of a blood sample taken from a person unconscious or dead as a result of an accident. But our Court has consistently held that the "admissibility of evidence is governed by the Mississippi Rules of Evidence, not by statutory enactment." Deeds v. State, 27 So. 3d 1135, 1141 (Miss. 2009).

Miss. Code Ann. § 63-11-7 provides in part:

> If any person be unconscious or dead as a result of an accident, or unconscious at the time of arrest or apprehension or when the test is to be administered, or is otherwise in a condition rendering him incapable of refusal, such person shall be subjected to a blood test for the purpose of determining the alcoholic content of his blood as provided in this chapter, if the arresting officer has reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor. The results of such test or tests, however, shall not be used in evidence against such person in any court or before any regulatory body without the consent of the person so tested, or, if deceased, such person's legal representative. However, refusal of release of evidence so obtained by such officer or agency will in criminal actions against such person result in the suspension of his or her driver's license for a period of ninety days as provided in this chapter for conscious and capable persons who have refused to submit to such test.

SUSPENSION FOR DUI 1st OFFENSE

Note: See *CHAPTER 12 "COMMERCIAL MOTOR VEHICLES"* for a discussion on suspension of commercial driver's license.

➤ **Suspension for not less than ninety (90) days and until offender completes MASEP**

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> [T]he Department of Public Safety, the Commissioner of Public Safety or his duly authorized agent shall, ***after conviction*** and upon receipt of the court abstract, suspend the driver's license and driving privileges of such person for a period of not less than ninety (90) days and until such person attends and successfully completes an alcohol safety education program as herein provided. Commercial driving privileges shall be suspended as provided in Section 63-1-83. (emphasis added).

Completion of MASEP cannot be used as a condition under Miss. Code Ann. § 99-15-26 since MASEP is required *upon conviction*. Conditional sentencing does not apply to offenses under the Mississippi Implied Consent Law. See *CHAPTER 5 "PROVING DUI"* for a discussion on conditional sentencing restrictions.

Miss. Code Ann. § 63-11-30(6) provides in part:

> The judge shall cause a copy of the traffic ticket, citation or affidavit, and any other pertinent documents concerning the conviction, to be sent to the Commissioner of Public Safety. A copy of the traffic ticket, citation or affidavit and any other pertinent documents, having been attested as true and correct by the Commissioner of Public Safety, or his designee, shall be sufficient proof of the conviction for purposes of determining the enhanced penalty for any subsequent convictions of violations of subsection (1) of this section.

Suspension appropriate penalty for failure to attend and complete MASEP.

"[T]he mandatory suspension of the offender's driver's license by the Commissioner of Public Safety as provided in Section 63-11-30 (2)(a) would be the appropriate penalty for failure to attend and complete MASEP. Since the legislature has provided this punishment for suspension of one's driver's license for failure to complete MASEP, further penalties are not available." Op. Att'y Gen. No. 2008-00301 (July 18, 2008).

➤ **Additional suspension for refusal**

Miss. Code Ann. § 63-11-30(4) provides:

> In addition to the other penalties provided in this section, every person refusing a law enforcement officer's request to submit to a chemical test of his breath as provided in this chapter, or who was unconscious at the time of a chemical test and refused to consent to the introduction of the results of such test in any prosecution, shall suffer an additional suspension of driving privileges as follows:
>
> The Commissioner of Public Safety or his authorized agent shall suspend the driver's license or permit to drive or deny the issuance of a license or permit to such person as provided for first, second and third or subsequent offenders in subsection (2) of this section. Such suspension shall be in addition to any suspension imposed pursuant to subsection (1) of Section 63-11-23. The minimum suspension imposed under this subsection shall not be reduced and no prosecutor is authorized to offer a reduction of such suspension as part of a plea bargain.

See also Sheppard v. Mississippi State Highway Patrol, 693 So. 2d 1326, 1329 (Miss. 1997)("There is never an arrest for refusal because there is no criminal offense of refusal. Refusal only results in a civil penalty of forfeiture of one's license for ninety days and enhanced punishment if one is convicted of D.U.I. Miss. Code Ann. § § 63-11-21, -23, -30.").

➤ **Hardship license only for a DUI first offense**

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> The circuit court having jurisdiction in the county in which the conviction was had or the circuit court of the person's county of residence may reduce the suspension of driving privileges under Section 63-11-30(2)(a) if the denial of which would constitute a hardship on the offender, except that no court may issue such an order reducing the suspension of driving privileges under this subsection until thirty (30) days have elapsed from the effective date of the suspension. Hardships shall only apply to first offenses under Section 63-11-30(1), and shall not apply to second, third or subsequent convictions of any person violating subsection (1) of this section.

Mississippi Attorney General Opinions:

Only first offenders eligible for hardship.

"Only first offenders are eligible for hardship orders which would restore their driving privileges before the expiration of the suspension period." Op. Att'y Gen. 1993 WL 503296 (July 26, 1989).

➤ **Hardship license not available if there is a refusal**

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> A reduction of suspension on the basis of hardship shall not be available to any person who refused to submit to a chemical test upon the request of a law enforcement officer as provided in Section 63-11-5.

- **Person applying for hardship license to pay fee to the circuit clerk**

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> When the petition is filed, such person shall pay to the circuit clerk of the court where the petition is filed a fee of Fifty Dollars ($50.00), which shall be deposited into the State General Fund to the credit of a special fund hereby created in the State Treasury to be used for alcohol or drug abuse treatment and education, upon appropriation by the Legislature. This fee shall be in addition to any other court costs or fees required for the filing of petitions.

- **Hardship petition and hearing**

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> The petition filed under the provisions of this subsection shall contain the specific facts which the petitioner alleges to constitute a hardship and the driver's license number of the petitioner. A hearing may be held on any petition filed under this subsection only after ten (10) days' prior written notice to the Commissioner of Public Safety, or his designated agent, or the attorney designated to represent the state. At such hearing, the court may enter an order reducing the period of suspension. The order entered under the provisions of this subsection shall contain the specific grounds upon which hardship was determined, and shall order the petitioner to attend and complete an alcohol safety education program as provided in Section 63-11-32.

- **Certified copy of hardship order to be delivered to the Department of Public Safety**

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> A certified copy of such order shall be delivered to the Commissioner of Public Safety by the clerk of the court within five (5) days of the entry of the order. The certified copy of such order shall contain information which will identify the petitioner, including, but not limited to, the name, mailing address, street address, social security number and driver's license number of the petitioner.

- **Proof of hardship to be established by clear and convincing evidence**

Miss. Code Ann. § 63-11-30(2)(a) provides in part:

> At any time following at least thirty (30) days of suspension for a first offense violation of this section, the court may grant the person hardship driving privileges upon written petition of the defendant, if it finds reasonable cause to believe that revocation would hinder the person's ability to:
>
> (i) Continue his employment;
>
> (ii) Continue attending school or an educational institution; or
>
> (iii) Obtain necessary medical care.
>
> Proof of the hardship shall be established by clear and convincing evidence which shall be supported by independent documentation.

- **Whose duty to represent state at any hearing under Section 63-11-30(2)(a)**

Miss. Code Ann. § 63-11-23(4) provides:

> It shall be the duty of the county prosecuting attorney, an attorney employed under the provisions of Section 19-3-49, or in the event there is no such

prosecuting attorney for the county, the duty of the district attorney to represent the state in any hearing held . . . under the provisions of Section 63-11-30(2)(a).

➤ **If person convicted is under the legal age to obtain a license**

Miss. Code Ann. § 63-11-30(9) provides:

> Any person under the legal age to obtain a license to operate a motor vehicle convicted under this section shall not be eligible to receive such license until the person reaches the age of eighteen (18) years.

SUSPENSION FOR DUI 2nd OFFENSE

➤ **Suspension for two (2) years**

Miss. Code Ann. § 63-11-30(2)(b) provides in part:

> Except as may otherwise be provided by paragraph (d) of this subsection, the Commissioner of Public Safety shall suspend the driver's license of such person for two (2) years. Suspension of a commercial driver's license shall be governed by Section 63-1-83.

Miss. Code Ann. § 63-11-30(10) provides:

> Suspension of driving privileges for any person convicted of violations of Section 63-11-30(1) shall run consecutively.

➤ **Additional suspension for refusal**

Miss. Code Ann. § 63-11-30(4) provides:

> In addition to the other penalties provided in this section, every person refusing a law enforcement officer's request to submit to a chemical test of his breath as provided in this chapter, or who was unconscious at the time of a chemical test and refused to consent to the introduction of the results of such test in any prosecution, shall suffer an additional suspension of driving privileges as follows:
>
> The Commissioner of Public Safety or his authorized agent shall suspend the driver's license or permit to drive or deny the issuance of a license or permit to such person as provided for first, second and third or subsequent offenders in subsection (2) of this section. Such suspension shall be in addition to any suspension imposed pursuant to subsection (1) of Section 63-11-23. The minimum

> suspension imposed under this subsection shall not be reduced and no prosecutor is authorized to offer a reduction of such suspension as part of a plea bargain.

See also Sheppard v. Mississippi State Highway Patrol, 693 So. 2d 1326, 1329 (Miss. 1997)("There is never an arrest for refusal because there is no criminal offense of refusal. Refusal only results in a civil penalty of forfeiture of one's license for ninety days and enhanced punishment if one is convicted of D.U.I. Miss. Code Ann. § § 63-11-21, -23, -30.").

➤ **Eligibility for reinstatement**

Miss. Code Ann. § 63-11-30(2)(d) provides:

> Except as otherwise provided in subsection (3), any person convicted of a second violation of subsection (1) of this section shall receive an in-depth diagnostic assessment, and if as a result of such assessment is determined to be in need of treatment of his alcohol and/or drug abuse problem, such person shall successfully complete treatment of his alcohol and/or drug abuse problem at a program site certified by the Department of Mental Health. Such person shall be eligible for reinstatement of his driving privileges upon the successful completion of such treatment after a period of one (1) year after such person's driver's license is suspended. Each person who receives a diagnostic assessment shall pay a fee representing the cost of such assessment. Each person who participates in a treatment program shall pay a fee representing the cost of such treatment.

SUSPENSION FOR DUI 3RD OR SUBSEQUENT OFFENSE

➤ **Suspension for five (5) years**

Miss. Code Ann. § 63-11-30(2)(c) provides in part:

> Except as may otherwise be provided by paragraph (e) of this subsection, the Commissioner of Public Safety shall suspend the driver's license of such person for five (5) years. The suspension of a commercial driver's license shall be governed by Section 63-1-83.

Miss. Code Ann. § 63-11-30(10) provides:

> Suspension of driving privileges for any person convicted of violations of Section 63-11-30(1) shall run consecutively.

➤ **Additional suspension for refusal**

Miss. Code Ann. § 63-11-30(4) provides:

> In addition to the other penalties provided in this section, every person refusing a law enforcement officer's request to submit to a chemical test of his breath as provided in this chapter, or who was unconscious at the time of a chemical test and refused to consent to the introduction of the results of such test in any prosecution, shall suffer an additional suspension of driving privileges as follows:
>
> The Commissioner of Public Safety or his authorized agent shall suspend the driver's license or permit to drive or deny the issuance of a license or permit to such person as provided for first, second and third or subsequent offenders in subsection (2) of this section. Such suspension shall be in addition to any suspension imposed pursuant to subsection (1) of Section 63-11-23. The minimum

> suspension imposed under this subsection shall not be reduced and no prosecutor is authorized to offer a reduction of such suspension as part of a plea bargain.

See also Sheppard v. Mississippi State Highway Patrol, 693 So. 2d 1326, 1329 (Miss. 1997)("There is never an arrest for refusal because there is no criminal offense of refusal. Refusal only results in a civil penalty of forfeiture of one's license for ninety days and enhanced punishment if one is convicted of D.U.I. Miss. Code Ann. §§ 63-11-21, 23, 30.").

➤ **Eligibility for reinstatement**

Miss. Code Ann. § 63-11-30(2)(e) provides:

> Except as otherwise provided in subsection (3), any person convicted of a third or subsequent violation of subsection (1) of this section shall receive an in-depth diagnostic assessment, and if as a result of such assessment is determined to be in need of treatment of his alcohol and/or drug abuse problem, such person shall enter an alcohol and/or drug abuse program approved by the Department of Mental Health for treatment of such person's alcohol and/or drug abuse problem. If such person successfully completes such treatment, such person shall be eligible for reinstatement of his driving privileges after a period of three (3) years after such person's driver's license is suspended.

NOTICE OF DRIVER'S LICENSE SUSPENSION OR REVOCATION

➤ **Manner and time of notice**

The Commissioner of Public Safety, or duly authorized agent, shall give notice of the Implied Consent suspension or revocation pursuant to Miss. Code Ann. § 63-1-52.

- **Suspension by commissioner under § 63-11-30 not appealable**

Miss. Code Ann. § 63-11-26 provides:

> When the commissioner of public safety, or his authorized agent, shall suspend the driver's license or permit to drive of a person or shall deny the issuance of a license or permit to a person as provided in section 63-11-30, the person shall not be entitled to any judicial review of or appeal from the actions of the commissioner. A final conviction under said section shall finally adjudicate the privilege of such convicted person to operate a motor vehicle upon the public highways, public roads and streets of this state.

- **Commissioner may adopt regulations as to the Implied Consent Law**

Miss. Code Ann. § 63-11-5(5) provides:

> The Commissioner of Public Safety and the State Crime Laboratory created pursuant to Section 45-1-17 are hereby authorized from and after the passage of this section to adopt procedures, rules and regulations, applicable to the Implied Consent Law.

For more information on procedures, rules, and regulations see the Mississippi Department of Public Safety website at www.dps.state.ms.us. The Crime Lab's Implied Consent Breath Alcohol Testing Training Manual and Implied Consent Policy Manual is accessible by clicking "Crime Lab" on the left-hand side, then clicking "Manuals" under the subheading Administration.

DRIVING AFTER SUSPENSION OR REVOCATION FOR VIOLATION OF § 63-11-30

Miss. Code Ann. § 63-11-40 provides:

> Any person whose driver's license, or driving privilege has been cancelled, suspended or revoked under the provisions of this chapter and who drives any motor vehicle upon the highways, streets or public roads of this state, while such license or privilege is cancelled, suspended or revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than forty-eight (48) hours nor more than six (6) months, and fined not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00).
>
> The commissioner of public safety shall suspend the driver's license or driving privilege of any person convicted under the provisions of this section for an additional six (6) months. Such suspension shall begin at the end of the original cancellation, suspension or revocation and run consecutively.

See Price v. State, 752 So. 2d 1070, 1076 (Miss. Ct. App. 1999)("The fact that Price was driving while his license was suspended was an important and essential element comprising the totality of the circumstances surrounding Price's arrest and subsequent trial. . . . While Price claims that there were many references to the suspended license to his detriment, this Court found no indication in the record that the fact that Price was driving with a suspended license was mentioned an unusual number of times, nor does Price provide this Court with proof or evidence of same.").

Mississippi Attorney General Opinions:

Who may be prosecuted under Section 63-11-40.

"[T]he Commission of Public Safety has the authority to suspend or revoke a driver's license or driving privilege upon a violation of the Implied Consent Law. Therefore, an individual who has had his driving privileges revoked may be charged under Mississippi Code Annotated Section 63-11-40 for driving while his driving privileges are suspended even though he never had a valid driver's license to begin with." Op. Att'y Gen. No. 2002-0260 (May 17, 2002).

ADDITIONAL SUSPENSION FOR DRIVING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE

➤ **Suspension for not less than six (6) months**

Miss. Code Ann. § 63-1-71(1) provides in part:

> Notwithstanding the provisions of Section 63-11-30(2)(a) and in addition to any penalty authorized by the Uniform Controlled Substances Law . . . every person convicted of driving under the influence of a controlled substance, or entering a plea of nolo contendere thereto, . . . in a court of this state, . . . shall forthwith forfeit his right to operate a motor vehicle over the highways of this state for a period of not less than six (6) months.

➤ **Court to collect license and forward to Department of Public Safety**

Miss. Code Ann. § 63-1-71(2) provides in part:

> The court in this state before whom any person is convicted of or adjudicated delinquent for a violation of an offense under subsection (1) of this section shall collect forthwith the Mississippi driver's license of the person and forward such license to the Department of Public Safety along with a report indicating the first and last day of the suspension or revocation period imposed pursuant to this section. If the court is for any reason unable to collect the license of the person, the court shall cause a report of the conviction or adjudication of delinquency to be filed with the Commissioner of Public Safety. That report shall include the complete name, address, date of birth, eye color and sex of the person and shall indicate the first and last day of the suspension or revocation period imposed by the court pursuant to this section.

- **Court to warn offender not to drive during suspension period**

Miss. Code Ann. § 63-1-71(2) provides in part:

> The court shall inform the person orally and in writing that if the person is convicted of personally operating a motor vehicle during the period of license suspension or revocation imposed pursuant to this section, the person shall, upon conviction, be subject to the penalties set forth in Section 63-11-40. A person shall be required to acknowledge receipt of the written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of Section 63-11-40.

- **If offender holds a driver's license from another jurisdiction**

Miss. Code Ann. § 63-1-71(2) provides in part:

> If the person is the holder of a driver's license from another jurisdiction, the court shall not collect the license but shall notify forthwith the Commissioner of Public Safety who shall notify the appropriate officials in the licensing jurisdiction. The court shall, however, in accordance with the provisions of this section, revoke the person's nonresident driving privilege in this state.

OTHER LAWS PERTAINING TO SUSPENSIONS AND REVOCATIONS

- **Suspension for failure to respond to a traffic summons or to pay a traffic fine, fee or assessment**

Miss. Code Ann. § 63-1-53(1) provides in part:

> Upon failure of any person to respond timely and properly to a summons or

citation charging such person with any violation of this title, or upon failure of any person to pay timely any fine, fee or assessment levied as a result of any violation of this title, the clerk of the court shall give written notice to such person by United States first class mail at his last known address advising such person that if within ten (10) days after such notice is deposited in the mail the person has not properly responded to the summons or citation or has not paid the entire amount of all fines, fees and assessments levied, then the court will give notice thereof to the Commissioner of Public Safety and the commissioner may suspend the driver's license of such person. The actual cost incurred by the court in the giving of such notice may be added to any other court costs assessed in such case. If within ten (10) days after the notice is given in accordance with this subsection such person has not satisfactorily disposed of the matter pending before the court, then the clerk of the court immediately shall mail a copy of the abstract of the court record, along with a certified copy of the notice given under this subsection, to the Commissioner of Public Safety, and the commissioner may suspend the driver's license of such person as authorized under subsections (2) and (3) of this section.

See also Comment to M.R.C.P. 45 which provides in part: "[Rule 45] has no application to subpoenas issued in support of administrative hearings or by administrative agencies; those subpoenas are governed by statute. See, e. g., . . . § 63-1-53 (hearings to suspend driver's license); . . . ."

➤ **Revocation under § 63-1-51(1), which includes manslaughter or negligent homicide resulting from the operation of a motor vehicle**

Miss. Code Ann. § 63-1-51(1) provides in part:

The commissioner shall forthwith revoke the license of any person for a period of one (1) year upon receiving a duly certified record of each person's convictions of any of the following offenses when such conviction has become final:

(a) Manslaughter or negligent homicide resulting from the operation of a motor vehicle;

(b) Any felony in the commission of which a motor vehicle is used;

(c) Failure to stop and render aid as required under the laws of this state in event of a motor vehicle accident resulting in the death or personal injury of another;

(d) Perjury or the willful making of a false affidavit or statement under oath to the department under this article or under any other law relating to the ownership or operation of motor vehicles;

(e) Conviction, or forfeiture of bail not vacated, upon three (3) charges of reckless driving committed within a period of twelve (12) months;

(f) Contempt for failure to pay a fine or fee or to respond to a summons or citation pursuant to a charge of a violation of this title.

➤ **Suspension under § 63-1-53(2), which includes any accident resulting in the death or personal injury of another or serious property damage**

Miss. Code Ann. § 63-1-53(2) provides:

The commissioner is hereby authorized to suspend the license of an operator without preliminary hearing upon a showing by his records or other sufficient evidence that the licensee:

(a) Has committed an offense for which mandatory revocation of license is required upon conviction except under the provisions of the Mississippi Implied Consent Law;

(b) Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage;

(c) Is an habitually reckless or negligent driver of a motor vehicle;

(d) Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;

(e) Is incompetent to drive a motor vehicle;

(f) Has permitted an unlawful or fraudulent use of such license;

(g) Has committed an offense in another state which if committed in this state

would be grounds for suspension or revocation;

(h) Has failed to pay any fine, fee or other assessment levied as a result of any violation of this title;

(i) Has failed to respond to a summons or citation which charged a violation of this title; or

(j) Has committed a violation for which mandatory revocation of license is required upon conviction, entering a plea of nolo contendere to, or adjudication of delinquency, pursuant to the provisions of subsection (1) of Section 63-1-71.

Additionally, notice of the driver's license suspension is pursuant to Miss. Code Ann. § 63-1-53(3).

Mississippi Attorney General Opinions:

Authority of Commissioner of Public Safety to suspend for out-of-state convictions.

"As for the revocation of licenses of persons for out-of-state convictions, § 63–1–53 of the Code gives the Commissioner of Public Safety the authority to suspend the license of any person who "Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation". § 63–1–53(g)." Op. Att'y Gen. 1993 WL 669079 (January 20, 1993).

➤ **Suspensions of license of minors under § 63-1-55 not applicable to DUI violations**

Miss. Code Ann. § 63-1-55 provides in part::

> A trial judge, in his discretion, if the person so convicted or who has entered a plea of guilty for any traffic violation, ***except the offenses enumerated in paragraphs (a) through (e) of subsection (1) of Section 63-1-51 and violations of the Implied Consent Law and the Uniform Controlled Substances Law***, is a minor and dependent upon and subject to the care, custody and control of his parents or guardian, may, in lieu of the penalties otherwise provided by law and the provision of said section, suspend such minor's driver's license by taking and

keeping same in custody of the court for a period of time not to exceed ninety (90) days. The judge so ordering such suspension shall enter upon his docket "DEFENDANT'S DRIVER'S LICENSE SUSPENDED FOR _____ DAYS IN LIEU OF CONVICTION" and such action by the trial judge shall not constitute a conviction. (emphasis added).

➤ **Commissioner may adopt regulations as to general traffic laws**

Miss. Code Ann. § 45-1-3 provides:

> When not otherwise specifically provided, the commissioner is authorized to make and promulgate reasonable rules and regulations to be coordinated, and carry out the general provisions of the Highway Safety Patrol and Driver's License Law of 1938.

For more information on procedures, rules, and regulations see the Mississippi Department of Public Safety website at www.dps.state.ms.us.

MISSISSIPPI DRIVER LICENSE COMPACT LAW

Miss. Code Ann § 63-1-113 provides:

> Article IV of the [Mississippi Driver License Compact Law], set forth in section 63-1-103, shall apply to those offenses enumerated in subsection (1) of section 63-1-51, and any suspension therefor shall be governed by the provisions of section 63-1-53.

Miss. Code Ann. § 63-1-103 provides in part:

ARTICLE IV

Effect of Conviction

(a) The licensing authority in the home state, for the purposes of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Article III of this compact, as it would if such conduct had occurred in the home state, in the case of conviction for:

(1) Manslaughter or negligent homicide resulting from the operation of a motor vehicle;

(2) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle;

(3) Any felony in the commission of which a motor vehicle is used;

(4) Failure to stop and render aid in the event of a motor vehicle accident resulting in the death or personal injury of another.

(b) As to other convictions, reported pursuant to Article III, the licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state.

(c) If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in subdivision (a) of this Article, such party state shall construe the denomination and description appearing in subdivision (a) hereof as being applicable to and identifying those offenses or violations of a substantially similar nature and the laws of such party state shall contain such provisions as may be necessary to ensure that full force and effect is given to this Article.

Contempt under Miss. Code Ann. § 63-1-51(1)(f).

"[I]n order to have a conviction as required under [Miss. Code Ann. § 63-1-51(1)(f)] there must be a charge of contempt filed by way of citation or warrant of arrest and a subsequent finding of guilt of contempt." Op. Att'y Gen. No. 2004-0561 (Nov. 15, 2004).

CHAPTER 11

ZERO TOLERANCE FOR MINORS

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WHEN ZERO TOLERANCE FOR MINORS IS APPLICABLE

Zero Tolerance for Minors ***only*** applies to minors whose BAC is two one-hundredths percent (.02%) or more, but lower than eight one-hundredths percent (.08%). Palmer v. City of Oxford, 860 So. 2d 1203, 1214 (Miss. 2003)("Since Palmer's BAC level was .127% it is not within the parameters of the Zero Tolerance for Minor's provision of the Implied Consent Law.").

Miss. Code Ann. § 63-11-30(3)(a) provides:

> This subsection shall be known and may be cited as Zero Tolerance for Minors. The provisions of this subsection *shall apply only* when a person under the age of twenty-one (21) years has a blood alcohol concentration of two one-hundredths percent (.02%) or more, but lower than eight one-hundredths percent (.08%). If such person's blood alcohol concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply. (emphasis added).

These BAC restrictions apply to felony DUI charges, too:

> Although Winters was under twenty-one at the time of his arrest, the "Zero Tolerance for Minors" law does not apply, because the trial judge, as the trier of fact, found Winters's BAC to be higher than .08%. So Winters's conviction falls under Section 63-11-30(2), which applies to all individuals with a BAC of more than .08%. Further, Winters falls under Section 63-11-30(2)(c), as this DUI charge is at least his third offense within five years. Thus, the trial judge sentenced him appropriately.

Winters v. State, 52 So. 3d 1172 (Miss. 2010).

PENALTIES UPON 1ST CONVICTION

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> Upon conviction of any person under the age of twenty-one (21) years for the first offense of violating subsection (1) of this section where chemical tests provided for under Section 63-11-5 were given, or where chemical test results are not available, such person shall have his driver's license suspended for ninety (90) days and shall be fined Two Hundred Fifty Dollars ($250.00); and the court shall order such person to attend and complete an alcohol safety education program as provided in Section 63-11-32. The court may also require attendance at a victim impact panel.

Miss. Code Ann. § 63-11-30(9) provides:

> Any person under the legal age to obtain a license to operate a motor vehicle convicted under this section shall not be eligible to receive such license until the person reaches the age of eighteen (18) years.

PENALTIES UPON 2ND CONVICTION

Miss. Code Ann. § 63-11-30(3)(c) provides:

> Upon any second conviction of any person under the age of twenty-one (21) years violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not more than Five Hundred Dollars ($500.00) and shall have his driver's license suspended for one (1) year.

But the suspension period may be reduced upon the successful completion of treatment.

Miss. Code Ann. § 63-11-30(3)(e) provides:

> Any person under the age of twenty-one (21) years convicted of a second violation of subsection (1) of this section, may have the period that his driver's license is suspended reduced if such person receives an in-depth diagnostic assessment, and as a result of such assessment is determined to be in need of treatment of his alcohol and/or drug abuse problem and successfully completes treatment of his alcohol and/or drug abuse problem at a program site certified by the Department of Mental Health. Such person shall be eligible for reinstatement of his driving privileges upon the successful completion of such treatment after a period of six (6) months after such person's driver's license is suspended. Each person who receives a diagnostic assessment shall pay a fee representing the cost of such assessment. Each person who participates in a treatment program shall pay a fee representing the cost of such treatment.

PENALTIES UPON 3RD CONVICTION

Miss. Code Ann. § 63-11-30(3)(d) provides:

> For any third or subsequent conviction of any person under the age of twenty-one (21) years violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not more than One Thousand Dollars ($1,000.00) and shall have his driver's license suspended until he reaches the age of twenty-one (21) or for two (2) years, whichever is longer.

The person must also complete treatment:

Miss. Code Ann. § 63-11-30(3)(f) provides:

> Any person under the age of twenty-one (21) years convicted of a third or

subsequent violation of subsection (1) of this section shall complete treatment of an alcohol and/or drug abuse program at a site certified by the Department of Mental Health.

HARDSHIP UNDER ZERO TOLERANCE FOR MINORS

➤ **Hardship may be granted after thirty (30) days of suspension**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> The court in the county in which the conviction was had or the circuit court of the person's county of residence may reduce the suspension of driving privileges under Section 63-11-30(2)(a) if the denial of which would constitute a hardship on the offender, except that no court may issue such an order reducing the suspension of driving privileges under this subsection until thirty (30) days have elapsed from the effective date of the suspension.

➤ **Hardships only applies to DUI first offenses**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> Hardships shall only apply to first offenses under Section 63-11-30(1), and shall not apply to second, third or subsequent convictions of any person violating subsection (1) of this section.

➤ **Hardship not available if there is a refusal**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> A reduction of suspension on the basis of hardship shall not be available to any

person who refused to submit to a chemical test upon the request of a law enforcement officer as provided in Section 63-11-5.

➤ **Person applying for hardship to pay fee to the circuit clerk**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> When the petition is filed, such person shall pay to the circuit clerk of the court where the petition is filed a fee of Fifty Dollars ($50.00), which shall be deposited into the State General Fund to the credit of a special fund hereby created in the State Treasury to be used for alcohol or drug abuse treatment and education, upon appropriation by the Legislature. This fee shall be in addition to any other court costs or fees required for the filing of petitions.

➤ **What a petition for hardship must contain**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> The petition filed under the provisions of this subsection shall contain the specific facts which the petitioner alleges to constitute a hardship and the driver's license number of the petitioner.

➤ **When hearing on the petition is held**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> A hearing may be held on any petition filed under this subsection only after ten (10) days' prior written notice to the Commissioner of Public Safety, or his designated agent, or the attorney designated to represent the state. At such hearing, the court may enter an order reducing the period of suspension.

- **Hardship order requirements**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> The order entered under the provisions of this subsection shall contain the specific grounds upon which hardship was determined, and shall order the petitioner to attend and complete an alcohol safety education program as provided in Section 63-11-32. A certified copy of such order shall be delivered to the Commissioner of Public Safety by the clerk of the court within five (5) days of the entry of the order. The certified copy of such order shall contain information which will identify the petitioner, including, but not limited to, the name, mailing address, street address, social security number and driver's license number of the petitioner.

- **Proof of hardship to be established by clear and convincing evidence**

Miss. Code Ann. § 63-11-30(3)(b) provides in part:

> At any time following at least thirty (30) days of suspension for a first offense violation of this section, the court may grant the person hardship driving privileges upon written petition of the defendant, if it finds reasonable cause to believe that revocation would hinder the person's ability to:
>
> (i) Continue his employment;
>
> (ii) Continue attending school or an educational institution; or
>
> (iii) Obtain necessary medical care.
>
> Proof of the hardship shall be established by clear and convincing evidence which shall be supported by independent documentation.

ELIGIBILITY FOR NONADJUDICATION

A minor under Zero Tolerance for Minors is eligible for nonadjudication only once:

Miss. Code Ann. § 63-11-30(3)(g) provides:

> The court shall have the discretion to rule that a first offense of this subsection by a person under the age of twenty-one (21) years shall be nonadjudicated. Such person shall be eligible for nonadjudication only once. The Department of Public Safety shall maintain a confidential registry of all cases which are nonadjudicated as provided in this paragraph. A judge who rules that a case is nonadjudicated shall forward such ruling to the Department of Public Safety. Judges and prosecutors involved in implied consent violations shall have access to the confidential registry for the purpose of determining nonadjudication eligibility. A record of a person who has been nonadjudicated shall be maintained for five (5) years or until such person reaches the age of twenty-one (21) years. Any person whose confidential record has been disclosed in violation of this paragraph shall have a civil cause of action against the person and/or agency responsible for such disclosure.

MISSISSIPPI ATTORNEY GENERAL OPINIONS

Listed chronologically below are Mississippi Attorney General Opinions pertaining to Zero Tolerance for Minors.

Judge to determine if BAC is .02% or more but lower than .08%.

Whether or not a minor has a blood alcohol concentration of .02% or more but lower than .08% is a question of fact to be determined by the trier of fact, in this case the Justice Court Judge. Op. Att'y Gen. No. 2009-00098 (March 27, 2009).

Nonadjudication of a DUI is not available to an adult

"[N]onadjudication of a DUI is available only to a minor pursuant to Section 63-11-30(3)(g) of the Mississippi Code. Nonadjudication of a DUI is not available to an adult. Whether or not the driver's license of a minor who has been nonadjudicated of a DUI is suspended is an issue left to the discretion of the sentencing judge." Op. Att'y Gen. No. 2007-00369 (Oct. 26, 2007).

Authority of municipal or justice court to grant a hardship.

"The authority of a municipal or justice court to grant a hardship privilege does not apply to anyone who does not qualify for the provisions of the Zero Tolerance for Minors Act." Op. Att'y Gen. No. 2004-0325 (July 23, 2004).

Non-adjudication only applies to first offense.

"[Section 63-11-30(3)(g)] only authorizes the non-adjudication of a DUI offense for a minor if it is first offense. In addition, such person shall be eligible for non-adjudication only once. Therefor, a person who has had a DUI non-adjudicated may not have a subsequent DUI offense non-adjudicated." Op. Att'y Gen. No. 2003-0311 (July 7, 2003).

State assessment to be collected.

"[I]f a judge non-adjudicates a DUI charge under Mississippi Code Annotated Section 63-11-30(3) but imposes a $250.00 fine as a condition of such non-adjudication, such fine is a "penalty" under Mississippi Code Annotated Section 99-19-73 and therefore the assessment must be collected." Op. Att'y Gen. No. 2002-0102 (Feb. 22, 2002).

Nonadjudicated charge remains on docket until expunged.

"[T]he court has the discretion to expunge a nonadjudicated charge on its own motion or the defendant may petition the court to expunge the charge. Unless or until the nonadjudicated charges are expunged, they remain on the docket with the disposition of nonadjudicated/dismissed." Op. Att'y Gen. No. 2001-0719 (Nov. 30, 2001).

If defendant fails to complete court imposed conditions.

"Upon successful completion of the court-imposed conditions, the court shall dismiss the charges and close the case and such care may not be used to enhance a subsequent conviction.

On the other hand, if the defendant fails to successfully complete the court-imposed conditions, the court may, after a due process hearing, accept the previously entered guilty plea and impose a sentence. Such conviction may then be used for enhancement purposes in subsequent DUI trials. " Op. Att'y Gen. No. 2001-0492 (Aug. 10, 2001).

Zero Tolerance for Minors does not apply to drugs.

"[A] minor charged with being impaired by any substance other than alcohol does not qualify for the Zero Tolerance for Minors provisions since he will not have a blood alcohol reading between .02% and .08%." Op. Att'y Gen. No. 2001-0227 (April 23, 2001).

DUI charge a public record unless and until the court orders the charge nonadjudicated.

"[T]he justice court record of a juvenile who is arrested and charged with DUI is a public record until and unless a court orders the charge nonadjudicated." Op. Att'y Gen. No. 2000-0592 (Oct. 6, 2000).

DUI charge left on arrest docket unless properly expunged.

"Based on [Section 43-21-159], a charge of DUI against a minor should be handled in the same manner as a charge against an adult. The Zero Tolerance for Minors subsection of the Implied Consent Law does not remove a DUI charge against a minor from the municipal court. The name of the minor will be left in the arrest docket unless properly expunged." Op. Att'y Gen. No. 2000-0551 (Sept. 22, 2000).

Court may not nonadjudicate a DUI second offense.

"[Section 63-11-30(3)(g)] does not allow a court to nonadjudicate a second offense DUI charge against a minor even if the first offense did not fall under the Zero Tolerance for Minors Law." Op. Att'y Gen. No. 2000-0523 (Sept. 8, 2000).

Court has discretion to impose conditions.

"[I]f a judge non-adjudicates a charge under the Zero Tolerance Law, he has the discretion to impose conditions upon the defendant to satisfy the non-adjudication; however, it is strictly within the discretion of the judge." Op. Att'y Gen. No. 1999-0604 (Oct. 29, 1999).

Defendant must enter guilty plea to qualify for nonadjudication.

"[A] court can only nonadjudicate a DUI offense under Mississippi Code Annotated Section 63-11-30(3)(g) if the defendant enters a guilty plea to the charge." Op. Att'y Gen. No. 1999-0164 (April 9, 1999).

Zero Tolerance for Minors does not apply if there is a refusal.

"[T]he Zero Tolerance for Minors law only applies when a person under the age of twenty-one (21) years has a blood alcohol concentration two one-hundredths percent (.02%) or more, but lower than eight one-hundredths percent (.08%). Therefore, if a person refuses to take the intoxilizer, and there is no blood alcohol level reading, the Zero Tolerance for Minors section of the DUI law would not apply." Op. Att'y Gen. No. 98-0607 (Oct. 27, 1998).

CHAPTER 12

COMMERCIAL MOTOR VEHICLES

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DUI WHEN OPERATING A COMMERCIAL VEHICLE

➤ **Operating a commercial motor vehicle with a BAC .04% or more is DUI**

Miss. Code Ann. § 63-11-30(1)(e) provides:

> It is unlawful for any person to drive or otherwise operate a vehicle within this state who (e) has an alcohol concentration of four one-hundredths percent (.04%) or more in the person's blood, based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of such person's blood, breath or urine, administered as authorized by this chapter for persons operating a commercial motor vehicle.

See also Young v. City of Brookhaven, 693 So. 2d 1355, 1358 (Miss. 1997)("Miss. Code Ann. § 63-11-30 merely sets forth numerous methods of committing the same crime.").

Operating commercial vehicles has its own safety issues:

> By enacting T.C.A. § 55-50-408, the legislature made it a crime to operate a commercial motor vehicle with a blood alcohol concentration of point zero four (.04) or more. . . . The language of the statute is clear and references to the other DUI provisions in the code indicate that the legislature intended to create a higher standard of care for those who drive commercial motor vehicles.

State v. Snyder, 835 S.W.2d 30, 32 (Tenn. Crim. App. 1992).

Undoubtedly, our legislature likewise intended "to create a higher standard of care for those who drive commercial motor vehicles" in the State of Mississippi.

➤ **Implied Consent Law applicable to Commercial Driver's License Act if not conflicting**

Miss. Code Ann. § 63-1-202 provides in part:

> This article is a remedial law which should be liberally construed to promote public health, safety and welfare. The provisions of Article 1 of this chapter, being the Highway Safety Patrol and Driver's License Law of 1938, and the provisions of Title 63, Chapter 11, Mississippi Code of 1972, being the Mississippi Implied Consent Law, including penalties for violations thereof, shall be applicable to the provisions of this article to the extent that such laws do not conflict with the provisions of this article. ***If any provisions of this article conflict with the provisions of the Highway Safety Patrol and Driver's License Law of 1938 or the Mississippi Implied Consent Law, then the provisions of this article shall control.*** (emphasis added).

See State v. Arterburn, 751 N.W.2d 157, 163 (Neb. 2008)("The Legislature's explicit intent [of the commercial driver's license legislation] is to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries. The stated purpose by the Legislature indicates that it intended a civil sanction.").

➤ **Consent to chemical tests**

Miss. Code Ann. § 63-1-224 provides:

> (1) A person who holds a commercial driver's license and drives a motor vehicle within this state or a person who drives a commercial motor vehicle within this state for which a commercial learner's permit or a commercial driver's license is required under this article is deemed to have given his consent to a chemical test or tests of his breath for the purpose of determining the alcohol content of his blood. A person may give his consent to a chemical test or tests of his blood or urine for the purpose of determining the presence in his body of any other substance which would impair a person's ability to drive a motor vehicle.

(2) The tests shall be administered, and all procedures and proceedings relating thereto shall be performed, as nearly as practicable, in accordance with the provisions of the Mississippi Implied Consent Law. However, from and after April 1, 1992, refusal of any such person to submit to such test or a test given which indicates that such person was driving such motor vehicle within this state with any measurable or detectable amount of alcohol in his system or while under the influence of a controlled substance shall require such person to be immediately placed out of service for twenty-four (24) hours and shall require suspension of the commercial driver's license of such person for the applicable period of time prescribed in this article.

Miss. Code Ann. § 63-1-203(c) provides:

"Commercial driver's license" or "CDL" means a license issued by a state or other jurisdiction, in accordance with the standards contained in 49 CFR, Part 383, to an individual which authorizes the individual to operate a class of commercial motor vehicle.

➤ **Commercial motor vehicle defined**

Miss. Code Ann. § 63-1-203(f) provides:

"Commercial motor vehicle" or "CMV" means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle:

(i) Has a gross combination weight rating of eleven thousand seven hundred ninety-four (11,794) kilograms or more (twenty-six thousand one (26,001) pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than four thousand five hundred thirty-six (4,536) kilograms (ten thousand (10,000) pounds);

(ii) Has a gross vehicle weight rating of eleven thousand seven hundred ninety-four (11,794) or more kilograms (twenty-six thousand one (26,001) pounds or more);

(iii) Is designed to transport sixteen (16) or more passengers, including the driver;

(iv) Is of any size and is used in the transportation of hazardous materials as defined in this section; or

(v) The term shall not include:

1. Authorized emergency vehicles as defined in Section 63-3-103;

2. Motor homes as defined in Section 63-3-103; however, this exemption shall only apply to vehicles used strictly for recreational, noncommercial purposes;

3. Military equipment owned or operated by the United States Department of Defense, including the National Guard, and operated by: active duty military personnel; members of the military reserves; members of the National Guard on active duty, including personnel on full-time National Guard duty; personnel on part-time National Guard training; National Guard military technicians (civilians who are required to wear military uniforms); and active duty United States Coast Guard personnel. This exception is not applicable to United States Reserve technicians;

4. Farm vehicles, which are vehicles:

a. Controlled and operated by a farmer;

b. Used to transport either agricultural products, farm machinery, farm supplies or both to or from a farm;

c. Not used in the operations of a common or contract motor carrier; and

d. Used within one hundred fifty (150) miles of the farm.

SUSPENSION OF COMMERCIAL DRIVER'S LICENSE

➤ **Disqualification and suspension for DUI**

Miss. Code Ann. § 63-1-216(1)(a)(i) provides:

> A person shall be disqualified from driving a commercial motor vehicle for a period of one (1) year if convicted of a first violation of:
>
> (i) Operating, attempting to operate, or being in actual physical control of a commercial motor vehicle on a highway with an alcohol concentration of four one-hundredths percent (0.04%) or more, or under the influence as provided in Section 63-11-30;

Miss. Code Ann. § 63-1-216(1)(a)(v) provides:

> A person shall be disqualified from driving a commercial motor vehicle for a period of one (1) year if convicted of a first violation of:
>
> (v) Operating, attempting to operate, or being in actual physical control of a motor vehicle on a highway with an alcohol concentration of eight one-hundredths percent (0.08%) or more, or under the influence of intoxicating liquor or other substance, as provided in Section 63-11-30;

Miss. Code Ann. § 63-1-216(1)(a)(vi) provides:

> A person shall be disqualified from driving a commercial motor vehicle for a period of one (1) year if convicted of a first violation of:
>
> (vi) Operating, attempting to operate, or being in actual physical control of a motor vehicle on a highway when the person is under the influence of any other drug or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of driving safely as provided in Section 63-11-30;

Miss. Code Ann. § 63-1-216(2)(a) provides:

> A person's privilege to operate a commercial motor vehicle in the State of Mississippi shall be suspended for one (1) year, if:
>
> (i) The person is convicted of a first violation of operating, attempting to operate or being in actual physical control of a commercial motor vehicle on a highway with an alcohol concentration of four one-hundredths percent (0.04%) or more, or under the influence, as provided in Section 63-11-30; and
>
> (ii) The person's commercial driver's license is issued by a state or country that does not issue commercial driver's licenses and disqualify persons in accordance with 49 CFR, Parts 383 and 384.

Hardship Not Available under Commercial Driver's License Act

Commercial Driver's License Act does not provide for hardships. An offender holding a commercial driver's license would need to downgrade to a regular driver's license to apply for a hardship under § 63-11-30(2)(a).

➤ **Disqualification and suspension for refusal**

Miss. Code Ann. § 63-1-216(1)(a)(iv) provides:

> (1)(a) A person shall be disqualified from driving a commercial motor vehicle for a period of one (1) year if convicted of a first violation of:
>
> (iv) Refusal to submit to a test to determine the operator's alcohol concentration, as provided in Title 63, Chapter 11, Mississippi Code of 1972;

See Chancellor v. Dozier, 658 S.E.2d 592, 594 (Ga. 2008)("[W]hen the arresting officer informs the driver that refusal to submit to chemical testing could result in the suspension of the person's driver's license, due process does not require that the arresting officer inform the driver of all the consequences of refusing to submit to testing because the officer has "made it clear that refusing the test was not a 'safe harbor,' free of adverse consequences. South Dakota v. Neville, supra, 459 U.S. at 566, 103 S.Ct. 916."); Jones v. Director of Revenue, State of Missouri, 237 S.W.3d 624, 626 (Mo. Ct. App. 2007)("Jones argues that for the warning to be sufficient, it must now include an additional requirement that he be informed of the ancillary consequence of having his commercial driver's license disqualified. However, we do not believe such a supplement to the implied consent warning is necessary, because it logically follows that the privilege to drive a commercial motor vehicle extends from the underlying privilege to drive a private motor vehicle. Loss of this additional privilege would rationally follow revocation of the underlying privilege.").

➤ **Disqualification and suspension when transporting hazardous materials**

Miss. Code Ann. § 63-1-216(b) provides:

> A person shall be disqualified from driving a commercial motor vehicle for three (3) years if convicted of a violation listed in subsection (1) of this section, if the violation occurred while transporting a hazardous material required to be placarded.

Miss. Code Ann. § 63-1-203(o) provides:

> "Hazardous materials" means any material that has been designated as hazardous under 49 USCS Section 5103 and is required to be placarded under subpart F of 49 CFR, Part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR, Part 73.

- **Disqualification and suspension if two or more violations**

Miss. Code Ann. § 63-1-216(c) provides:

> A person shall be disqualified from driving a commercial motor vehicle for life if convicted of two (2) or more violations or a combination of them listed in subsection (1) of this section arising from two (2) or more separate occurrences.

Miss. Code Ann. § 63-1-216(g) provides:

> The commissioner shall adopt rules establishing guidelines, including conditions, under which a disqualification for life under this section, except that a disqualification issued pursuant to paragraph (e) of this subsection may be reduced to a period of not less than ten (10) years.

- **Disqualification and suspension additional to criminal penalties**

Miss. Code Ann. § 63-1-225 provides in part:

> Except as otherwise specifically provided by this article, any violation of this article for which the only penalty under this article is the requirement that the commissioner suspend the commercial learner's permit or commercial driver's license of a person shall not, for the purposes of this article, constitute a criminal offense. However, if a violation of this article also constitutes a criminal offense under the provisions of some other law, then any criminal penalty which may be imposed for violation of such criminal law shall be in addition to suspension of a person's license under this article.

➤ **Suspensions and disqualifications to run concurrently**

Miss. Code Ann. § 63-1-217 provides:

> A suspension of a person's operating privilege or license and a disqualification imposed under Section 63-1-216 imposed for the same violation, shall run concurrently.

Miss. Code Ann. § 63-1-225 provides in part:

> If violation of any law of this state other than a violation of this article requires that the driver's license or driving privileges of a person be suspended, cancelled or revoked, then any suspension, cancellation or revocation imposed for violation of such law shall also result in suspension, revocation or cancellation of the person's commercial learner's permit or commercial driver's license under the provisions of this article for the same period of time and to run concurrently therewith.

➤ **Effective date of disqualification**

Miss. Code Ann. § 63-1-218 provides:

> (1) A disqualification from driving a commercial motor vehicle shall be effective on not less than ten (10) days' notice.
>
> (2) If requested, a hearing on the disqualification shall be conducted, under Section 63-1-53. The scope of the hearing shall be limited to verification of the conviction.
>
> (3) A person aggrieved by a decision resulting from a hearing under this section may have the decision reviewed on the record. The appeal shall be to the Circuit Court of the First Judicial District of Hinds County or, in the discretion of the licensee, to the circuit court of the county in which the licensee resides or has a principal place of business.

Miss. Code Ann. § 63-1-203(h) provides:

> "Conviction" means an unvacated adjudication of guilt, or a determination by a judge or hearing officer that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended or probated. Conviction shall also mean a plea of guilty or nolo contendere which has been accepted by the court.

Miss. Code Ann. § 63-1-215(2) provides:

> The commissioner shall give all out-of-state convictions full faith and credit and treat them for sanctioning purposes under this article as if they occurred in this state.

See State v. Arterburn, 751 N.W.2d 157, 163 (Neb. 2008)("In commercial license disqualifications, the director of the DMV, not a judge, revokes the license based upon a "conviction" as defined in § 60-4, 168(7). . . . A disqualification under [that statute] is distinct from a criminal procedure. The burden of proof is a preponderance of the evidence - not proof beyond a reasonable doubt."); Lentz v. Sprynczatyk, 708 N.W.2d 859, 863 (N.D. 2006)("Lentz argues that since his first DUI conviction occurred before the statute became effective, the Department should have disqualified him from operating a commercial motor vehicle for only one year. The Department's application of N.D.C.C. § 39-06.2-10(8) cannot be said to be retroactive merely because Lentz's first DUI conviction in 2000 occurred before the effective date of the subsection. It was Lentz's second DUI offense, an offense that occurred after the effective date of the subsection in 2003, that triggered the ninety-nine year driver's license suspension.").

- **When commercial driver's license is to be surrendered**

Miss. Code Ann. § 63-1-216(f) provides:

> A person who is disqualified from driving a commercial motor vehicle shall surrender the person's Mississippi commercial driver's license no later than the effective date of the disqualification. Upon receipt of the person's commercial driver's license, that person, if otherwise eligible, may apply for a non-CDL, and upon payment of sufficient fees receive the driver's license.

- **No person may drive a commercial vehicle if license is suspended, revoked, or cancelled**

Miss. Code Ann. § 63-1-207(3) provides:

> No person may drive a commercial motor vehicle while the person's driving privilege is suspended, revoked, or cancelled, while subject to a disqualification.

Miss. Code Ann. § 63-1-216(1)(a)(vii) provides:

> (1)(a) A person shall be disqualified from driving a commercial motor vehicle for a period of one (1) year if convicted of a first violation of:
>
> (vii) Operating or attempting to operate a commercial motor vehicle while the license is revoked, suspended, cancelled, or disqualified;

Miss. Code Ann. § 63-1-203(i) provides:

> "Disqualification" means any of the following three (3) actions:
>
> (i) The suspension, revocation or cancellation of a commercial driver's license by the state or jurisdiction of issuance;
>
> (ii) Any withdrawal of a person's privilege to drive a commercial motor vehicle

by a state or other jurisdiction as the result of a violation of state or local law relating to motor vehicle traffic control, other than parking, vehicle weight or vehicle defect violations; or

(iii) A determination by the Federal Motor Carrier Safety Administration that a person is not qualified to operate a commercial motor vehicle under 49 CFR, Part 391.

➤ **Notification required by driver to employer**

Miss. Code Ann. § 63-1-205(c) provides:

> The driver of a commercial motor vehicle shall notify the state and employers of convictions as follows:
>
> (c) Notification of suspensions, revocations and cancellations. A driver whose driver's license is suspended, revoked, or cancelled by any state, who loses the privilege to drive a commercial motor vehicle in any state for any period, or who is disqualified from driving a commercial motor vehicle for any period, shall notify the driver's employer of that fact before the end of the business day following the day the driver received notice of that fact.

Miss. Code Ann. § 63-1-203(j) provides:

> "Driver" means any person who drives, operates or is in physical control of a commercial motor vehicle on a public highway or who is required to hold a commercial driver's license.

➤ **Employer responsibilities**

Miss. Code Ann. § 63-1-206(2)(a) provides:

> No employer may knowingly allow, require, permit or authorize a driver to operate a commercial motor vehicle in the United States:
>
> (a) During any period in which the driver has a CMV driver's license suspended, revoked, or cancelled by a state or has lost the privilege to operate a commercial motor vehicle in a state, or has been disqualified from operating a commercial motor vehicle;

Miss. Code Ann. § 63-1-203(k) provides:

> "Employer" means any person, including the United States, a state, the District of Columbia or a political subdivision of a state, who owns or leases a commercial motor vehicle or assigns employees to operate a commercial motor vehicle.

➤ **Commissioner to notify the licensing authority of suspension or revocation**

Miss. Code Ann. § 63-1-212 provides:

> (1) After suspending, revoking, or disqualifying a person from holding a commercial driver's license, the commissioner shall update the person's records to reflect that action within ten (10) days. After suspending, revoking or disqualifying a nonresident commercial driver's privileges, the commissioner shall notify the licensing authority of the state which issued the commercial driver's license or commercial driver certificate within ten (10) days, including in the notice both the disqualification period and the reason for the disqualification.
>
> (2) Upon receipt from another jurisdiction of the prior record of an applicant for a commercial driver's license or a commercial learner's permit, the commissioner shall incorporate the prior record into the applicant's driver record and, in the case of adverse information, promptly implement any disqualification, licensing

limitations, denials, and penalties that are required under 49 CFR, Part 384, that have not been applied by those jurisdictions where the applicant was previously licensed.

Miss. Code Ann. § 63-1-213 provides:

> When any person operating a commercial motor vehicle or who holds a commercial driver's license issued by another state is convicted in this state of any violation of state law or local ordinance relating to motor vehicle traffic control, other than parking violations, the commissioner shall notify the driver licensing authority in the licensing state of the conviction within ten (10) days of the date of conviction.

➤ **Limitation on number of driver's licenses**

Miss. Code Ann. § 63-1-204 provides:

> No person who drives a commercial motor vehicle shall have more than one (1) driver's license.

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Mississippi Attorney General's Office (AG), http://www.ago.state.ms.us

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Mississippi Judicial College (MJC), http://www.olemiss.edu/depts/mjc

National Highway Traffic Safety Administration (NHTSA), http://www.nhtsa.gov

Office of Highway Safety Traffic Safety Data, http://www.psdl.ssrc.msstate.edu

Sobriety Trained Officers Representing Mississippi (STORM), http://www.msstorm.net

GLOSSARY

Alcohol means any substance containing any form of alcohol including, but not limited to, ethanol, methanol, propanol and isopropanol. Miss. Code Ann. § 63-1-75(a).

Alcohol concentration means either grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath. Miss. Code Ann. § 63-11-3(e). When expressed as a percentage it means:

(i) The number of grams of alcohol per one hundred (100) milliliters of blood; or

(ii) The number of grams of alcohol per two hundred ten (210) liters of breath; or

(iii) The number of grams of alcohol per sixty-seven (67) milliliters of urine.

Miss. Code Ann. § 63-1-75(b).

Adult is a person who has reached the legal age of majority.

Affidavit is a written statement confirmed by oath or affirmation.

All-terrain vehicle means a motor vehicle that is designed for off-road use and is not required to have a motor vehicle privilege license. Miss. Code Ann. § 63-21-5(dd).

Arraignment is the procedure whereby a criminal defendant comes before the court to hear the charge and to enter a plea.

Arrest is taking into custody a person to answer accusations of criminal conduct.

Arrest warrant is a writ issued by a judge for law enforcement to take a particular person into custody.

Bench Warrant is a process issued by the court itself for the arrest of someone.

Beyond a reasonable doubt is proof to the exclusion of every reasonable hypothesis except that of guilt.

Booked means the administrative step taken after the arrested person is brought to the police station, which involves entry of the person's name, the crime for which the arrest was made, and other relevant facts on the police docket, and which may also include photographing, fingerprinting, and the like. Miss. Code Ann. § 63-11-3(h).

Burden of Proof is a standard of requisite proof necessary to prevail on the merits of the case. Criminal law requires proof beyond a reasonable doubt. Civil law ordinarily requires proof by a preponderance of the evidence.

Cannabis[3] is one of the seven drug categories that is derived primarily from carious species of Cannabis plants. The active ingredient in cannabis is delta-9 tetrahydrocannabinol, or THC. There are four (4) principal forms of Cannabis: Marijuana, Hashish, Hash Oil, and Marinol (a synthetic form of THC not derived from the Cannabis plant).

Central Nervous System (CNS) depressants[3] is one of the seven drug categories that slow down the operation of the brain and the body. Examples include: alcohol, barbiturates, anti-anxiety tranquilizers (e.g., Valium Librium, Xanax, Prozac, and Thorazine), GHB (Gamma Hydroxybutyrate), Rohypnol and many other anti-depressants (e.g., Zoloft, Paxil).

Central Nervous System (CNS) stimulants[3] is one of the seven drug categories that accelerate the heart rate and elevate the blood pressure and "speed-up" or over-stimulate the body. Examples include: Cocaine, "Crack", Amphetamines and Methamphetamine ("Crank").

Chain of Custody is proving that the integrity of evidence has not been compromised, i.e., no indication or reasonable inference of probable tampering with the evidence or substitution of the evidence, by showing continuous custodial possession.

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[3]Terms and definitions of the Drug Evaluation and Classification Program at http://www.decp.org reprinted with permission from the International Association of Chiefs of Police.

Chemical test means an analysis of a person's blood, breath, urine or other bodily substance for the determination of the presence of alcohol or any other substance which may impair a person's mental or physical ability. Miss. Code Ann. § 63-11-3(c).

Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.

Citation is a traffic ticket or summons.

Commercial driver's license means a license issued in accordance with the requirements of [the Commercial Driver's License Act] to an individual which authorizes the individual to drive a Class A, B or C commercial motor vehicle. Miss. Code Ann. § 63-1-75(c).

Commercial motor vehicle means a motor vehicle designed or used to transport passengers or property:

(i) If the vehicle has a gross vehicle weight rating of twenty-six thousand one (26,001) or more pounds, or such lesser rating as determined by applicable federal regulations; or

(ii) If the vehicle is designed to transport sixteen (16) or more passengers, including the driver; or

(iii) If the vehicle is transporting hazardous materials and is required to be placarded in accordance with the Hazardous Materials Transportation Act, 49 Code of Federal Regulations, Part 172, Subpart F. Miss. Code Ann. § 63-1-75(f).

Community service means work, projects or services for the benefit of the community assigned, supervised and recorded by appropriate public officials. Miss. Code Ann. §63-11-3(b).

Consent is knowing approval. *See* U.S. v. Elrod, 441 F.2d 353, 356 (5th Cir. 1971).

Continuance is the postponement of a court proceeding to a later date.

Controlled substance means any substance so classified under Section 102(6) of the Controlled Substances Act, 21 USCS 802(6), and includes all substances listed on Schedules I through V of 21 Code of Federal Regulations, Part 1308, as they may be revised from time to time, any substance so classified under Sections 41-29-113 through 41-29-121, Mississippi Code of 1972, and any other substance which would impair a person's ability to operate a motor vehicle. Miss. Code Ann. § 63-1-75(g).

Conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court or tribunal, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended or probated. Miss. Code Ann. § 63-1-75(h).

Culpable negligence is a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and that this shall be so clearly evidenced as to place it beyond every reasonable doubt. *See* Conley v. State, 790 So. 2d 773, 793 (Miss. 2001).

Custodial interrogation is questioning initiated by law enforcement officers of a person in custody. "In custody" is where from the totality of the circumstances a reasonable person would feel arrested as opposed to being temporarily detained.

Demurrer is a defendant's formal objection to an alleged defect in an indictment.

Direct Evidence is evidence which, if believed, proves the fact without inference or presumption. It is evidence that is not circumstantial, e.g., eyewitness testimony.

Discovery is a procedure that allows each party to obtain before trial certain information accessible to the opposition.

Dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits. Such does not preclude a refiling of the claim.

Disqualification means a withdrawal of the privilege to drive a commercial motor vehicle, including a suspension, cancellation or revocation of a person's driver's license or driving privileges and an out-of-service order. Miss. Code Ann. § 63-1-75(I).

Dissociative anesthetics[3] is one of the seven drug categories. These drugs inhibit pain by cutting off or "disassociating" the brain's perception of pain. Examples include: PCP (Phencyclidine) and its analogs (Ketamine, Ketalar, and Dextromethorphan).

Divided attention is a field sobriety testing technique requiring the subject to concentrate on more than one task at a time.

Double jeopardy is a constitutional protection that prohibits a second prosecution after acquittal, a second prosecution after conviction, and multiple punishments for the same offense.

Drive means to drive, operate or be in physical control of a motor vehicle. Miss. Code Ann. § 63-1-75(j).

Driver's license means a license issued by a state to an individual which authorizes the individual to drive a motor vehicle. Miss. Code Ann. § 63-1-75(l).

Driving privilege means both the driver's license of those licensed in Mississippi and the driving privilege of unlicensed residents and the privilege of nonresidents, licensed or not, the purpose of this section being to make unlicensed and nonresident drivers subject to the same penalties as licensed residents. Miss. Code Ann. § 63-11-3(a).

Driving under the influence is driving in a state of intoxication that lessens a person's normal ability for clarity and control. *See* Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999).

Drug is any substance which, when taken into the human body, can impair the ability of the person to operate a vehicle safely.

Due process refers to legal procedures necessary for a fair and just trial.

Evidence is testimony and exhibits offered during a trial (or hearing) to prove or disprove a fact.

Exclusionary rule is a procedure that allows the court to exclude from the prosecutor's case-in-chief evidence directly or derivatively obtained by the exploitation of an illegal search or seizure.

Expert testimony is testimony relating scientific, technical, or other specialized knowledge by one qualified to do so.

Expunge is the court erasing, as authorized by law, information contained in an official record.

Extenuating circumstances are unusual circumstances supporting a position for leniency.

Eyewitness is a person who actually saw a particular event as it took place.

Felony is an indictable offense punishable by confinement in the penitentiary or death.

Fine is a monetary punishment or penalty.

Forensic describes a discipline ready applicable to the evidentiary matters, e.g., a forensic chemist.

Gross negligence is conduct tantamount to a wanton disregard of, or utter indifference to, the safety of human life.

Hallucinogens[3] is one of the seven drug categories. They are drugs or substances that affect a person's perceptions, sensations, thinking, self awareness, and emotions. They may also cause hallucinations (a sensory experience of sonething that does not exist outside of the mind.). Examples include: LSD, Peyote, Psilocybin and MDMA (Ecstasy).

Hardship means reasonable cause to believe that revocation of a driver's license would hinder the person's ability to:

(i) Continue his employment;

(ii) Continue attending school or an educational institution; or

(iii) Obtain necessary medical care.

Proof of the hardship shall be established by clear and convincing evidence which shall be supported by independent documentation. Miss. Code Ann. § 63-21-5.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Exceptions, as set forth in M.R.E. 801(d), include a prior statement by a witness and an admission by party opponent.

Highway means the entire width between property lines of any road, street, way, thoroughfare or bridge in the State of Mississippi not privately owned or controlled, when any part thereof is open to the public for vehicular traffic and over which the state has legislative jurisdiction under its police power. Miss. Code Ann. § 63-15-3(a).

Horizontal Gaze Nystagmus is the involuntary jerking of the eyes occurring as the eyes gaze to the side.

Indictment is a formal charge of a felony returned by a grand jury.

Implement of husbandry means every vehicle designed and adapted exclusively for agricultural, horticultural or livestock raising operations or for lifting or carrying an implement of husbandry and in either case not subject to registration if used upon the highways. Miss. Code Ann. § 63-21-5(d).

Incarceration is confinement to a jail or prison.

Inhalants[3] is one of the seven drug categories. They include a wide variety of breathable substances that produces mind-altering results and effects. Examples include: Toluene, plastic cement, paint, gasoline, paint thinners, hair sprays and various anesthetic gases.

In limine is where a party seeks to exclude, at the beginning of the trial, specific objectionable evidence.

Judgment is a final decision or order from which an appeal may be taken or the final determination of an action.

Juvenile: 1. As used in article IV of the Interstate Compact on Juveniles, any person who is a minor under the law of the state of residence of the parent, guardian, person or agency entitles to the legal custody of such minor. 2. As used in Mississippi's Probation and Parole Law, a person less that seventeen (17) years of age.

License means any driver's, operator's, commercial operator's, or chauffeur's license, temporary instruction permit or temporary license, or restricted license, issued under the laws of the State of Mississippi pertaining to the licensing of persons to operate motor vehicles. Miss. Code Ann. § 63-15-3(d).

Miranda warnings are warnings required to be given by law enforcement when subjecting a suspect to custodial interrogation, i.e., "You have the right to remain silent, ..."

Misdemeanor is an offense punishable by a maximum possible sentence of confinement for one year or less, a fine, or both.

Mistrial is a trial declared invalid by the court because of a fundamental error in the proceedings or the inability of the jury to reach a verdict.

Motor vehicle means every self-propelled vehicle (other than traction engines, road rollers and graders, tractor cranes, power shovels, well drillers, implements of husbandry and electric personal assistive mobility device as defined in Section 63-3-103) which is designed for use upon a highway, including trailers and semitrailers designed for use with such vehicles, and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails. Miss. Code Ann. § 63-15-3©.

Narcotic analgesics[3] is one of the seven drug categories. They relieve pain, induce euphoria and create mood changes in the user. Examples include: Opium, Codeine, Heroin, Demerol, Darvon, Morphine, Methadone, Vicodin and Oxycontin.

Negligence is a failure to act as a reasonably prudent person would act under similar circumstances.

Nolle prosequi is a formal dismissal of a criminal indictment. Such, though, does not bar a subsequent indictment for the same offense.

Nolo contendere is a plea whereby the defendant neither admits nor denies guilt, but instead accepts the judgment of guilt by choosing not to contest the allegations underlying the charge. Mississippi does not allow nolo contendere pleas in felony cases. (Latin: "I will not contest it.")

Nonadjudication is the dismissal of a case upon the defendant's successful completion of a conditional sentence. A court may also nonadjudicate a first offense under the Zero Tolerance for Minors. Miss. Code Ann. Section 63-1130(3)(g).

Nonresident means every person who is not a resident of the State of Mississippi. Miss. Code Ann. § 63-15-3(e).

Nonresident's operating privilege means the privilege conferred upon a nonresident by the laws of Mississippi pertaining to the operation by him of a motor vehicle, or the use of a motor vehicle owned by him, in the State of Mississippi. Miss. Code Ann. § 63-15-3(f).

Nystagmus is an involuntary jerking of the eyes.

Operator means every person who is in actual physical control of a motor vehicle. Miss. Code Ann. § 63-15-3(g).

Owner means a person who holds the legal title of a motor vehicle; in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of

possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter. Miss. Code Ann. § 63-15-3(h).

Paraphernalia is any type of equipment or accessory utilized for illicit drug use.

Plea is the defendant's formal response (usually "guilty" or "not guilty") to a criminal charge.

Person means every natural person, firm, copartnership, association or corporation. Miss. Code Ann. § 63-15-3(I).

Post-release supervision is a conditional suspension of a prison sentence as set forth in Miss. Code Ann. Section 47-7-34.

Probable cause is facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, 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. *See* Conway v. State, 397 So. 2d 1095, 1098 (Miss. 1980).

Probation is court-imposed terms and conditions that a convicted defendant must follow to avoid being held in contempt of court or incarcerated.

Proof of financial responsibility means proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of Twenty-five Thousand Dollars ($25,000.00) because of bodily injury to or death of one (1) person in any one (1) accident, and subject to said limit for one (1) person, in the amount of Fifty Thousand Dollars ($50,000.00) because of bodily injury to or death of two (2) or more persons in any one (1) accident, and in the amount of Twenty-five Thousand Dollars ($25,000.00) because of injury to or destruction of property of others in any one (1) accident. Miss. Code Ann. § 63-15-3((j).

Psychophysical tests are methods for investigating the mental and physical characteristics of a person suspected of alcohol or drug impairment. An officer's observations of such tests are admissible to show probable cause to arrest and administer a breath test and, at trial, as proof of intoxication.

Qualified person to withdraw blood means any person who has been trained to withdraw blood in the course of their employment duties including but not limited to laboratory personnel, phlebotomist, emergency medical personnel, nurses and doctors. Miss. Code Ann. § 63-11-3(f).

Reasonable suspicion (or reasonable grounds) is a particularized and objective basis for suspecting criminal activity sufficient to justify an investigatory stop. But "probable cause" is required to make an arrest. *See* Floyd v. City of Crystal Springs, 749 So. 2d 110, 114-15 (Miss. 1999)(citing Terry v. Ohio, 392 U.S. 1 (1968).

Reckless disregard embraces willful or wanton conduct; it is usually accompanied by a conscious indifference to consequences and a deliberate disregard that risk and the high probability of harm are involved. *See* Willing v. Estate of Benz, 958 So. 2d 1240, 1247 (Miss. Ct. App. 2007); Giles v. Brown, 962 So. 2d 612, 615 (Miss. Ct. App. 2006).

Reckless driving is driving in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property. Miss. Code Ann. § 63-3-1201.

Refusal to take breath, urine and/or blood test means an individual declining to take a chemical test, and/or the failure to provide an adequate breath sample as required by the Implied Consent Law when requested by a law enforcement officer. Miss. Code Ann. § 63-11-3(d).

Registration refers to certificates and registration plates issued under the laws of this state for the registration of motor vehicles.

Search warrant is an order issued by a judge upon probable cause directing an officer to search a specified place for a specified thing.

Sentence is punishment imposed by the court upon a person convicted of a crime.

Standardized field sobriety testing (SFST) utilize the following tests: Horizontal Gaze Nystagmus (HGN), Walk and Turn (WAT), and One Leg Stand (OLS). Based on a series of controlled laboratory studies, scientifically validated clues of alcohol impairment have been identified for each of these three tests.

State means any state, territory or possession of the United States, the District of Columbia, or any province of the Dominion of Canada. Miss. Code Ann. § 63-15-3(m).

Subpoena is a process requiring a witness to appear and give testimony at a deposition, hearing or trial.

Subpoena duces tecum is a process requiring a witness to produce certain documents, records, or other tangible evidence at a deposition, hearing or trial.

Supervised probation is a conditional suspension of a prison sentence as set forth in Miss. Code Ann. Section 47-7-33.

Suspended sentence is a prison sentence that a defendant does not have to serve upon successful completion of probation.

Under the influence is commonly understood to mean driving in a state of intoxication that lessens a person's normal ability for clarity and control. *See* Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999)(citing Government of Virgin Islands v. Steven, 134 F.3d 526, 528 (3rd Cir. 1998)).

Vertical Gaze Nystagmus is an involuntary jerking of the eyes (up and down) which occurs as the eyes are held at maximum deviation.

Victim impact panel means a two-hour seminar in which victims of DUI accidents relate their experiences following the accident to persons convicted under the Implied Consent Law. Paneling programs shall be based on a model developed by Mothers Against Drunk Driving (MADD) victim panel or equivalent program approved by the court. Miss. Code Ann. § 63-11-3(g).

APPENDIX A – FORMS

FORMS

DUI Report Form ..... **App. A-3**

DUI Ticket ..... **App. A-11**

Affidavit for Search Warrant for Urine/Blood ..... **App. A-13**

Search Warrant for Urine/Blood ..... **App. A-15**

Sample DUI Report Form

Case #
Charges:
Location of Offense:
Date of Offense:

Time of Stop: _____ Time of Custody: _____ Time of Miranda:

Accident: Yes No
Video: Yes No
Date of Report:

Personal Information

Name _____ Alias
Sex _____ Race _____ DOB _____ SSN _____
DL# _____ DL State: _____

Address _____
City _____ State _____ Zip _____

Employer/School: _____

Vehicle Information

Vehicle Make _____ Model _____ Color _____ Year _____
Tag # _____ State _____ Vehicle Disposition _____

Passenger and Witness List

1. Name _____ Sex __ Race ___ DOB _____ SSN _____
   Address _____ City _____ State ___
   Phone _____ Remarks _____

2. Name _____ Sex __ Race ___ DOB _____ SSN _____
   Address _____ City _____ State ___
   Phone _____ Remarks _____

3. Name _____ Sex __ Race ___ DOB _____ SSN _____
   Address _____ City _____ State ___
   Phone _____ Remarks _____

Evidence: ___ Yes ___ No _____

Sealed: __ Yes ___No Sent to Crime Lab: ____ Yes ___ No

Rec'd results from Crime Lab: ___ Yes (Date Rec'd _____)____ No

Reporting Officer was called to assist by: Radio/Cell Phone

Time Called: _____ Time of Arrival: _____

Department:_____ Deputy/Officer: _____ Badge #: _____

Additional Comments by Deputy/Officer: _____

_____

Initial Vehicle Observation (Initial Reason for the Stop)

Direction of Travel and Location: _____

1. Weaving in Roadway: _____
2. Speeding _____ Speed Zone _____
3. Improper Equipment _____
4. No tag or Improper Tag _____
5. Failure to Yield _____
6. Tint Violation _____
7. Seatbelt Violation _____
8. Failure to Stop for Stop Sign _____
9. Other _____
10. Safety/Sobriety Checkpoint: _____

    Officer who made initial contact: _____

    Vehicle was moved to a safe location, to wit: _____

    Vehicle attempted to leave, avoid or flee checkpoint: ___ Yes ___ No

    Other Remarks: _____

Observation of Vehicle After Initiating Traffic Stop

Approximate Length or Distance Vehicle traveled prior to stopping: _____

Vehicle stopped at Left Center Right of Roadway

Other Observations/Notes: _____

Initial Approach to Vehicle

Visual: _____

Odor: _____

Other: _____

Personal Contact with Driver

1. Identification of Driver

   DL State ID Verbal ID No ID provided

2. Number of Occupants and Sex: _____

3. OBSERVATION of the DRIVER

(Circle the applicable selections, all items in the check box do not necessarily apply to a particular DUI investigation.)

FACE	EYES	CLOTHES	SPEECH	BREATH
Normal	Normal	Normal	Normal	None
Flushed	Bloodshot	Soiled	Mumbled	Strong
Pale	Watery	Torn	Slurred	Moderate
Other: _____	Dilated	Disarranged	Incoherent	Faint
_____	Constricted	Arm Band(s)	Spanish	
	Sleepy	Hand Stamp(s)	Hesitant	
	Glassy	Footwear:_____	Fast	
	Glasses	_____	Slow	
	Contacts (hard or soft)		Accent	

ATTITUDE		OTHER ACTIONS
Normal	Mood Swing	Belching
Argumentative	Nervous	Coughing
Belligerent	Polite	Crying
Carefree	Profanity	Drinks/Tries
Cocky	Quiet	Difficulty Understanding
Confused	Sarcastic	Eat or Chews / Tries
Cooperative	Talkative	Hiccupping
Defensive	Inattentive	Passes Out
Defiant	Uncooperative	Poor Coordination
Insulting	Upset	Smokes / Tries
Joking	Apologetic	Vomiting
Jumpy	Excited	Slow Reaction
Repetitive Statements	Repetitive Questions	Spits
Combative	Sleepy	Urinates
Other:_____		Other:_____

EXITING CAR	STANDING	RESPONSE TO INSTRUCTIONS	
Normal	Normal	Normal	Untruthful
Falling	Falling	Avoided Question	Changing Subject
Needs Support	Leaning for Support	Unable to Cooperate	Unwilling to Cooperate
Staggering			
Stumbling		Other: _____	

Additional Observations, including items found in vehicle: _____

_____

_____

1. Are you sick or injured? _____ Yes _____ No

2. Are you Diabetic? ____ Yes _____ No

3. Do you take Insulin? _____ Yes _____ No

4. Do you have any physical Impairments? _____ Yes _____ No

5. Are you under any long term care of a doctor or dentist? _____ Yes _____ No

6. Do you wear dentures? _____ Yes _____ No

7. Have you taken any medicine or illegal drugs? _____ Yes _____ No

What? _____

How Much? _____

When did you last take it? _____

8. Do you currently feel any effects of the drugs? _____ Yes _____ No

9. What time did you last go to sleep? _____

10. When did you last eat? _____

11. Where are you going? _____

12. Where are you now? _____

13. What have you been drinking? _____

14. Do you feel the effects of the drink now? _____ Yes _____ No

15. Description of Clothing: _____

16. Do wear Contacts Lenses? If Yes, are they Hard or Soft?

Evaluation of Standardized Field Sobriety Testing:

Test were not given:

Unsafe Roadside Conditions: _____

Officer Safety: _____

Suspect's Health Conditions: _____

Suspect's Level of Impairment was too great to complete safely:_____

_____

Roadway Surface: _____

_____

Weather Conditions

Day	Night	Dry	Wet
Cool/Cold	Warm/Hot	Well-Lit Area	Dark
Sunshine	Light Rain	Heavy Rain	Ice
Calm/No Wind	Breezy	Very Windy	Snow

Horizontal Gaze Nystagmus: (look for 4 or more clues)

Stimulus Held 12"- 15" from nose, just above eye level

Resting Nystagmus: _____ Yes _____ No

Equal Pupil Size: _____ Yes _____ No

Tracking: _____ Yes _____ No

Lack of Smooth Pursuit: _____ Right Eye _____ Left Eye

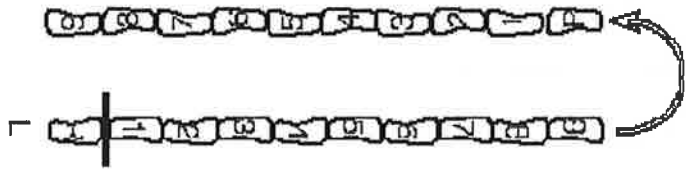
Distinct & Sustained Nystagmus at Maximus Deviations: _____Right Eye _____ Left Eye

Onset of Nystagmus Prior to 45 Degrees: _____ Right Eye _____ Left Eye

Vertical Nystagmus: _____ Right Eye _____ Left Eye

Other Remarks: _____

Total Number of Clues Observed: ____



Walk and Turn (look for 2 or more clues)

Instructions Stage:

Cannot Keep Balance _____

Starts too Soon _____

Walking Stage:

First Nine Steps

Stops Walking _____

Misses Heel to Toe _____

Steps off Line _____

Raises Arms _____

Improper Turn: _____

Other Remarks:_____

Total Number of Clues Observed: ____

Sways _____ Which foot did suspect raise? _____

Uses arms to balance _____

Hops _____

Puts Foot Down _____

Type of Footwear: _____

Other Remarks: _____

Total Number of Clues Observed: _____

Vehicle Search

Drugs:

Yes _____ No _____

Type: _____

Amount: _____

Found: _____

Alcohol:

Yes _____ No _____

Type_____ Amount_____ Closed_____ Open_____

Currency:

Yes _____ No _____

Type _____ Seized Yes _____ No _____

Weapons:

Yes _____ No _____

_____ On person _____ In Vehicle Location:_____

Stolen Yes _____ No _____

Make/Model _____

Chemical Test Data

Intoxilyzer 8000

Offered: Yes_____ No _____

Refused: Yes _____ No _____

Twenty Minute Observation Period

Start Time_____ End/Test Time: _____

BAC Result: _____

Urine

Offered: Yes_____ No_____

Refused: Yes_____ No_____

Blood

Offered: Yes_____ No_____

Refused: Yes_____ No_____

Hospital:_____

Nurse Information: _____

Arrest Procedures

Officer: _____ Badge #: _____

Offender was already in custody when I arrived: Offered: Yes _____ No _____

Transported

_____ My Vehicle

_____ Other Officer's Vehicle

_____ DUI Van

_____ OTHER _____

Transported to _____

Booking Procedure

_____ Cooperative

_____ Uncooperative

Explain: _____

_____

Suspect was released to booking officers.

_____

DUI TICKET

STATE OF MISSISSIPPI - UNIFORM TRAFFIC TICKET
DRIVING UNDER THE INFLUENCE

(Name of Law Enforcement Agency)	Agency Code _____	[Eight Digit Ticket Number]

IN THE COURT DESIGNATED BELOW, THE AFFIANT HEREIN BEING DULY SWORN, UPON OATH DOES DEPOSE AND SAY THAT WITHIN THE COUNTY OF _____, STATE OF MISSISSIPPI, AT THE FOLLOWING LOCATION, TIME AND DATE: JUDICIAL DISTRICT: ☐ 1 ☐ 2

HWY/ST		DISTRICT	
DAY	DATE	TIME OF STOP _____ A.M. P.M.	ACCIDENT? ☐ YES ☐ NO

NAME (FIRST NAME, MIDDLE NAME, LAST NAME)

LICENSE ADDRESS

CITY	STATE		ZIP CODE	
DRIVER LICENSE NUMBER	STATE	SEX	RACE	DATE OF BIRTH
VEHCLE LICENSE NUMBER	STATE	YEAR/VEH	MODEL	VEHICLE TYPE

Defendant's Current Address: _____

Defendant's Telephone Number:

☐ Offense occurred within the city limits of _____ Mississippi

☐ Violation pursuant to Commercial Driver's License Law.

☐ require placard under Hazardous Materials Transportation Act

That the aforesaid person did, in violation of § 63-11-30 (1) Mississippi Code of 1972, willfully and unlawfully drive or otherwise operate a motor vehicle within this state:

☐ (a) Under the influence of intoxicating liquor; or

☐ (b) under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; or

☐ (c) ☐ Having an alcohol concentration of eight one-hundredths percent (. 08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, to wit _____%

☐ Having an alcohol concentration of two one-hundredths percent (.02%) or more For persons who are below the legal age to purchase alcoholic beverages under state law, to wit: _____%

☐ (d) under the influence of any drug or controlled substance, the possession of which is unlawful under the Mississippi Controlled Substances Law, or

☐ (e) having an alcohol concentration of four one hundredths percent (.04%) or more for persons operating a commercial motor vehicle, to wit: _____%

AGAINST THE PEACE AND DIGNITY OF THE STATE OF MISSISSIPPI

Affiant / Officer's Signature _____ Unit / Badge # _____

Sworn to before me, this the _____ day of _____, 20___.

(NAME AND TITLE) _____

ARRAIGNMENT DATE BEFORE ☐ MUNICIPAL COURT ☐ JUSTICE COURT

_____ ON THE _____ DAY OF _____, 20____

Court's Physical Address: _____

Court's Mailing Address: _____

Court's Telephone Number: _____

CASE # _____ PAGE # _____ DOCKET # _____

Offense: First ☐ Second ☐ Third or Subsequent ☐

THE DEFENDANT CHARGED HEREIN:

_____ WAIVED defendant's right to an attorney after having been advised by the trial judge of the defendants right to attorney, and, if the defendant could not afford an attorney that one would be appointed free of charge to represent the defendant; or _____

_____ WAS REPRESENTED (EMPLOYED OR APPOINTED) by an attorney whose name, address and telephone number is:

Name _____ Phone (____) _____

Address _____

SIGNATURE OF JUDGE _____

ORIGINAL/AFFIDAVIT 7-09

AFFIDAVIT FOR SEARCH WARRANT

UNDERLYING FACTS AND CIRCUMSTANCES

The undersigned _____, a duly commissioned officer of the _____ Department, having been duly sworn states on oath:

1. That by virtue of the following conduct on the part of reasonable suspicion and/or probable cause in initiating the initial stop and/or investigation exists:

_____

_____

_____

2. That the undersigned officer made the following observations: _____

_____

_____

_____

3. That a portable breath test (PBT) was administered, with the following result obtained:

__Positive for alcohol – test result of ____.____ __ Negative for alcohol

4. That the above named performed as follows during Standardized Field Sobriety Testing:

HGN: _____

W&T: _____

OLS: _____

5. That the above named performed as follows during administration of other field tests:

FN: _____

ABC: _____

R.M.: _____

OTHER: _____

That based upon the foregoing, the undersigned officer has reason to believe and does believe that the suspect's blood and/or urine contains alcohol and/or other substances which might impair their ability to operate a motor vehicle and, therefore, requests that a Search Warrant be issued to obtain blood and/or urine samples from the above named suspect.

_____

OFFICER

SWORN TO AND SUBSCRIBED before me on this the ____ day of _____, 20__.

_____

_____ JUDGE

SEARCH WARRANT

AUTHORIZATION TO OBTAIN BLOOD/URINE SPECIMENS

STATE OF MISSISSIPPI

COUNTY OF _____

TO: ANY LAWFUL OFFICER OF THE STATE OF MISSISSIPPI

WHEREAS _____, known to me to be a credible person, has this day made complaint on oath before me as follows:

1. That he/she has good reason to believe and does believe that certain things hereafter described are now in or about the following place in this City and County:

   The person of :

   Date of Birth: _____ Race: _____ Sex: _____

   Social Security Number: _____

   Address:_____

2. That said things are particularly described as follows:

   a. Vials of blood from the person identified in Number 1 above sufficient for purposes of testing for its content of alcohol or other substances which might impair ability to drive or operate a vehicle; and/or,

   b. Urine samples from the person identified in Number 1 above sufficient for purposes of testing for its content of alcohol or other substances which might impair ability to drive or operate a vehicle.

3. That the public has a primary interest in and right to possession of the above described things in that said things are necessary in the enforcement of the statutes of the State of Mississippi, specifically Section 63-11-1, et. seq., of the Mississippi Code of 1972, Annotated as Amended, regarding operation of a vehicle while under the influence of intoxicating liquor or other substances, in that the aforesaid blood and/or urine samples may contain such substances as may impair the ability to drive or operate a vehicle of the person identified in Number 1 above.

4. That the facts tending to establish the foregoing grounds for issuance of the Search Warrant and Authorization have been communicated to this Court, under oath, and that

this Court having duly heard and considered the evidence in support of issuance of this Warrant and Authorization does find that probable cause does exist.

THEREFORE, you are hereby commanded to proceed at any time in the day or night to search Forthwith for the things set forth above, making known to the person identified in Number 1 above, your purpose and authority for so doing, and to leave a copy of this Warrant and bring things seized before this Court on the time and date proper, and prepare a written inventory of the things seized, and have then and there this writ, and with your proceedings noted thereon.

1. Do not interpret this writ as limiting your authority to seize all contraband and things the possession of which is unlawful which you find incident tot your search, or as limiting your authority to make otherwise valid arrests.

WITNESS MY HAND this the _____ day of _____, 20___.

_____

_____ Court Judge

RETURN

I, _____, received this warrant on the _____ day of _____, 20___, and have executed it as follows:

On the _____ day of _____, 20_____, at _____ o'clock __.m., I searched the person identified and caused to be delivered the Authorization of obtaining blood and/or urine specimens, leaving a copy of this Warrant and Authorization with said person and with _____, who obtained the specimens.

The following is an inventory of things taken:

I hereby swear that this inventory is a true and detailed account of all things taken by me on the Warrant.

_____

SWORN TO AND SUBSCRIBED and returned before me this the _____ day of _____, 20____.

_____

_____ Court Judge