IN THE SUPREME COURT OF MISSISSIPPI

NO. 2013-KA-00184-SCT

FRANK GIDEON WHITAKER, IV a/k/a FRANK GIDEON WHITAKER a/k/a FRANK WHITAKER

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	01/25/2013
TRIAL JUDGE:	HON. M. JAMES CHANEY, JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	MARK W. PREWITT PAMELA NETTERVILLE GRADY
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAURA HOGAN TEDDER JOHN R. HENRY, JR.
DISTRICT ATTORNEY:	RICHARD EARL SMITH, JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 07/17/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. Frank Gideon Whitaker IV and Cynthia Ann Grantham were involved in a motor-vehicle accident in Warren County, Mississippi. The Warren County Circuit Court found Whitaker guilty of aggravated driving under the influence pursuant to Mississippi Code Section 63-11-30(5), sentenced him to twenty-five years and ordered Whitaker to pay Grantham $25,000. Whitaker raises two issues on appeal and, in both, contends a blood

sample taken from Whitaker following the collision while he remained unconscious should not have been admitted into evidence.

FACTS AND PROCEDURAL HISTORY

¶2. On October 21, 2012, at approximately 5:30 p.m., Whitaker, driving a white pick-up truck, and Grantham, driving a white sport-utility vehicle, collided on Oak Ridge Road in Warren County, Mississippi. Several witnesses, Burch Brown, Martin Daffron, and John Kirby Day, claim to have witnessed Whitaker's truck traveling at an excessive rate of speed along Oak Ridge Road just moments before the accident occurred. Deputy Brandon Jones of the Warren County Sheriff's Department arrived to find medical personnel already attending to the two drivers, both of whom were unconscious. The drivers were transported to River Region Medical Center.

¶3. Witness Brown testified that he was putting out pine straw in his front yard when he saw Whitaker's truck traveling in excess of one hundred miles per hour just seconds before he heard the crash. Martin Daffron was traveling along Oak Ridge Road when he spotted Whitaker's truck running "too fast for that curve." Daffron testified that he was slowing down from roughly forty-one or forty-two miles per hour to maneuver the curve when he saw Whitaker's truck turn "sideways" and go airborne. Daffron further testified that it was his estimation that the truck was doing in excess of fifty miles per hour or more around the curve where the accident occurred. John Kirby Day testified that he also saw Whitaker's truck enter the ditch, go airborne, and strike Grantham's vehicle. He ran to Grantham and, upon seeing her injuries, believed her to be dead.

¶4. Sergeant Jason Bailess arrived and joined Deputy Jones at the scene. Sergeant Bailess testified that he smelled a strong odor of alcohol coming from Whitaker but was unable to obtain a breath sample or consent to a blood sample due to Whitaker's unconscious state. Sergeant Bailess then filled out an affidavit for a search warrant, requesting a blood sample be taken from Whitaker, having suspected him of driving under the influence. Justice Court Judge Jeff Crevitt issued the search warrant requested by Sergeant Bailess.

¶5. Sergeant Bailess then drove to River Region Medical Center and had the nurse caring for Whitaker draw blood as requested by the search warrant. The attending nurse, James Davidson, drew the blood sample from Whitaker with the blood alcohol kit provided by Sergeant Bailess. Sergeant Bailess testified that he watched Nurse Davidson withdraw the blood after first preparing the area with Betadine solution. Sergeant Bailess then took the samples from Nurse Davidson and affixed labels to them and had Nurse Davidson sign that he had taken the blood sample.

¶6. Upon his return to the sheriff's office, Sergeant Bailess dropped the blood sample into the evidence box. Sergeant Bailess, at a hearing on a Motion to Suppress or Exclude Evidence, testified that the report management system used by the sheriff's department issued case number 603 to the report, to which the blood sample was attached. Sergeant Bailess further testified that he was the shift supervisor and that it was his duty to approve the reports. It was during his time as shift supervisor, sometime prior to 6:00 a.m. the next day, that he realized the report management system had issued case number 603 to the case. Sergeant Bailess stated that the correct case number issued to the accident was 607. According to Sergeant Bailess, the error occurred because the 911 operators assign the case

numbers, and if other reports are filed prior to the officer returning to log the report, the computer system at the sheriff's office automatically generates the next sequential number.

¶7. Sergeant Bailess also testified that it is not uncommon for the 911 case numbers and the sheriff's office computer system to switch up case numbers because of the time at which various officers return to file the reports. In explaining why he changed the case number from 603 to 607, Sergeant Bailess further testified it is the shift supervisor's job to ensure the correct case number is assigned to each report. The blood sample taken on the date of the accident, October 21, 2011, remained in the evidence locker until it was taken to the crime lab on December 7, 2011, by Samuel Winchester, another detective for the Warren County Sheriff's Department.

¶8. David Lockey, a forensic toxicologist for the Mississippi Crime Laboratory, testified as an expert for the State as to the method by which he tested the blood sample. Lockey testified that all test instruments were working properly and that the gas chromatograph used to test the blood revealed an ethyl alcohol concentration of 0.18. After holding the sample for at least six months, the Mississippi Crime Lab disposed of Whitaker's blood sample, pursuant to its internal procedure.

¶9. On August 15, 2012, Whitaker filed a Motion to Suppress and to Compel Production of Blood Sample. On September 14, 2012, the circuit court heard the Motion to Suppress and Compel, and the district attorney informed the court that the crime lab had disposed of Whitaker's blood sample at some time prior to the hearing. Whitaker also filed a Supplemental Motion to Suppress or Exclude Evidence. The circuit court eventually denied all of Whitaker's challenges asserted in his Motion to Suppress or Exclude Evidence.

¶10. Following a bench trial, the trial court convicted Whitaker of aggravated driving under the influence under Mississippi Code Section 63-11-30(5) and sentenced him to twenty-five years. The trial court also ordered Whitaker to pay $25,000 in restitution to Grantham. Whitaker appealed and raises two main issues.

DISCUSSION

¶11. Whitaker raises two issues on appeal: (1) whether the trial court admitted reversible error by admitting blood-sample tests in violation of the Mississippi Implied Consent Act, and (2) whether the trial court abused its discretion when it admitted unreliable blood-sample evidence against Whitaker.

I. Whether the circuit court committed reversible error when it admitted blood-sample test results into evidence in violation of the statutory privileges afforded in the Mississippi Implied Consent Act.

¶12. Whitaker argues that the issue is a matter of statutory interpretation and should be reviewed *de novo*. However, Whitaker neglected to acknowledge that a search warrant was obtained prior to his blood being taken, articulating the issue as a matter of whether Mississippi Rules of Evidence 501 and 1103 violate constitutional protections afforded to defendants through the enactment of the Mississippi Implied Consent Act. *See* Miss. Code Ann. §§ 63-11-1 to 63-11-53 (Rev. 2013). Therefore, as an issue relating to the admissibility of evidence, the standard of review is abuse of discretion. ***Smith v. State***, 986 So. 2d 290, 295 (¶ 12) (Miss. 2008).

¶13. Whitaker's blood was taken pursuant to a search warrant, not Mississippi Code Section 63-11-7, as Whitaker claims. Section 63-11-7 provides that police may take the blood of any unconscious or dead person if reasonable grounds exist to believe they were drinking,

however, the result of any testing of the blood sample "shall not be used in evidence against any 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." Miss. Code Ann. § 63-11-7 (Rev. 2013).

¶14. The Mississippi Implied Consent Act was enacted prior to the Mississippi Rules of Evidence. In 1989, following the enactment of the Mississippi Rules of Evidence, the Court held that the privilege contained in Mississippi Code Section 63-11-7 was judicially repealed by Mississippi Rules of Evidence 501 and 1103. ***Whitehurst v. State***, 540 So. 2d 1319, 1324 (Miss. 1989); *see also* ***Deeds v. State***, 27 So. 3d 1135, 1141 (¶ 18) (Miss. 2009) ("This Court has held that the Mississippi Rules of Evidence supercede statutory provisions which would render inadmissible evidence that otherwise would be admissible under the Rules of Evidence.") Whitaker presents an interesting argument as to the role of the judiciary and Legislature, however, his blood was not taken pursuant to the Implied Consent Act. Therefore, Whitaker's request to overrule ***Whitehurst*** is moot, as the Court has held that a "a case is moot so long as a judgment on the merits, if rendered, would be of no practical benefit to the plaintiff or detriment to the defendant." ***Gartrell v. Gartrell***, 936 So. 2d 915, 916 (¶ 8) (Miss. 2006). It is clear the ***Whitehurst*** Court's interpretation of Mississippi Rules of Evidence 501 and 1103 would not be relevant to Whitaker, as his blood was not taken pursuant to the Mississippi Implied Consent Act.

¶15. Whitaker's blood was taken pursuant to the search warrant issued by the justice court judge; therefore, the Court need not reach the constitutional challenges he raises to ***Whitehurst.***

II. Whether the trial court abused its discretion in admitting the blood sample into evidence.

¶16. Again, the Court reviews a "trial court's decision to admit or exclude evidence under an abuse of discretion standard of review." ***Smith***, 986 So. 2d at 295 (¶ 12). Whitaker raises three sub-issues related to his claim that the trial court abused its discretion by admitting the blood evidence into court: (1) that the State failed to adhere to the appropriate chain of custody; (2) that the State failed to appropriately authenticate and identify the blood sample pursuant to Mississippi Rule of Evidence 901; and (3) that the State did not follow the procedure required under Mississippi Code Section 63-11-9 for the drawing of blood from an unconscious person.

A. Chain of Custody

¶17. Whitaker's chain-of-custody argument is that Sergeant Bailess admitted that the blood was improperly labeled and he was forced to change the evidence label. To show an improper chain of custody, Whitaker bears the burden of showing "whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence." ***Gibson v. State***, 503 So. 2d 230, 234 (Miss. 1987). Accordingly, the issue is whether the relabeling of the evidence by Sergeant Bailess constitutes a showing of possible interference or tampering. In ***Ellis v. State***, Ellis argued that the nurse who drew his blood did not testify, therefore, it was possible the blood was mislabeled and substituted. ***Ellis v. State***, 934 So. 2d 1000, 1005 (¶6) (Miss. 2006). The Court, stating "the presumption of regularity supports the official acts of public officers,"

found that the officer who witnessed the blood being withdrawn could testify sufficiently to the chain of custody. ***Id.*** at 1005 (¶ 22-23).

¶18. After reviewing the trial-court transcript, it is evident that Sergeant Bailess provided adequate and sensible reasons in explaining why the blood sample carried two different evidence numbers, which stemmed from the assignment of one case number by the 911 operating system and the assignment of the other case number by the auto-generated computer system at the police department. Sergeant Bailess's explanation is sufficient evidence of a chain of custody. The labeling mistake was noticed and corrected by Sergeant Bailess within the same shift. Furthermore, Sergeant Bailess testified that the sample was the only blood sample taken on the night of the accident, preventing any tampering or substitution with another blood sample. Whitaker has the burden of showing more than a mere possibility of substitution. ***Id.*** Therefore, the trial judge was within his discretion to determine the credibility of Sergeant Bailess, as the State provided sufficient support of the chain of custody.

B. Authentication and Identification

¶19. Whitaker's next argument is that the State could not properly authenticate and identify the blood sample pursuant to Mississippi Rule of Evidence 901. "Rule of Evidence 901 provides that authentication is a condition precedent to admissibility and gives illustrations regarding how documents may be authenticated." ***Freeman v. State***, 121 So. 3d 888, 898 (¶ 23) (Miss. 2013). "Documents may be authenticated by 'Testimony of Witness with Knowledge,'which consists of "[t]estimony that a matter is what it is claimed to be.'" ***Id.*** (quoting Miss. R. Evid. 901(b)(1)). To satisfy the above standard, Whitaker must present

some evidence supporting an argument that the State's witnesses testifying to the chain of custody did not possess adequate knowledge to provide such testimony. ***Id.*** Instead, Whitaker asserts mere legal conclusions without providing any facts supporting why he has met the applicable standards. The witnesses presented were Sergeant Bailess, Samuel Winchester, and David Lockley. Sergeant Bailess was the detective in charge of the evidence on the night of the accident. Samuel Winchester transferred the evidence to the crime lab. Once at the crime lab, David Lockley performed the blood test and was able to testify as to the accuracy of the results. Therefore, without more than mere conclusions, Whitaker's argument that the State failed to properly authenticate and identify the evidence pursuant to Mississippi Rule of Evidence 901 is without merit.

¶20. Whitaker also mentions that the chain of custody cannot be authenticated properly because the Mississippi Crime Lab disposed of the blood after six months. Whitaker does not directly raise the issue on appeal, nor was it raised at trial. Instead, he merely argues the State cannot authenticate the blood sample, but, as mentioned, the State properly authenticated the blood sample with the testimony of the above-named witnesses. Moreover, the Court recently has held that the disposal of blood six months after testing requires a showing of "bad faith on the part of the police" to result in any due-process violation. ***Harness v. State***, 58 So. 3d 1, 4 (¶ 13) (Miss. 2011) (citing ***Arizona v. Youngblood***, 488 U.S. 51, 337 (1988)). Whitaker has not alleged that the police acted in bad faith. Therefore, since the State thoroughly identified the chain of custody and properly authenticated the blood sample, the issue is without merit.

C. Section 63-11-9

¶21. Finally, Whitaker argues that the State did not provide evidence that Nurse Davidson was qualified to draw his blood pursuant to Section 63-11-19. Like the first issue, the third issue can be dismissed because the Implied Consent Act was not the basis for obtaining the blood sample. Sergeant Bailess acquired a search warrant for the blood sample obtained by Nurse Davidson.

¶22. Whitaker further asserts that Nurse Davidson must have testified to establish the initial link in the custodial chain; however, the State does not have to produce every "handler of evidence." ***Ellis***, 934 So. 2d at 1005 (¶ 21). Moreover, as in ***Ellis***, Sergeant Bailess was present to witness the blood being drawn. Therefore, he could testify sufficiently as to the procedure and the chain of custody from the time the blood was drawn through his placing it in the evidence locker. Thus, the issue is without merit.

CONCLUSION

¶23. Whitaker has failed to raise any issues of merit. His constitutional challenge to the ***Whitehurst*** Court's interpretation of the Mississippi Rules of Evidence is moot, as his blood was not drawn pursuant to the Mississippi Implied Consent Act. Whitaker also has failed to satisfy his burden of showing that the evidence was tampered with or substituted, defeating his chain-of-custody argument. Finally, Whitaker failed to present any evidence supporting his claim that the blood sample was not properly authenticated. Accordingly, the judgment and sentence of the Warren County Circuit Court are affirmed.

¶24. **CONVICTION OF AGGRAVATED DRIVING UNDER THE INFLUENCE AND SENTENCE OF TWENTY-FIVE (25) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TEN (10) YEARS SUSPENDED AND FIVE (5) YEARS POST-RELEASE SUPERVISION AND**

ORDERED TO PAY $25,000 IN RESTITUTION, $5,000 IN FINES, $104 IN COURT COSTS, AND $280.50 IN STATE ASSESSMENTS, AFFIRMED.

WALLER, C.J., RANDOLPH, P.J., LAMAR, CHANDLER AND PIERCE, JJ., CONCUR. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY DICKINSON, P.J., AND KING, J.

KITCHENS, JUSTICE, DISSENTING:

¶25. I find that affirmance of the judgment of the Warren County Circuit Court offends the Fourteenth Amendment of the United States Constitution and Article 3, Section 14, of the Mississippi Constitution. Failure of the State to ensure preservation of the blood sample used by the State to secure Whitaker's conviction violated his fundamental right to due process of law. Respectfully, I dissent.

¶26. The circuit court heard arguments on Whitaker's Motion to Suppress and to Compel Production of Blood Sample on September 14, 2012. On the morning of the hearing, though the Motion to Suppress and Compel Production of Blood Sample had been filed by Whitaker on August 15, 2012,[1] the District Attorney of Warren County informed defense counsel that the blood sample was no longer available. The State expressed its understanding that the policy of the Mississippi Crime Laboratory was "to retain those items for six months, [and] after six months to destroy those items," and that Whitaker's blood sample had been

[1] Whitaker's counsel previously had filed, on May 7, 2012, a Motion for Discovery, requesting "complete disclosure and discovery" pursuant to Uniform Circuit and County Court Rule 9.04. Rule 9.04A, subsections (5) and (6), require the prosecution to disclose to the defendant's attorney "any physical evidence" and "any exculpatory material concerning the defendant" 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." The defendant's Motion to Compel followed on August 15, 2012.

destroyed pursuant to that policy. David Lockey, the State's expert in forensic toxicology who had tested Whitaker's blood sample, testified that "[*a*]*fter testing*, the sample will be put . . . in a storage box . . . in our toxicology freezer . . . for six months or longer, *a minimum* of six months." (Emphasis added.) No evidence in the record establishes precisely when the sample was destroyed, but its destruction occurred at some time prior to the motion hearing on September 14, 2012.

¶27. A deprivation of liberty implicates a person's fundamental right to due process of law under the United States Constitution and the Mississippi Constitution. U.S. Const. amend. XIV; Miss. Const. art. 3, § 14. The United States Supreme Court has held that due process of law requires that the prosecution turn over to the accused all evidence "material either to guilt or to punishment" that is "favorable to an accused upon request." ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, the State is under an obligation only to preserve evidence "that might be expected to play a significant role in the suspect's defense," meaning that "evidence must both [1] possess an exculpatory value that was apparent before the evidence was destroyed, and [2] be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." ***California v. Trombetta***, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Further, a criminal defendant is required to "show bad faith on the part of the police" in order to establish a deprivation of due process. ***Arizona v. Youngblood***, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

¶28. ***Harness v. State***, 58 So. 3d 1, 3 (Miss. 2011), involved a circumstance analogous to the present one. Harness was indicted for driving under the influence and causing a death

pursuant to Mississippi Code Sections 63-11-30(1) and 63-11-30(5). ***Id.*** at 2. Harness filed both a motion for discovery and a motion to compel, seeking the blood sample which was to be used by the State as evidence against him for independent testing by an expert of the defendant's choosing. ***Id.*** at 2-3. This Court held that Harness failed under the first prong of ***Trombetta***: "Harness has failed to show that the blood sample had exculpatory value before it was destroyed, and we find no denial of due process in this case." ***Id.*** at 6.

¶29. I dissented in ***Harness***, 58 So. 3d at 7 (Kitchens, J., dissenting), and respectfully maintain today that the case was wrongly decided:

> The preservation of evidence is especially important when the evidence in question is a blood sample taken from a person suspected of driving under the influence. In such cases, a defendant in Mississippi's state courts has a statutory right independently to test the sample for blood alcohol content. Miss. Code Ann. § 63-11-13 (Rev. 2004).[2] This statutory right is firmly rooted in due process concerns, to ensure the accused's ability to mount a defense and thoroughly confront the evidence against him. As our case law demonstrates,

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[2]Mississippi Code Section 63-11-13 (Rev. 2013) provides that:

> 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.

As I noted in ***Harness***, "[a]lthough the final sentence provides that a violation of this right will not preclude the admission of the State's test results, we repeatedly have held that rules governing the admissibility of evidence are strictly within the province of the courts and are not a legislative matter." ***Harness***, 58 So. 3d at 9 n.21 (Kitchens, J., dissenting) (citing ***Deeds v. State***, 27 So. 3d 1135, 1141 (Miss. 2009); ***Whitehurst v. State***, 540 So. 2d 1319, 1323 (Miss. 1989)).

> Mississippi law affords a greater level of due process protection than the standards provided in ***Trombetta*** and its progeny.

Id. at 9. Moreover, this Court has held that "a respondent charged with the operation of a motor vehicle while under the influence of intoxicating liquor is entitled to a reasonable opportunity to attempt to procure the seasonable taking of a blood sample for test purposes." ***Id.*** at 9 (quoting ***Scarborough v. State***, 261 So. 2d 475, 478 (Miss. 1972)). As such, "the unreasonable denial of defendant's request for a blood test pursuant to Mississippi Code Section 63-11-13 amounts to a denial of due process of law." ***Harness***, 58 So. 3d at 9 (Kitchens, J., dissenting). My ***Harness*** dissent concluded that "the unreasonable denial of a defendant's request for an *independent* blood test under the same statutory provision discussed in ***Scarborough*** also will amount to a denial of due process of law." ***Id.*** at 9 (emphasis in original).

¶30. While the United States Supreme Court established a floor in ***Trombetta*** and ***Youngblood***, Mississippi's ceiling, established by statute and by decisions of this Court, imposes upon our prosecutors a vigorous duty to ensure that evidence sought, or likely to be sought, by an accused for independent testing is not destroyed:

> While these facts, taken together, may not demonstrate a specific intent to destroy the blood sample, the district attorney's indifference to the defendant's efforts to obtain independent testing, which is both a statutory and constitutional right, is tantamount to a willful disregard of the affirmative duty to preserve evidence that "might be expected to play a significant role in the suspect's defense."

Id. at 10 (citing ***Tolbert v. State***, 511 So. 2d 1368, 1372 (Miss. 1987); ***Trombetta***, 467 U.S. at 489). As I additionally observed in my ***Harness*** dissent, the State's "affirmative duty to prosecute responsibly" is undergirded by Mississippi Rule of Professional Conduct 3.8(d).

Harness, 58 So. 3d at 10 (Kitchens, J., dissenting). Rule 3.8(d) imposes a special duty on the prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ." Miss. R. Prof'l Conduct 3.8(d); *see also* URCCC 9.04A(5), (6). The comment to Rule 3.8 explains that "[a] prosecutor has the responsibility of a ***minister of justice*** and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded *procedural justice* and that guilt is decided on the basis of sufficient evidence." (Emphasis added.)

¶31. While I do not suggest that the State's failure to ensure the preservation of Whitaker's blood was intentional, I view the prosecutor's inattention to that task in the same way that I expressed such thoughts in ***Harness***:

> [t]hough the prosecutor in this case may not have set out deliberately to deprive the accused of his right to independent testing, his error in failing to undertake steps to preserve the defendant's right to such testing produced the same result as if he had purposely caused the evidence to be destroyed without the defendant's being allowed to test it.

Harness, 58 So. 3d at 10 (Kitchens, J., dissenting).[3] If the State had notice of Whitaker's intention independently to test his blood sample, then the State had an affirmative duty to ensure its preservation, so that an independent analysis could have been conducted by Whitaker. Here, it appears that Whitaker, like Harness, first filed a motion for discovery. Three months later, when it had become evident to the defense that the blood sample to be used against Whitaker at trial was not forthcoming from the State, a motion to compel was filed. Not until the morning of trial, nearly one month after Whitaker had filed the motion to compel, did the district attorney inform defense counsel that the sample had been destroyed by the State Crime Laboratory.

¶32. The district attorney stated at the motion hearing that it was his understanding of the Crime Laboratory's policy that samples were to be maintained for six months before destruction. The expert from the Crime Laboratory testified at trial that samples were to be maintained for *at least* six months following completion of analysis before destruction. Otherwise, the record is devoid of any documentation of such a Crime Laboratory policy. It

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[3]That said, if the Crime Laboratory destroyed the evidence *prior to* the filing of Whitaker's Motion for Discovery or his Motion to Compel, due process might have been satisfied, as the State would have had no notice of his intention independently to test the sample. If the blood sample here was destroyed *after* the filing of Whitaker's motions, then the State's failure to ensure its preservation, having notice of Whitaker's desire independently to test it, amounted to a violation of his right to due process of law. Nevertheless, the date the Crime Laboratory destroyed the blood sample does not appear in the record, though it is highly germane to this analysis. In ***Harness***, for instance, it was clear that Harness's blood sample was destroyed one week after his motion to compel was filed and served on the district attorney and *three months* after his motion for discovery "notified the district attorney . . . that he desired a blood sample for independent testing." ***Harness***, 58 So. 3d at 7, 10 (Kitchens, J., dissenting). My reversal of this case would depend on a determination by the trial court of the date on which Whitaker's blood sample was destroyed.

is unclear from the record whether Whitaker and/or defense counsel were aware of this policy. In ***Harness***, the laboratory report bore notice that "[a]ll samples submitted for toxicological examination will be routinely disposed of six months *after analyses are completed*." ***Id.*** at 7 (emphasis added). Here, the laboratory report did not contain such a notice. The record reflects that the State's examination of the sample was completed on December 19, 2011, *five months* before Whitaker filed his Motion for Discovery, in May 2012. Thus, the district attorney appears to have been on notice for at least a full month that destruction of the sample was imminent when Whitaker notified him of his intention independently to test the blood sample.[4]

¶33. Unintentional or otherwise, the failure on the part of the district attorney to ensure that the Crime Laboratory maintained Whitaker's blood sample for independent testing does not comport with our requirement that prosecuting attorneys function as "ministers of justice." During the final days before the Crime Laboratory was scheduled to destroy the blood sample, the maintenance of the sample for the purpose of independent testing by Whitaker, accused of driving under the influence of intoxicating liquor, had the potential of making the difference between liberty and a lengthy incarceration. This Court ought to require more of its "ministers of justice." Adversarial advocacy for the State, though legitimate, should travel hand-in-hand with fair play in such circumstances as these, where the rights of the accused must be guarded by all concerned. But in the absence of a potentially exculpatory,

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[4] The Crime Laboratory may have broken with its own policy of maintaining samples for at least six months.

independent test of his blood, Whitaker was faced at trial with the State's analysis, and only that, of a sample of dubious efficacy.[5]

¶34. The majority highlights that Whitaker's "blood was not taken pursuant to the Implied Consent Act." I agree that Whitaker's blood was not taken pursuant to the procedures prescribed in Mississippi Code Section 63-11-7, since the investigating officer chose to obtain a search warrant. But the affidavits for search warrant, States' Exhibits 8 and 9, sworn by the peace officer seeking the blood sample and signed by a Warren County Justice Court judge, cited "63-11-30" as the statutory provision pursuant to which Whitaker was being investigated. The State indicted and prosecuted Whitaker under Mississippi Code Sections 63-11-30(1) and 63-11-30(5), and he was convicted under those sections. It cannot, therefore, be said that Whitaker's blood was not taken pursuant to the Implied Consent Act, or, at the very least, with that body of law in mind. The document utilized by the investigating officer to present to the magistrate a showing of probable cause, the means by which Whitaker's blood ultimately was obtained, explicitly referred to the very sections of the Implied Consent Act of which the officer believed Whitaker to be in violation.

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[5] Indeed, the exigency of the situation was exacerbated by the fact that the blood sample, for six weeks between October 21, 2011, and December 7, 2011, was retained in the police evidence locker until it was transported to the Crime Laboratory for analysis. The State's expert in forensic toxicology testified that "there is a slight possibility" that failure to refrigerate for such a period of time could degrade the blood sample if it was not "stored in a manner or drawn and stored in the manner recommended by the kit [used by the nurse to take and preserve the blood sample]." The anticoagulant and preservatives contained in the kit are, according to the expert, designed to prevent the blood from breaking down; but if the blood does break down, "[t]here is a possibility of bacteria-produced ethanol within a container, within a sealed tube, under the right circumstances, such as heat and other factors." An independent analysis of Whitaker's blood sample might, had it been preserved, have demonstrated a problem with the State's maintenance of the blood sample. With its destruction, any possibility of exculpation on the basis of the sample forever was lost.

¶35. Deprivation of liberty without full due process of law mandates reversal. I would remand, first, for a determination of precisely when Whitaker's blood sample was destroyed by the Crime Laboratory. If the trial court were to determine that the sample was destroyed *after* Whitaker had filed his Motion for Discovery in May 2012, Whitaker would be entitled to a new trial. At that new trial, if the State's blood analysis were deemed admissible by the trial court, I would require that the jury be given the negative inference instruction I recommended in ***Harness***:

> The Court instructs the jury that if you find from the evidence that the State has failed to preserve any physical evidence whose contents or quality are in question in this case, and which the defendant could have had tested or analyzed by a qualified expert of his choosing, but for the State's having failed to cause that evidence to be preserved for independent, expert testing or analysis by the defense, then you may infer that such testing or analysis would have been favorable to the defendant and unfavorable to the State. However, if you choose to make the negative inference against the State, this would not necessarily result in the defendant's acquittal. If other evidence on this issue has been presented to you which either establishes the fact or resolves the issue to which the missing evidence is relevant, then you must weigh that evidence along with all other evidence. If, after considering all of the evidence, including the negative inference, you unanimously believe that the defendant has been proved guilty, beyond a reasonable doubt, then your verdict shall be, "We, the jury, find the defendant guilty."

Harness, 58 So. 3d at 12 (Kitchens, J., dissenting).

¶36. For these reasons, I respectfully dissent.

DICKINSON, P.J., AND KING, J., JOIN THIS OPINION.