IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2013-CA-00081-COA

KENNETH M. CROOK **Appellant**

vs.

CITY OF MADISON, MISSISSIPPI **Appellee**

BRIEF OF APPELLEE, THE CITY OF MADISON, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Circuit Judge may evaluate possible disqualification or recusal.

Honorable John Emfinger
Circuit Court Judge

Honorable Edwin Hannan
County Court Judge

Steve C. Thornton, Esq.
Counsel for Appellant

Kenneth M. Crook
Appellant

John Hedglin, Esq.
Assistant City Prosecutor/Counsel for the Appellee

Angie Gelston
Former Code Enforcement Officer for the City of Madison/Affiant

Bill Foshee
Building Official for the City of Madison/Affiant

John Hedglin, City Attorney/Assistant City Prosecutor

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STATEMENT OF THE CASE

I. Procedural Status

Kenneth M. Crook ("Crook" or "Defendant") was charged with two counts of violation of the City of Madison's Rental Inspection and Property Licensing Act ("Rental Ordinance" or "RIPLA").

The first count alleged that on March 11, 2009, the defendant Crook was renting out the premises located at 127 Cypress Drive in the City of Madison without having obtained the license required under the rental ordinance.

The second count alleged that on July 1, 2010, the defendant Crook was renting out the premises located at 127 Cypress Drive in the City of Madison without having obtained the license required under the rental ordinance.

Both warrants were served on Mr. Crook on October 6, 2010.

Trial was held in Municipal Court of the City of Madison on January 13, 2011, where the defendant Crook was convicted on both counts.

Crook appealed his convictions to the County Court of Madison County, wherein, after a bench trial before the County Court Judge, he was again convicted on both counts and ordered to pay a fine of three hundred dollars on each count.

Crook appealed his convictions to the Circuit Court, which affirmed the County Court. Crook has now appealed his convictions to this Court.

II. Statement of the Facts

On July 15, 2008, the City of Madison adopted a rental ordinance, the stated purpose of which was "to preserve and promote the public health, safety and general welfare of the City's residents and of the public generally, and to assure the proper maintenance of the City's residential rental housing stock." (Page 2 of Exhibit S-2).

The ordinance was adopted pursuant to the statutory authority granted in Miss. Code Section 21-17-5 of the City to adopt ordinances with respect to the care, management, and control of its municipal affairs, property and finances, and , more specifically, Mississippi Code Section 21-19-25 which authorizes the City to adopt codes by ordinance dealing with the general health, safety, or welfare, or a combination of the same.

The rental ordinance makes it unlawful for any person to own, operate, manage, or maintain a Single-Household or Multiple-Household Dwelling located in the City, where such Dwelling contains one or more renal units, without a current and valid Rental License having been issued for such Dwelling. Any Person owning, operating, managing, or maintaining one or more than one such Dwelling shall obtain a Rental License for each separate location. (Page 5 of Exhibit S-2).

The ordinance requires the owner of such rental units to post and maintain in effect a bond, collateral, or letter of credit as surety with the application for any future correction order issued under the rental ordinance. The amount of the surety required is $10,000 per unit. (Page 5 of Exhibit S-2). An administrative appeal procedure is established if the landlord wishes to contest any orders. (Page 11 of Exhibit S-2).

The ordinance contains inspection provisions for rental units (Page 7 of Exhibit S-2), but also contains the following provisions:

"**Section 8. Notice and Orders**

a. Notice of Inspection. The Building Official shall provide reasonable advance notice to the Owner as to the date and time of inspection....the Owner shall provide a copy of such notice to each affected tenant.

Section 7. Inspection and Certification

d. Right of Entry. For the purpose of making the inspections and repairs required and authorized by the provisions of RIPLA

iii. Should a **Tenant** or Owner refuse entry, the Building Official shall be authorized by virtue of the terms of the Rental License to secure a judicial warrant authorizing entry..."

(Page 8 of Exhibit S-2).

A slightly amended version of the ordinance was adopted on May 18, 2010, and was introduced as Exhibit S-3, but the amendments do not alter the provisions of the ordinance that are the subject of this appeal.

The property which is the subject of the charges was conveyed to the defendant Crook and his wife on December 23, 2003. (Exhibit S-3).

At trial, with respect to the 2009 violation, Arthur "Duke" Swyers, testified that he resided at 127 Cypress Drive in Madison from 2009, and specifically that he resided there on March 11, 2009 (T.91).

Mr. Swyers testified unequivocally that the nature of his occupancy was "rental" and that he was renting the property from the defendant Crook. (T.91)

During cross-examination, Mr. Swyers stated that he and Crook had conversations about some sort of lease-to-own arrangement on the property (T.91), but that he never agreed to purchase the house. (T.93).

Mr. Swyers specifically stated that he never signed any purchase agreement, he

never signed a contract for deed, and that he never verbally agreed to purchase the property. (T.95-96). He characterized the discussions as "investigating" the possibility of a purchase. (T.96).

Mr. Swyers stated that he never paid any sort of down payment, and that he was just making monthly payments during his occupancy of the house. (T.96).

With respect to the 2010 violation, Tammy Thompson testified that she resided at 127 Cypress Drive from March through September of 2010. (T.98).

She stated unequivocally that she was "renting" the house. (T.98).

She testified that she signed a document styled "Option Contract for Sale and Purchase with Occupancy" on March 13, 2010, and that document was introduced into evidence as Exhibit S-5. (T.99).

Ms. Thompson testified that she told the defendant Crook that she had no intention of purchasing the property and she just needed to rent a house, and that this was the document he had her sign. (T.100).

Ms. Thompson testified that the defendant Crook has asked her if he and his wife could have dinner at the house "so that if the City asked, that he could say he was there. He also asked if could sleep on the sofa sometime so that he could say he was living there." (T.101). She refused the request.

On cross-examination, Ms. Thompson was asked about an application for water service she had filed with the City that stated the property was not a rental property. (T.104). but she stated that she had only done so because she was directed to by the defendant Crook (T.106).

On cross-examination, Ms. Thompson testified that she had been called by the

City, but she had not returned the calls until she moved out of the house "and that my kids were safe." (T.105). On redirect, she clarified her remarks by explaining that she wasn't concerned about anyone from the City doing anything to her children, she was concerned because the defendant Crook "had told me about all his guns and ammunition he has and different things . . . ."(T.107).

Also on redirect examination, Ms. Thompson testified that the defendant Crook had told her that the so-called option was "basically a rental agreement" when he provided the document to her. (T.107).

Bill Foshee testified that he was the director of building and permits and code enforcement for the City of Madison and was the city official responsible for administration of the rental ordinance. He testified that he had held that position since adoption of the ordinance in 2008 and that his office maintained all records pertaining to administration of the ordinance, and that the defendant Crook had never held a rental license for the property owned by Crook located at 127 Cypress Drive. (T.121-122).

Madison Building Official Bill Foshee testified that the defendant Crook had produced a hand-written document to his office dated March 26, 2010 (introduced as Exhibit S-10) that stated that he, Crook, would be occupying the home at 127 Cypress and requesting refund of an application fee he had previously made, but for which he had not finished the process. (The date of this hand-written document is 13 days after the defendant Crook had executed the so-called option agreement with Tammy Thompson, granting her exclusive occupancy of the property. Later, the defendant Crook testified that he saw no conflict between the two documents. T.159).

Mr. Foshee also identified a letter from Mr. Crook dated June 1, 2010, in which

the defendant Crook stated that his home address was 127 Cypress Drive, despite the fact that the uncontested testimony was that Ms. Thompson was living there at that time, and that Mr. Crook was not residing there with her. That letter was introduced as Exhibit S-12. (T.124-125). Mr. Crook later testified that he considered 127 Cypress to be his home at that time despite the fact that he was not sleeping at that address or living there or occupying the property. In fact he testified that the property at 127 Cypress was his home even during the period when he had granted Ms. Thompson exclusive occupancy of the property. (T.160).

Although not presented as witness as a trial on the merits, the Court should also be aware of the testimony offered by Charles Dennis, Ph.D., in support of one of the defendant Crook's motions to dismiss. Dr. Dennis, a retired college instructor in corporate finance and investment finance, testified that the rental ordinance would have the effect of either lowering the profit of the landlord or increasing the rent paid by the renter. (T.69). He stated that he could not say whether the ordinance would decrease the landlord's profits or increase the rental rates, because that would be controlled by the market. (T.70).

On cross-examination, Dr. Dennis admitted that he had not investigated the cost of a surety bond or a letter of credit or a property bond. (T.165). He specifically admitted that he did not know how much of an effect the surety requirement would have. (T.166). He admitted that a landlord having to comply with an electrical code or a plumbing code or a building code would also have some effect, but that was just a cost of doing business. (T.166). Dr. Dennis acknowledged that the ordinance did not set a maximum or a minimum rent or establish any sort of formula to determine rental rates. He also

acknowledged that landlord did not need city approval to set his rental rates or report such rates to the City. (T.196). When asked if "this [surety] requirement will even definitely have an effect on rent – rental rates," his reply was, "I think – I think that it is true that it is possible that is will not." (T.167). He went on to explain that it was the market that would determine rental rates and that there are "innumerable factors which affect the market. (T.169).

SUMMARY OF ARGUMENT

Crook's principal argument is that the City's rental ordinance (RIPLA) is invalid because of provisions pertaining to inspection of the premises to be leased. Crook relies on cases that hold that an absolute right to administrative inspection constitutes a violation of the Fourth Amendment.

However, Crook ignores the great body of law that holds that such an ordinance will not be invalidated if there is a provision for adequate notice of such inspection, and a provision for obtaining a judicial search warrant if there is an objection to the search. The City's ordinance contains those exact safeguards.

Crook also argues that the City has no right to enact the ordinance because there is no statutory basis for the enactment and because of the surety provision somehow constitute a regulation on the amount of rent that can be charged.

The City has an express right to adopt any ordinance dealing with the general public health, safety or welfare pursuant to Miss. Code Section 21-19-25.

The requirement for a surety to ensure compliance does not constitute a "regulation" of rental rates under the law, and any possible effect on rental rates (which

even the appellant's own expert would not state will occur) is no more a regulation of rates than the cost of compliance with building codes, fire codes, electrical codes, gas codes or any other safety or building code that may have some incidental cost.

The appellant's argument that the affidavits in support of the arrest warrants are deficient are not supported by case law. MRCCCP 7.06 governs the content of such affidavits, and it has clearly been complied with.

The evidence clearly supports the trial court's finding of fact.

ARGUMENT

I. The inspection provision does not invalidate the ordinance, since it specifically provides for notice of inspection and the requirement of obtaining a judicial warrant if either the tenant or the landlord objects to the inspection.

Two basic principles govern this issue:

(A) RIPLA is not facially invalid under the Fourth Amendment for requiring the owner of property to consent to future inspections when applying for a license to rent, where the ordinance contains express provisions for notice to the owner and the tenant of any such future request to inspect the rental property and upon failure of the owner or tenant to consent to such inspection, provides that a judicial search warrant must be obtained by the City;

(B) To the extent that appellant argues an "as applied" constitutional challenge , then such as applied attack is premature and void on the grounds of lack of ripeness and standing, and this Court lacks jurisdiction to hear the claim.

There are no facts in the record relating to the application of the inspection provisions of

the Act to the specific facts involving the criminal charges or violation of the Act, the defendant's actions or the City's conduct with respect to defendant. RIPLA requires that every owner of rental property (the Act does not apply to owner occupied property) obtain a rental license (§ 5) for each separate rental property owned and post a surety bond for repairs in the sum of $10,000 for each rental property. Issuance of the rental license requires that a Certificate of Compliance , following an inspection of the property, be obtained and maintained, to assure compliance with RIPLA and all other city codes (housing, building, environmental, zoning and subdivision), and all state and federal laws and regulations. Appellant Crook had applied for a Rental License and Certificate of Compliance but failed to post a surety bond for the rental premises, which at all times he was renting to a tenant. No Rental License or Certificate of Compliance was ever issued to Crook and no inspection of the property was ever conducted. Thus Crook never signed the license containing any involuntary consent to allow inspection of the building. The rental official requested on several occasions that defendant authorize an inspection of the property, but defendant refused to grant consent and the City never entered the property. Defendant is being prosecuted solely for renting property without obtaining a Rental License under RIPLA and not for any code violations discovered as a result of an illegal search of the rental premises alleged to be in violation of the Fourth Amendment.

Crook does not challenge the Act under substantive due process as being arbitrary and capricious for failing to advance substantial and important police power and public nuisance purposes, nor could he. Indeed the U.S. Supreme Court decision in *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967), upon which Defendant principally

relies, held that there is strong validity to the substantive provisions of rental housing acts. The Court acknowledged the strong governmental interest in inspecting for housing code violations and established the standard for obtaining administrative search warrants to inspect for such violations. *Id.* at 538-40, 87 S.Ct. at 1736. The Court went on to state:

> "The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. *The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant.*" (emphasis supplied). *Camara* at 533, 87 S.Ct. at 1733.

See also, *Tobin v. City of Peoria,* 939 F. Supp. 628 (N.D. Ill. 1996) (strong governmental interest for strict housing code enforcement). Indeed because of the significant state interest in protecting tenants and preventing urban blight through the deterioration of housing, the Court in *Butcher v. City of Detroit*, 347 N.W. 2d 702, 707-708 (Mich. App. 1984), held that inspection of housing advanced a significant state interest.

In examining the Ordinance, the Preamble sets forth the critical findings authorizing the exercise of the significant health and safety police and public nuisance powers necessary to address the:

> "...decline in health, safety and quality of life due to a lack of inspection and preventive and ongoing maintenance for an increasing number of *rental* properties owned by absentee landlords" (Emphasis supplied).

The Purposes provision of the Ordinance establishes the critical finding of the legislative body (Board of Aldermen) to the ongoing need to assure the proper maintenance of the City's

residential housing stock (§ 2) and in the Preamble the critical findings:

> "WHEREAS, the City has received numerous complaints from residents regarding unabated nuisances and risks to health, welfare and safety caused by poorly maintained rental properties ..., resulting in sanitation problems, traffic safety issues, environmental and health concerns, and (housing) code violations."

Similarly, see *Butcher v. City of Detroit*, 347 N.W. 2d 702, 707-708. Appellant thus focuses his appeal on his Fourth Amendment argument that the Ordinance's licensing procedures for rental buildings which requires owners to consent to future inspections of the property without any provision for obtaining judicial search warrants prior to inspecting the premises, renders RIPLA facially invalid.

The Act, However, Does Provide for Judicial Search Warrants. In setting out his argument, Appellant attempts to minimize the effect of the critical provisions of the Ordinance, , relating to the mandatory provisions for obtaining a judicial search warrant in order for the City to inspect any premises. Such provisions will be shown to be decisive in establishing the constitutionality of the Act. The omitted sections of Section 7(d)(3) and Section 8 state:

> **Section 8. Notice and Orders**
>
> **a. Notice of Inspection.** The Building Official shall provide reasonable advance notice to the Owner as to the date and time of inspection....the Owner shall provide a copy of such notice to each affected tenant.
>
> **Section 7. Inspection and Certification**
>
> **d. Right of Entry.** For the purpose of making the inspections and repairs required and authorized by the provisions of RIPLA
>
> iii. Should a **Tenant or Owner** refuse entry, the Building Official shall be authorized by virtue of the terms of the Rental License to secure a judicial warrant authorizing entry...

Facial Constitutional Challenge

Appellant relies heavily upon the U.S. Supreme Court decision in *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967), as well as other cases following *Camara*, as support for the proposition that a housing code rental ordinance **facially** violates the Fourth Amendment search and seizure merely because it requires an owner of the rental property to consent to future inspections at the time of a future lease or sale of the property. All of these cases, including *Camara*, will be shown to be distinguishable.

As stated in *U.S. v. Salerno*, 487 U.S. 739, 745 (1987): "A facial challenge to a legislative act is, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The requirement of recourse to a judicial warrant when an owner or tenant objects to an inspection under RIPLA negates any possibility that RIPLA violates the Fourth Amendment.

In *Camera,* 387 U.S. 523 (1967), the U.S. Supreme Court dealt with a housing code inspection ordinance that authorized "area wide inspections," not occurring at the point of sale or lease as in the pending case. The ordinance provided for unlimited inspections, without any requirement to obtain an administrative or judicial search warrant, totally dissimilar to RIPLA's requirement that despite the owner consent to future inspections in the Rental License, a judicial warrant had to be obtained if the owner or tenant objected to the search. The San Francisco ordinance provided:

> "Sec. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Camara held at 387 U.S. 523, 534:

> "In summary, we hold that *administrative searches* of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted *without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual."* (Emphasis supplied).

Appellant fails to cite to all of the federal court of appeal and district court decisions that have properly interpreted *Camara* as limited to housing code ordinances authorizing searches **without any provision in the ordinance itself for obtaining an administrative or judicial warrant, upon objection from the owner or tenant.**

The recent federal Court of Appeals case of *Mann v. Calumet City, Ill.*, 588 F. 3d 949 (7th Cir. 2009) in a situation almost identical to our current case, held that Housing Code Point of Sale or Lease ordinances requiring that owners consent to inspections as a condition of obtaining a license, is not facially unconstitutional under the Fourth Amendment, **if the ordinance provides that the City is required to obtain a judicial search warrant prior to any inspection if the owner fails to consent after receiving notice of the proposed inspection.** The *Mann* Court held:

> "Point of sale ordinances such as this one are common **and have withstood constitutional attack in all cases that we know of in which the ordinance avoided invalidation under the Fourth Amendment *by requiring that the city's inspectors obtain a warrant to inspect a house over the owner's objection*.** *Joy Management Co. v. City of Detroit,* 183 Mich.App. 334, 455 N.W.2d 55, 57-58 (1990); *Butcher v. City of Detroit,* 131 Mich.App. 698, 347 N.W.2d 702, 707-08 (1984); *Hometown Co-Operative Apartments v. City of Hometown,* 515 F.Supp. 502, 504 (N.D.Ill.1981); *Currier v. City of Pasadena,* 48 Cal.App.3d 810, 121 Cal.Rptr. 913, 917-18 (1975); cf. *Greater New Haven Property Owners Ass'n v. City of New Haven,* 288 Conn. 181, 951 A.2d 551, 562-66 (2008); *Tobin v. City of Peoria,* 939 F.Supp. 628, 633 (C.D.Ill.1996); *Dome Realty, Inc. v. City of Paterson,* 83 N.J. 212, 416 A.2d 334, 349-50 (1980). That means all cases other

than *Wilson v. City of Cincinnati,* 46 Ohio St.2d 138, 346 N.E.2d 666, 671 (1976). **Calumet City's ordinance contains such a requirement.** Id. at 951-952." (Emphasis supplied).

In *Tobin v. City of Peoria,* 939 F. Supp. 628 (C.D. Ill. 1996), favorably approved by *Mann v. Calumet, supra,* the Court rejected petitioner's argument (identical to defendant's argument in this case), that the ordinance, by including a provision that the owner consent to future inspections, was facially unconstitutional as coercing an involuntary consent through the imposition of a penalty, citing *Sokolov v. Village of Freeport,* 420 N.E. 2d 55, 58 (N.Y. 1988) (one of the state cases cited by defendant). The *Tobin* Court rejected the argument, after reviewing Camera and all other cases, stating:

> "This Court finds that the plain language of the Inspection Ordinance can be read as incorporating a warrant requirement into the inspection procedure, thereby successfully defeating a claim that it is unconstitutional on its face." Id at 633.

Indeed the very arguments raised by Appellant in this case were rejected by the federal district court in *Hometown Co-Op Apartments v. City of Hometown,* 515 F. 502, 503 (N.D. Ill. 1981):

> "This is not the first time these parties have been before the Court with respect to the constitutionality of a Hometown ordinance that authorizes point of sale inspections of residential property. Last year, this Court held that the predecessor of Hometown's present ordinance was "unconstitutional under the fourth amendment insofar as it fail(ed) to provide for a warrant as a prerequisite for the point of sale inspection."*Hometown Cooperative Apartments v. City of Hometown,* 495 F.Supp. 55, 60 (N.D.Ill.1980). Following our ruling, the City of Hometown amended its ordinance by specifically providing that: (e) (w)here no consent has been given to enter or inspect any property, no entry or inspection shall be made **without the procurement of a warrant from the Circuit Court of Cook County."**

After extensively reviewing *Camara, Currier v. City of Pasadena,* 48 Cal.App.3d 810 (1978) and *Wilson v. City of Cincinnati,* 346 N.E.2d 666 (1976), the Court held:

> "By providing for a warrant procedure in cases in which a new owner or lessee of property refuses to consent to an inspection by the building department, the City of Hometown has remedied the fatal flaw in its earlier point of sale inspection ordinance. The property owner is no longer forced to choose between consenting to a warrantless search or subjecting himself or herself to substantial fines for failure to procure a certificate of inspection. If the property owner or tenant refuses to consent to the inspection, the city must procure a warrant in order to gain access to the property. To this extent, the Hometown ordinance is now in accord with the fourth amendment proscription of unreasonable searches and seizures." *Hometown Co-Op Apartments,* 515 F.Supp at 504.

See also, *Berwick Area Landlord Association v. Borough of Berwick,* 2007 WL 2065247 (U.S. D.C.W. MD) rejecting an allegation of facial unconstitutionality of a rental licensing ordinance where the City has provision for obtaining a judicial warrant. Appellant's admission that he has no license to rent the property at issue constitutes a valid basis for the City to seek a judicial warrant to inspect the property. *Lewis v. Washington County Health Department*, 868 N.E.2d 1216 (Ind. App. 2007); *Frech v. City of Columbia,* 693 S.W.2d 813 (Mo. En Banc, 1985)(upholding rental unit conservation law because it authorizes a municipal judge to issue a judicial warrant for inspection in connection with the City's licensing procedure concerning rental units).

Appellant cites to *Dearmore v. City of Garland, Texas,* 400 F.Supp.2d 894 (N.D. Tex. 2005). However, defendant failed to examine the fifth circuit Court of Appeals' decision affirming the district court. The language of the fifth circuit opinion, particularly controlling with respect to cases arising in Mississippi, at 519 F.3d 517, 520 (5th Cir. 2008) is instructive:

> "Following the issuance of these (district court) orders on November 3, 2005, counsel for the City informed counsel for Dearmore that he did not need to post the bond necessary to enforce the preliminary injunction because the City planned to amend the Ordinance to address the district court's order. On November 15, 2005, the Garland City Council amended the Ordinance, removing the provisions related to a nonresident owner's consent to the inspection of single-family rental properties and **clarifying the circumstances under which the City may seek a**

> **warrant to inspect such properties when consent has been refused or could not be obtained**. The City notified the district court of this amendment and filed a motion to dismiss Dearmore's action as moot, which Dearmore did not oppose. On November 30, 2005, the district court granted the City's motion and entered final judgment dismissing the case as moot and with prejudice."

Thus the very point established by the fifth circuit is exactly contrary to defendant's allegations and completely supports the seventh circuit *Mann* decision. In *Dearmore*, the district court issued a preliminary injunction against enforcement of the ordinance because there was no provision for seeking a judicial warrant to inspect the property, upon a refusal of the owner of an unoccupied rental property to consent to the inspection, and the court held the initial ordinance was facially unconstitutionally. The district court in *Dearmore* was very clear that the ordinance would have been upheld if the ordinance had given "the landlord the opportunity to refuse to consent if the property is unoccupied and include a warrant procedure to be followed in the event the landlord refuses." (400 F.Supp. at 904). As noted above, the Madison ordinance contains **both these safeguards**. Once the ordinance in *Dearmore* was amended to include the judicial warrant procedure, the suit became moot and the parties stipulated that the amended ordinance was constitutional, which was affirmed in the final judgment.

Two other two cases cited were federal district court cases in Illinois (*Makula v. Village of Schiller Park,* 1995 WL 755305 (N.D. Ill) and *Brower v. Village of Bolingbrook,* 735 F.Supp. 768 (N.D. Ill 1990) and are superseded by the seventh circuit decision in *Mann.* In addition, *Brower v. Village of Willowbrook* is miscited. In that case the Village ordinance contained a provision compelling the owner of rental property to submit to **warrantless administrative searches**. There was no provision in the ordinance for obtaining a judicial search warrant.

With regard to the state cases this court must recognize the primacy of federal law over state law with regard to federal constitutional issues.

Appellant has not argued a violation of the search and seizure provisions of the Mississippi constitution that would recognize greater protections than contained in the fourth amendment.

Currier v. City of Pasadena, 48 Cal.App.3d 810 (1975), particularly does not stand for the proposition that defendant sets forth in the case. In *Currier*, the City required the landlord to consent to future inspections **but did not have any provision for obtaining a judicial warrant for an inspection** once the owner or tenant objects to the inspection. The Court ruled the ordinance facially unconstitutional only because it was in violation of California Code of Civil Procedure § 1822.52 that requires that a housing code inspection be preceded by obtaining a judicial search warrant. In doing so the Court explicitly stated:

> "However we conclude that if, but only if, the ordinance is read and applied in conjunction with the statutory scheme (§§ 1822.50 – 1822.57) can it be constitutionally enforced. **c.f.. *Tellis v. Superior Court*, 5 Cal.App.3d 455 (1970) where a similar ordinance was sustained on the same basis as that we adopt here, namely that the ordinance required the use of a warrant under Code of Civil procedure sections 1822.50-1822.57"**

It is for that reason that *Mann* cited *Currier* as a supporting case, Id. 588 F.3d at 952.

Other state cases cited by Appellant are not controlling for the same reason – the City ordinance had no provision for issuance of judicial warrants. In *Sokolov v. Village of Freeport*, 420 N.E.2d 55, 58 (N.Y. 1981), there was no judicial warrant procedure and the Court of Appeals relied upon *Currier* for its holding:

> "We note also that the result reached in the present situation finds support in the case law of other States interpreting similar ordinances (see *Currier v. City of*

Pasadena, 48 Cal.App.3d 810, 121 Cal. Rptr. 913; see, also, *Wilson v. City of Cincinnati*, 46 Ohio St.2d 138, 346 N.E.2d 666). An ordinance which compels consent to a **warrantless search** may not be upheld except in certain carefully limited circumstances."

Similarly, neither *Wilson v. City of Cincinnati*, 346 N.E.2d 666 (Ohio 1976), nor *State v. Finnell*, 685 N.E.2d 1267 (Ohio, 1996), dealt with ordinances that had provisions for obtaining judicial warrants for inspection of property in the event that the seller refused to grant consent for the inspection. The courts simply followed *Camara* in finding that an involuntary consent included in an ordinance for warrantless inspections would not be constitutional absent a judicial warrant procedure.

Since the Appellant cannot show in his facial challenge to RIPLA, that the City would not under any circumstances seek a judicial warrant before inspecting rental premises, the facial claim must fail. As the federal district court held in *Berwick Area Landlord Association v. Borough of Berwick*, 2007 WL 2065247 (M.D. Pa. 2007) (not reported in the federal supplement):

"We reiterate that plaintiffs are launching **a facial challenge** of the Amended Ordinance. Therefore, plaintiffs must establish that no set of circumstances exist under which the statute could be valid. *U.S.* v. *Salerno,* 481 U.S. 739, 745 (1987). One interpretation of the Amended Ordinance is that both the owner and the tenant can be cited for refusing to allow a warrantless inspection. Indeed, the Amended Ordinance states explicitly that it is a violation for the owner to refuse to allow an inspection and also states that a tenant "shall" permit an inspection. §§ 141.4.15G; 141.5.9. Yet, another interpretation would be that if an owner or tenant refuses to allow an inspection, the Code Enforcement Officer's recourse would be through securing a search warrant at the reduced level of probable cause discussed in *Camara.* In support of this interpretation, we note that the Amended Ordinance permits the Code Enforcement Officer to seek a warrant for the purpose of compelling an inspection. § 141.4.15H. Furthermore, defendant argues this is the proper interpretation of the Amended Ordinance. (Rec. Doc. No. 19, at 25.) This is relevant because it is the defendant who enacted the Amended Ordinance. Because the Amended Ordinance has yet to be enforced, it is unclear whether Berwick will indeed attempt to issue citations to owners and tenants who refuse inspection or whether Berwick will resort to obtaining a search warrant.

Therefore, we find that plaintiff cannot establish that no set of circumstances exists under which the statute could be valid and plaintiffs' facial attack must fail."

An "As Applied" Constitutional Challenge Fails For Lack Of Ripeness.

In *Tobin v. City of Peoria*, 939 F. Supp. 628 (Central Dist. Ill., 1996), approved by *Mann*, the Court held that, where a rental license ordinance requires the City to seek a judicial warrant to allow inspection where the City is denied consent to inspect by the owner or tenant of property, then any as applied challenge to the constitutionality of the ordinance is premature and unripe until the City actually applies for the issuance of a judicial warrant to inspect:

> "Thus, in order to present a substantial controversy which is fit for judicial decision, Plaintiffs must demonstrate that the possibility that the Inspection Ordinance may be unconstitutionally applied is not merely contingent. Plaintiffs must show that there is a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895, *judgment vacated,* 442 U.S. 936, 99 S.Ct. 2872, 61 L.Ed.2d 305 (1979). Plaintiffs do not have to await consummation of the injury, but the injury must, at the very least, be impending. *Id.* at 296-98, 99 S.Ct. at 2308 (quoting *Pennsylvania v. State of West Virginia,* 262 U.S. 553, 43 S.Ct. 658, 663, 67 L.Ed. 1117, *aff'd,* 263 U.S. 350, 44 S.Ct. 123, 67 L.Ed. 1144 (1923))."

In *Hometown Co-Operative Apartments v. City of Hometown,* 515 F .Supp. 502 (N.D.Ill.1981), the Northern District of Illinois dealt with an ordinance similar to the one in the present case. Like the City's Inspection Ordinance, the *Hometown* ordinance provided a warrant procedure for situations in which a landlord refused to consent to an inspection but was ambiguous as to whether the municipality was *required* to obtain a warrant in the event of a refusal to consent to inspection. *Id.* at 503.

The plaintiffs in *Hometown* also sought a declaratory judgment that the ordinance was unconstitutional. The *Hometown* court held that the issue was not ripe because there was no

"real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Id.* at 504. (Internal quotation marks omitted.) In other words, the matter did not present a justiciable actual controversy within the context of the Declaratory Judgment Act because the alleged injury was contingent and abstract rather than impending.

Lack of expectation of privacy

In *City of Vincennes v. Emmons,* 841 N.E.2d 155 (Ind. 2006), the Indiana Supreme Court recently summarized all of the federal and state cases and determined that a landlord of residential property has no expectation of privacy needed to have standing to bring a facial or an as applied challenge to a rental licensing ordinance:

> "In order for the landlords to establish a Fourth Amendment violation they must show that the governmental action unreasonably invades their legitimate privacy interest. *See Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). The landlords' claim fails this threshold test. A legitimate expectation of privacy involves two components: "1) did the person exhibit an actual expectation of privacy; and 2) does society recognize that expectation as reasonable?" *Moran v. State,* 644 N.E.2d 536, 540 (Ind.1994) (citing *Katz,* 389 U.S. at 361, 88 S.Ct. 507). Fourth Amendment rights are personal and may not be vicariously asserted. *Rakas v. Illinois,* 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Accordingly, the tenants' well established right to be free of warrantless inspection does not confer any rights on the landlords.
>
> Both *Camara* and *See* [*v. City of Seattle*, 387 U.S. 541 (87 S.Ct. 1741, 18 L.Ed.2d 930 (1967)] addressed the Fourth Amendment rights of the occupant of leased property. The rental unit is the tenant's home, and the tenant clearly has an important interest in not having the inspector observe "conditions and events wholly unconnected with building violations, but nevertheless embarrassing" or intrusive to the tenant. 5 *Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment* § 10.1(g) at 34 (West 2004) (quoting Comment, 65 *Colum. L.Rev.* 288, 292 (1965)). The tenant also has a legitimate interest in "not having personal and family activities unnecessarily interrupted." *LaFave, supra,* § 10.1(g) at 34. For these reasons, as *Camara* held, a warrantless search without the tenant's consent is unconstitutional. *See* makes clear that occupants of commercial property also have cognizable Fourth

> Amendment interests: "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." 387 U.S. at 543, 87 S.Ct. 1741. However, the status of residential and commercial tenants for these purposes is not identical. Occupants of commercial property have a lesser expectation of privacy in their property than that of individuals in their homes. See, e.g., *New York v. Burger,* 482 U.S. at 700, 107 S.Ct. 2636 ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."); *Donovan v. Dewey,* 452 U.S. at 598–99, 101 S.Ct. 2534 ("The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home...").
>
> Landlords do not themselves occupy the rental units as either personal residences or as commercial space. Their interests are therefore substantially further down the scale of protected interests than either the residential or commercial tenant, and in most circumstances fall off the scale altogether. First, by leasing the property, the landlord has abandoned any expectation of privacy in the leased space and common areas because the tenant has full access to them. Second, to the extent there are areas in the premises that are not accessible by tenants, the only property ordinarily on the premises belonging to the landlord is the premises itself, which is the subject of legitimate governmental interest." *City of Vincennes, supra,* at 160-161.

Landlords have no right to operate residential rental units in violation of housing code standards. "The expectation that certain facts will not come to the attention of authorities" is not a privacy interest that society considers reasonable. *Illinois v. Caballes,* 543 U.S. 405, 125 S. Ct 834, at 837–38, 125 S.Ct. 834. If the only thing a landlord has to fear from a housing code inspection is discovery of code violations, the landlord has no cognizable privacy interest in keeping violations hidden from authorities."

See *U.S v. Gomez,* 770 F.2d 251, 254 (1st Cir. 1985) holding that privacy is different from ownership of property and that without an "expectation of privacy," no fourth amendment challenge can be made. Citing *U.S. v. Payner,* 447 U.S. 727, 731 (1980) ("A defendant's Fourth

Amendment rights are violated only when the challenged conduct invaded his legitimate expectations of privacy, rather than that of a third party (tenant)."

II. There is a specific statutory basis for adoption of the rental ordinance, and there is an abundance of authority and precedent for the surety requirement.

Appellant alleges that the requirement that an applicant for a rental license under the City's ordinance furnish "bond, collateral or letter of credit" in the amount of ten thousand dollars per rental unit is in conflict with the provisions of Miss. Code Section 21-19-5(2)(h) which states "Unless such actions are specifically authorized by another statute or law of the State of Mississippi, this section shall not authorize the governing authorities of municipalities to ... (h) without prior legislative approval, regulate, directly or indirectly, the amount of rent charged for leasing private residential property in which the municipality does not have a property interest."

Appellant's argument has two inherent flaws: (a) the surety requirement does not amount to "regulation," and (b) there is statutory authority for adoption of the City's ordinance.

(A) The Surety Requirement Does Not Constitute "Regulation"

Appellant argues that the cost of securing one of the surety instruments increases the landlord's cost of doing business and therefore indirectly "regulates" the amount or rent the landlord charges.

Appellant's own expert, Dr. Dennis, testified that such cost would not necessarily affect the rental rates. The expert stated that whether or not the landlord could pass such cost on to the tenant would depend on "whether the market would allow it."

The ordinance does not set a minimum or maximum rental level, nor does the ordinance establish a formula for elements which may or may not be taken into

consideration in establishing rental rates (similar to the process the Public Service Commission utilizes in approving utility rates).

The ordinance does not require a landlord to submit rental rates to the City for approval, or even to report such rates to the City.

At most (and disregarding the testimony of Appellant's own expert), the Appellant argues is that the cost of the surety requirement will "affect" the rental rate.

Neither state nor federal case law supports the Appellant's argument that actions which merely "affect" the rental rate constitute "regulation."

For more than a century, the Mississippi Supreme Court has recognized the distinction between enactments which "affect" activity and those which "regulate" activity. *Stone v. Yazoo and Miss. Valley Railroad Company*, 62 Miss. 607 (Miss.1885)("Congress has supreme, and it may be conceded exclusive, power over commerce among the several States, and any attempt of the State to *regulate* this commerce or to fetter or burden or restrict it in any way is unconstitutional, but it is not everything which may *incidentally or consequentially affect* this commerce which is to be held void." Emphasis added.); *Hood v. BASF Corporation*, 2006 WL 308378 (Miss.2006)(Unpublished)("The United States Supreme Court has consistently held that the Commerce Clause 'does not exclude all state power of regulation' and that 'there is a residuum of power in the state to make laws governing matter of local concern which nevertheless ... *affect* interstate commerce *or even ... regulate* it.' " Emphasis added.).

The United States Supreme Court recognized the distinction between the ability to affect and the power to regulate in the case of *United States v. Lopez* 514 U.S. 549, 558 (1995) (With respect to the authority of Congress to regulate interstate commerce under Article I, Section 8, Clause 3 of the United States Constitution, the Court held, "[O]ur case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause .... We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

Similarly, in the present case, there is no proof that the surety requirement in the City's ordinance "substantially" affects rental rates to the extent that it can be fairly characterized as "regulation."

(B) The City's Statutory Basis to Adopt the Ordinance

Section 21-19-25 expressly authorizes the City to adopt any code dealing with general public health, safety or welfare.

The Preamble to the City's Rental Inspection and Property Licensing Act (the ordinance at issue) specifically sets out that the purpose of the ordinance is to "establish safe standards related to preventive and ongoing property maintenance, and enable the City to effectively license, inventory, inspect, and, if necessary, repair rental properties, in order to protect the overall health, safety, and welfare of the City's residents." The text and substance of the ordinance bears out the stated intent.

The requirement of a surety bond or similar collateral is a common and well documented statutory method to ensure compliance with regulatory obligations. Examples include Section 21-19-35 ($2,000 bond required of transient vendors to require compliance with local ordinances); Section 73-29-13 ($5,000 bond or insurance policy required of polygraph operators); Section 73-4-29 ($10,000 bond required of auctioneer); Section 73-60-13 (professional home inspectors required to carry general liability insurance in amount of not less than $250,000); Section 27-17-21 ($100,000 bond required for manufacturer of alcoholic beverages and $5,000 bond required for retailers to ensure that "he will comply with the rules and regulations prescribed by the State Tax Commission and pay all taxes due); Section 27-65-21 (Contractor's bond to guarantee payment of taxes); Section 27-57-7 (Bond of not less than $1,000 nor more than $250,00 for distributors of lubricating oil, conditioned on duty of applicant to fully comply with all law pertaining to distributors of lubricating oil and pay all excise taxes due the state); Section 27-55-7 (Bond of not less than $1,000 nor more than $250,000 for distributors of gasoline, conditioned on duty of applicant to fully comply with all laws pertaining to

distributors of gasoline and pertaining to the transportation of gasoline and payment of taxes).

III. The affidavits in support of the arrest warrants were sufficient under Mississippi law, and, in any event, a technically deficient affidavit is not a basis for dismissal of criminal charges.

The appellant cites numerous cases dealing with adequacy of affidavits in search warrant situations in support of his contention that the affidavits in the present case are somehow deficient and therefore the cases should be dismissed.

The appellant has two problems with the argument: (a) based on recent appellate court case law, the affidavits are perfectly sufficient, and (b) even assuming there was a technical deficiency, Mississippi case law indicates that such deficiency is not a basis for dismissal of the charges.

As to the sufficiency of the affidavits, the recent case of *Loveless v. City of Booneville*, 972 So.2d 723 (Miss.App.2007), clearly sets forth the standard for misdemeanor affidavits:

> The "Police Justice Affidavit" citing Loveless for "willfully and unlawfully" possessing beer in violation of "an order of the Board of Supervisors of Prentiss County, Mississippi ... against the peace and dignity of the State of Mississippi" does not contain a reference to any Mississippi statute. In addition to not citing a Mississippi statute, the affidavit ***733** charging Loveless with "willfully and unlawfully possess[ing] 750ml of Taaka vodka" does not reference any local ordinance or order that Loveless was charged with violating. Loveless cites *Brown v. State,* 241 Miss. 838, 133 So.2d 529 (1961) to support his argument that these affidavits were deficient for failing to cite section 67–3–13 of the Mississippi Code.[FN12]
>
> In *Brown,* the supreme court held that the affidavit charging the defendant with unlawful possession of homemade beer was insufficient for failing to "allege that the possession was in violation of Chapter 279, Laws of 1958...." *Id.* at 840, 133 So.2d at 530.[FN13] However, the supreme court subsequently held "[i]n *Armstead v. State,* 503 So.2d 281 (Miss.1987) ... that all questions regarding the sufficiency of indictments are determinable by reference to Rule 2.05 [of the Uniform Criminal

> Rules of Circuit Court Practice] which articulated seven elements which are to be included in any indictment." *Nguyen v. State,* 761 So.2d 873, 875(¶ 7) (Miss.2000) (citing *Armstead,* 503 So.2d at 283). Rule 7.06 of the Uniform Circuit and County Court Rules, adopted effective May 1, 1995, contains the same seven elements as former Rule 2.05 and governs indictments and other criminal complaints such as the affidavits at issue in the case sub judice. *See id.* With respect to the specificity with which an indictment must describe the charged crime, Rule 7.06, in parts relevant to the alleged error, provides as follows:
>
> > 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....
>
> We note that the affidavit charging Loveless with unlawful possession of beer and the affidavit charging him with unlawful possession of whiskey both comply with the relevant portion of Rule 7.06 set forth above. Both affidavits plainly and concisely set forth the essential facts underlying the respective charges with sufficient clarity and definiteness such that Loveless was adequately notified of the "nature and cause of the accusation[s]" against him. Accordingly, the failure to reference section 67–3–13 of the Mississippi Code did not render these affidavits defective, and Loveless's argument to the contrary is without merit.

The affidavits in this case fully comply with the standard set forth in *Loveless*, as well as the "relevant portions" of MRCCCP 7.06. Both affidavits state (a) the name of the accused; (b) the date on which the affidavit was sworn to and filed in the court; (c) identification of the complainant; (d) the name of the municipality in which the charge was brought; (e) the date on which the offense was alleged to have occurred; (f) the signature of the complainant; and (g) the words "against the peace and dignity of the State of Mississippi and contrary to the ordinances of said city . . . . " Using the *Loveless* language as a standard, the affidavits in the present case more than met the requirement that the affidavit contain "a plain, concise and definite written statement of the essential facts constituting the offense charge and shall fully notify the

defendant of the nature and cause of the accusation. Formal and technical words are not necessary . . . ."

In the present case, both affidavits clearly and concisely state that the defendant Crook did "own, operate, manage or maintain a rental unit located at 127 Cypress Drive, Madison, MS, without a rental license in violation of the City's Rental Inspection Property and Licensing Act Ordinance, Section 5," and specified the date of the offense, as well as the technical language noted above.

Defendant Crook's allegation that neither affiant had sufficient facts to establish probable cause at the time the affidavits were signed is frivolous.

Angie Gelston, affiant on the first charge, testified that at the time the affidavit was filed she knew that the defendant Crook was the owner of the property, that he had applied for a rental license prior to the date of the alleged offense, that the license had never been issued, and that there were persons other than the Defendant Crook living in the house. These facts clearly established "probable cause."

Bill Foshee, affiant on the second charge, had knowledge of the same facts on the date he signed an affidavit, plus he had information from the person who was a tenant in the house at the time of the offense. Defendant Crook's suggestion that the "Option Contract for Sale and Purchase With Occupancy" somehow negated those factors is completely nonsensical. Any examination of the so-called "Option" reveals that it is merely a subterfuge for a rental agreement, much like Crook's delusion that by asking to eat dinner with Ms. Thompson and to sleep on her couch, he could somehow maintain his residential status at the house.

In any event, even assuming there was a technical deficiency in the affidavits (which there clearly was not), the Mississippi Supreme Court established in the case of *Henry v. State*,

486 So.2d 1209 (Miss.1986), that a technically deficient affidavit is not a basis for dismissal of charges or vacation of a conviction.

In *Henry*, the Supreme Court assumed, for purposes of the opinion that the affidavit in support of the arrest warrant for burglary was deficient and the subsequent arrest was illegal. The Court not only affirmed that conviction, but approved the use of a confession obtained after the illegal arrest based on a deficient affidavit.

IV. The Trial Court's Decision Was Not Against the Weight of the Evidence, Which Indicated that the Defendant Crook Engaged in a Pattern of Deception and Subterfuge in Order to Avoid Compliance with the Ordinance.

The Mississippi Supreme Court has always condemned the practice of "second-guessing" the jury with respect to factual determinations.

The facts in this case overwhelmingly support the factual determination of the trial judge.

Both Swyers and Thompson testified unequivocally that the nature of their occupancy was rental on the dates of the violation, that they had discussed that with the defendant Crook, and that he had indicated to both of them that he understood and agreed with their position.

Moreover, the "Option" that the Defendant Crook relies upon with respect to Ms. Thompson actually *supports* the trial court's determination that this was a rental occupancy. The so-called option does not establish a final purchase price, allows the occupant of the property to live there for a year during which the occupant makes

monthly payments, and if any such payment is missed, the occupant may be evicted. The monthly payments are very comparable to the amounts that Mr. Sweyrs paid during the period of time prior to enactment of the ordinance when all parties agree that the nature of his occupancy was rental. Significantly, the "Option" by its own terms prohibits recording of the document in the county land records; that provision is totally inconsistent with any legitimate conveyance of interest in real property.

The terms of the "Option," combined with the testimony of Ms. Thompson, establishes beyond any possible doubt that the defendant Crook was renting the house and attempting to disguise the landlord-tenant relationship with a deceptively styled rental agreement, much like his attempt to establish "residence" at the house by asking to eat dinner there and occasionally sleep on the couch.

In fact, even if the option had been legitimate, the occupancy of the house, for financial consideration, prior to exercise of the option and sale of the property, was still a rental relationship under any common and logical definition of the term.

Crook's argument with respect to Swyers is even more strained. There was no signed agreement of any type, just a series of self-serving e-mails cajoling Swyers to sign a document. Swyers also adamantly denied that there was anything but a rental relationship.

The trial court was amply justified in accepting the testimony of the City's witnesses and its interpretation of the documents admitted into evidence.

The law pertaining to a defendant's request to overturn a jury verdict based on the weight of the evidence is clear and well established.

In *Herring v. State*, 691 So.2d 948,957 (Mississippi 1957), the Court noted:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Thornhill v. State, 561 So.2d 1025, 1030 (Miss.1989), rehearing denied, 563 So.2d 609 (Miss.1990). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. Benson v. State, 551 So.2d 188, 193 (Miss.1989) (citing McFee v. State, 511 So.2d 130, 133-134 (Miss.1987)). Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. Mitchell v. State, 572 So.2d 865, 867 (Miss.1990).

In *Morgan v. State*, 681 So.2d 82,93 (Miss. 1996), the Court held:

> When this Court reviews the sufficiency of the evidence, we look to all of the evidence before the jurors to determine whether or not a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. Jackson v. State, 614 So.2d 965, 972 (Miss.1993). The evidence which supports the verdict is accepted as true, and the State is given the benefit of all reasonable inferences flowing from that evidence. Id. (citing Hammond v. State, 465 So.2d 1031, 1035 (Miss.1985)). We will not reverse a trial judge's denial of a motion for a new trial unless we are convinced that the verdict is so contrary to the weight of the evidence that, if it is allowed to stand, it would sanction an unconscionable injustice. Groseclose v. State, 440 So.2d 297, 300 (Miss.1983).

In *Gibson v. State*, 660 So.2d 1268,1272 (Miss. 1995), Justice Pittman, in a dissenting opinion, reviewed the applicable standard:

> In Wash v. State, 521 So.2d 890 (Miss.1988), this Court addressed whether the jury verdict of guilty should be overturned because it was against the weight of the evidence. The Court, in emphasizing the

limitations upon its scope of review of a finding of fact made by the jury, said, " 'the jury is the sole judge of the credibility of witnesses, and the jury's decision based on conflicting evidence will not be set aside where there is substantial and believable evidence supporting the verdict.' " Id. at 896 (quoting Billiot v. State, 454 So.2d 445, 463 (Miss.1984)). Put another way, "the reviewing court cannot set aside a verdict unless it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence." Dixon v. State, 519 So.2d 1226, 1229 (Miss.1988); Marr v. State, 248 Miss. 281, 159 So.2d 167 (1963).

In *Pharr v. State*, 465 So.2d 294,301 (Miss. 1984), the Court held:

> Where a defendant has moved for j.n.o.v., the trial court must consider all of the evidence--not just the evidence which supports the state's case--in the light most favorable to the state. May v. State, 460 So.2d 778, 781 (Miss.1984). The state must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Glass v. State, 278 So.2d 384, 386 (Miss.1973). If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand. May v. State, 460 So.2d 778, 781 (Miss.1984).
>
> In other words, once the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty. May v. State, 460 So.2d 778, 781 (Miss.1984); Fairchild v. State, 459 So.2d 793, 798 (Miss.1984); Pearson v. State, 428 So.2d 1361, 1364 (Miss.1983).

In *Holmes v. State*, 660 So.2d 1225,1227 (Miss. 1995) the Court held:

> Holmes asserts the State showed no evidence of violence or threat of injury, therefore the jury's verdict was wrong and against the overwhelming weight of the evidence. In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court accepts as true all evidence which supports the verdict and will reverse only when convinced that reasonable and fair-minded jurors could only find the defendant not guilty. Green v. State, 614 So.2d 926, 932 (Miss.1992).
>
> In this case a single witness, Sims, stated that Holmes snatched over one hundred dollars out of his hand and ran away. Sims said Holmes later offered to repay the money if Sims would drop the charges. The jury clearly believed Sims. Testimony from a single credible witness is sufficient to sustain a conviction. *Williams v. State*, 512 So.2d 666, 670 (Miss.1987).

Where the trial judge sits as the finder of fact in a bench trial, his findings of fact are entitle to the same deference as those of a jury. *Christian v. State*, 859 So.2d 1068, 1072 (Miss.App.2005).

In the case before the Court, the defendant's argument is based on the premise that the appellate court should disregard the trial judge's findings regarding credibility of the witnesses and interpretation of the evidence. As the cases cited above demonstrate, the appellate court should not disturb the factual findings on the part of the trial judge, where, as here, there are facts in evidence which support the verdict.

Clearly, this assignment of error is without merit.

V. Conclusion

For the reasons stated above, the State of Mississippi, by and through the City of Madison, requests this Court to affirm the decision of the County Court of Madison County.

Dated this the 19th day of June, 2013.

Respectfully Submitted,

City of Madison, Mississippi

By: _____
City Attorney/Assistant City Prosecutor

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CERTIFICATE OF SERVICE

I, John Hedglin, do hereby certify that on June 19, 2013, I transmitted the above and foregoing pleading to Steve Thornton, Esq. via U.S. mail to his P.O. Box 16465, Jackson, Mississippi, 39236, as well as a copy via electronic mail and to the Hon. John Emfinger and the Hon. Ed Hannan via hand delivery to the Madison County Court House in Canton, Mississippi.

_____