IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LESTER DARRELL MOORE **APPELLANT**

VS. **NO. 2015-KA-00207-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LESTER DARRELL MOORE **APPELLANT**

VERSUS **NO. 2015-KA-00207-SCT**

STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

A jury of the defendant's peers has found Lester Darrell Moore, a recidivist, guilty of felony shoplifting, i.e., the theft of goods valued in excess of $500. (R. 143; C.P. at 72)

Moore was thereafter sentenced " . . . to serve Five (5) Years day for day in the custody of the Mississippi Department of Corrections, and pursuant to section 99-19-81, Miss. Code of 1972, as amended, said sentence being without hope of parole or early release in the custody of the Mississippi Department o Corrections." (C.P. at 75)

When Moore committed his offense on March 5, 2013, the felony threshold for value, by virtue of Miss. Code Ann. 97-23-93, was an amount greater than $500.

When Moore was tried and sentenced twenty-one (21) months later on November 12, 2014, that threshold, effective July 1, 2014, had been amended to an amount in excess of $1000.

Moore argues with great vigor "[t]he trial court erred in refusing to apply the ameliorative provisions of Mississippi Code Annotated Section 97-23-93(5) and (7), which became effective after the date of the alleged offense but before Moore's trial and sentencing." (Brief of the Appellant at 5) Moore suggests that he, at best, was guilty of no crime greater than misdemeanor shoplifting.

(Brief of the Appellant at 5, 12)

LESTER DARRELL MOORE, a fifty-something year old (R. 147) African-American resident of Biloxi (R. 23, 83) with a rather lengthy criminal history (C.P. at 7-8), prosecutes a criminal appeal from his conviction of felony shoplifting returned in the Circuit Court of the Second Judicial District of Harrison County, Lisa P. Dodson, Circuit Judge, presiding.

Following an indictment returned on December 16, 2013, for the theft, as a recidivist, of leather wallets with a value in excess of $500, and after a bifurcated trial by judge and jury conducted on November 12, 2014, Moore was convicted of recidivism and felony shoplifting and thereafter sentenced to serve five (5) years day for day in the custody of the MDOC pursuant to section 99-19-81. (R. 149; C.P. at 74-75)

Moore, a testifying defendant, invites this Court to reverse and remand for re-sentencing for misdemeanor shoplifting or, alternatively, to remand his case for a new trial. (Brief of the Appellant at 5,12)

Moore's indictment, omitting its formal parts, alleged that

> " . . . LESTER DARRELL MOORE. . . on or about March 5, 2013, . . . did then and there willfully and feloniously take possession of merchandise displayed for sale, with the intention and purpose of converting such merchandise to his own use without paying the merchant's stated price, to-wit: leather wallets, the total value of more than Five Hundred and 00/100 dollars ($500.00), of the property of Dillard's located at 2600 Beach Boulevard, Biloxi, Mississippi, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi." (C.P. at 7)

Moore was also charged with recidivism by virtue of Miss.Code Ann. §99-19-81, it appearing that Moore had been twice previously convicted in 1987 of burglary and convicted again in 1995 of the transfer of a controlled substance. (R. 146-48; C.P. at 7-8)

It appears also that Moore had a larceny conviction in 1983 and a receiving stolen property

conviction in 1984 as well. (R. 146)

Following trial by jury conducted on November 12, 2013, the jury quickly returned the following verdict: "We, the jury, find the defendant, Lester Darrell Moore, guilty of felony shoplifting." (R. 143; C.P. at 27)

A poll of the jury, individually by name, demonstrated the verdict was unanimous. (C.P. at 144)

At the close of the sentence-determination phase of the bifurcated proceeding Judge Dodson declared Moore a habitual offender by virtue of 99-19-81 and sentenced him accordingly.

Two (2) issues are raised on appeal to this Court:

I. "The trial court erred by failing to apply the ameliorative punishment provisions of Mississippi Code Annotated Section 97-23-93 through the grant of instruction S-1 and [the] denial of instruction D-8."

II. "The trial court erred in allowing Officer Owens to testify as to the price of the wallets."

STATEMENT OF FACTS

Counsel opposite, in his usual and commendable fashion, has penned a fair and accurate synopsis of the salient facts involved in this case. Accordingly, we do not feel compelled to plow the same ground again in great detail here. It is enough to add the following:

On March 5, 2013, during the night-time hours, a security camera recorded a theft of merchandise at a Dillard's department store located on Beach Boulevard in the Edgewater Mall in Biloxi. (R. 22, 58)

Fourteen (14) wallets, both men's and women's, with a merchant's stated price "[i]n excess of $1,700" were taken by a black male later identified as Lester Darrell Moore. (R. 23)

Three (3) witnesses testified for the prosecution during the State's case-in-chief.

Andre Correa, securities supervisor for Dillards, testified he " . . . witnessed the suspect walk right into our men's accessory area and grab nine men's wallets." (R. 26)

"He began to put them in his jacket area, in the jeans and jacket area, stuffed them in his person." (R. 24)

Correa then notified Officer Shoemaker, the security officer on duty that evening. (R. 25)

Photographs of the nine men's wallets were taken by Correa who documented the "sku" numbers and the price of each item on a civil recovery report. (R. 26)

Correa later received five Michael Kors women's wallets that had been recovered by Officer Owens who found the wallets on the defendant's person following the defendant's arrest. (R. 27-28)

A video disc depicting the theft was created by Correa and admitted into evidence. (R. 29-30) Two civil recovery documents itemizing the objects of the theft, as well as their individual sales price, were also introduced into evidence. (R. 32-36)

The total value of the fourteen wallets, according to Correa, was $1,726. (R. 41)

Correa thereafter made a positive in-court identification of Moore as the person depicted in the video taking the wallets on the night of March 5, 2013. (R. 41)

David Shoemaker, an internal affairs investigator with the Biloxi police department, was also employed as the loss-prevention officer at Dillards. (R. 58) On the night of the theft Shoemaker was contacted by the surveillance operator at Dillards. Shoemaker thereafter came in contact with Moore outside the store. Shoemaker handcuffed and arrested Moore following "a brief struggle" taking place after Moore punched Shoemaker in the face with a closed fist. (R. 60)

During the struggle nine wallets " . . . fell from [Moore's] jacket, from underneath his jacket." (R. 61)

Shoemaker, likewise, made an in-court identification of Moore as the same individual he "

. . . had an incident with on March the 5th, of 2013." (R. 62-63)

James D. Owens, a Biloxi patrol officer, testified he responded " . . . . to a shoplifting call at Dillard's on the night of March 5th, 2013. (R. 64) When Owens arrived " . . . the suspect was handcuffed with his hands behind his back." (R. 66) Upon arriving at the station house Owens found five additional wallets in the sleeves of Moore's blue jacket. (R. 67)

Moore, who gave Owens a fictitious name, was later identified in court by Owens as the man he took into custody the night of March 5th, 2013. (R. 68)

At the close of the State's case-in-chief the defendant's motion for a directed verdict predicated on the State's failure to make out a *prima facie* case of theft, was overruled. (R.74-77)

After being advised of his right to testify or not (R. 77-78), Moore elected to testify in his own behalf. (R. 82)

Lester Moore admitted during trial he took from Dillards the nine (9) men's wallets but denied he took the five (5) ladies' wallets testified about by Officer Owens. (R. 84, 88)

Moore claimed he never went over to the ladies side of the store because a lady appeared to be watching him. (R. 85)

During cross-examination Moore admitted he was doing wrong. (R. 91)

At the close of all the evidence, Judge Dodson granted State's instruction S-1 (C.P. at 56) and denied the defendant's instruction D-8 which authorized the jury to find Moore guilty of misdemeanor shoplifting if it found beyond a reasonable doubt the total value of the wallets was less than $1000. (C.P. at 69)

Peremptory instruction was thereafter denied. (R. 104; .P. at 63)

Following closing arguments, the jury retired to deliberate at a time not reflected by the record. It subsequently returned with the following verdict: "We, the jury, find the defendant, Lester

Darrell Moore, guilty of felony shoplifting." (R. 143; C.P. at 72)

A poll of the jury, individually by name, reflected the verdict was unanimous. (R. 144)

Sentencing followed at which time Judge Dodson sentenced Moore, apparently a criminal entrepreneur, to serve five (5) years, day for day, in the custody of the MDOC. (R. 149; C.P. at 74-75)

Moore's motion for a new trial or for judgment seeking acquittal notwithstanding the verdict was filed on November 19, 2014, and denied on February 2, 2015, following a formal hearing. (C.P. at 79-82, 85, 151-60, respectively)

A timely notice of appeal followed on February 5, 2015. (C.P. at 86)

Charlie Stewart and Wilton McNair, Harrison County Public Defenders, rendered effective assistance to Mr. Moore during his trial for felony shoplifting.

The representation of Hunter Aikens, an attorney with the Indigent Appeals Division of the Office of the State Public Defender, has been equally effective.

SUMMARY OF THE ARGUMENT

"It is fundamental that the statute in effect at the time an offense is committed is the one that must control the prosecution of the offense." **Flowers v. State,** 35 So.3d 516, 518 (¶5) (Miss. 2010), citing **Wilson v. State,** 967 So.2d 32, 42 (Miss. 2007).

Contrary to the noble position taken by counsel opposite, the posture of the sentencing issue raised by Moore is controlled by **Wilson v. State,** *supra,* 967 So.2d 32 (Miss. 2007). The trial judge did not err in holding as a matter of law that the **Wilson** case "is exactly on point." (R. 10)

In addition, the trial judge did not abuse her broad judicial discretion in admitting, over Moore's objection that the witness lacked personal knowledge, the testimony of Officer Owens identifying the value of the stolen wallets.

"Relevancy and admissibility of evidence are largely within the discretion of the trial court, and reversal may be had only where that discretion has been abused." **Wilson v. State,** *supra,* 967 So.2d 32, 43 ¶23 (Miss. 2007), quoting from **McIntosh v. State,** 917 So.2d 78, 82 (Miss. 2005).

No abuse of judicial discretion has been demonstrated here.

In any event, any error was clearly harmless beyond a reasonable doubt because value, i.e., the merchant's stated price, was proven by other competent evidence introduced without objection. (R. 32-36)

ARGUMENT

I.

THE TRIAL JUDGE DID NOT ERR IN FAILING TO APPLY ANY AMELIORATIVE PUNISHMENT PROVISIONS OF MCA §97-23-93 THROUGH THE GRANTING OF JURY INSTRUCTIONS S-1 AND THE DENIAL OF D-8.

Moore committed his offense of shoplifting on March 5, 2013, and was indicted therefor on December 16, 2013. Trial took place on November 12, 2014.

On July 1, 2014, sixteen (16) months after Moore's offense and eight (8) months following Moore's indictment, the threshold requirement for becoming a felony offense was a merchant's stated price of $1000 as opposed to $500. Moore claims he should have been given the benefit of jury instructions S-1 and D-8, authorizing the jury to find " . . . Moore guilty of misdemeanor shoplifting if it determined that the price of the wallets was $1,000 or less." (Brief of the Appellant at 7)

Moore takes issue with the trial court's decision to deny jury instruction D-8 which " . . . would have instructed the jury to find Moore guilty of misdemeanor shoplifting if it determined that the price of the wallets was $1,000 or less. (R. 108-09; C.P. at 69)

The point is made that at the time Moore, nearly a year and a half prior to the amendment changing an element of the offense, shoplifted the wallets from Dillards his crime was a felony if the merchant's stated price exceeded $500.

It did.

Why should Moore be given the benefit of a sentence prescribed for a misdemeanor when the offense he actually committed at the time he committed it was, under the law, a felony?

"It is fundamental that the statute in effect at the time an offense is committed is the one that must control the prosecution of the offense." **Flowers v. State,** *supra,* 35 So.3d 516, 518 (¶5) (Miss. 2010), citing **Wilson v. State,** *supra,* 967 So.2d 32, 42 (Miss. 2007).

Moore appears to be a career criminal who either knew or is presumed to have known his offense was a felony and punishable as such.

"It is fundamental that all persons are presumed to know the law. . ." **McNeely v. State,** 277 So.2d 435 (Miss. 1973).

Moore, relying upon **Daniels v. State,** 742 So.2d 1140 (Miss. 1999), claims the trial judge should have applied the ameliorative punishment provisions of Miss.Code Ann. §97-23-93 (5) and (7) which, effective July 1, 2014, raised the merchant's stated price threshold necessary for a felony conviction to an amount exceeding $1000 as opposed to the pre-amendment threshold of $500.

This issue is raised *de novo* in 2015, eight (8) years after it was settled, fully, fairly and finally, in 2007 in the case of **Wilson v. State,** *supra.* Moore's complaint is controlled by the following language found in **Wilson**:

> Wilson argues that the trial court erred in sentencing her, thus entitling her to a new sentencing hearing. Wilson was indicted on May 23, 2003, for the November 4, 2002, crime of felony shoplifting pursuant to Mississippi Code Annotated section 97-23-93, which stated:

> A person convicted of shoplifting merchandise for which the merchant's stated price exceeds Two Hundred Fifty Dollars ($250.00) shall be guilty of a felony and, upon conviction, punished as provided in Section 97-17-41 for the offense of grand larceny.
>
> Miss. Code Ann. §97-23-93(7) (2002).

The statute subsequently was amended by the Legislature after Wilson was indicted but prior to her trial. Miss.Code Ann. §97-23-93, as amended, states:

> A person convicted of shoplifting merchandise for which the merchant's stated price exceeds Five Hundred Dollars ($500.00) shall be guilty of a felony and, upon conviction, punished as provided in Section 97-17-41 for the offense of grand larceny.
>
> Miss.Code Ann. §97-23-93(7) (Rev. 2006).

This amendment effectively made the charge of shoplifting merchandise over $250 in value but not more than $500 in value to be a misdemeanor rather than a felony. Wilson argues that, according to *Daniels v. State,* 742 So.2d 1140 (Miss. 1999), she should be sentenced as a misdemeanant instead of a felon. Wilson further argues that the jury made a finding only that she shoplifted merchandise with a value of more than $250 rather than the required $500 based upon Jury Instruction No. 3.

Nearly the identical argument made then and there by Wilson is made here and now by Moore. This Court's response to Wilson's complaint is quoted as follows:

> Wilson's argument is misplaced. In *Daniels,* the defendant committed the crime of capital rape, which at the time of the commission of the crime, carried a mandatory punishment of death or life imprisonment. *Id.* at 1144. The statute was amended effective from and after July 1, 1998, and the sentencing in *Daniels* occurred on August 24, 1998. Based on prior decisions of this Court, the trial court was under the belief that it had to sentence the defendant under the statute in effect at the time of the commission of the crime. *Id.* at 1144-45. In applying Mississippi Code Annotated section 99-19-33, and in an effort to clarify our prior cases, we stated:
>
> > [W]hen a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court must sentence according to the statute as amended. Any precedent holding otherwise is in error.
>
> Id. at 1145 (emphasis added). However, section 99-19-33 and *Daniels* stand for the proposition that when the statutory penalty for a particular crime is legislatively

> reduced after the date of the commission of the crime but before the date of sentencing, the trial court must sentence the defendant under the amended statute. Such a proposition is a far cry from today's case where **we are not dealing with an amended sentencing statute, but instead an amended statute as it relates to the elements of the criminal offense.** One of the elements of the amended felony shoplifting statute now requires that the stolen merchandise have a stated price which exceeds $500 in value, as opposed to $245 in value. Thus section 99-19-33 and *Daniels* are totally irrelevant to today's discussion. **In the case *sub judice*, only the elements of the crime of felony shoplifting changed and not the penalty, which has remained the same during this amendment process.** Wilson was properly convicted based upon Mississippi Code Annotated section 97-23-93 as it existed on November 4, 2002, the date of the crime. This issue is without merit. [emphasis ours]

Moore vigorously argues " . . . that the changes to the punishment provisions of our shoplifting statute - - raising the misdemeanor/felony threshold amount from $500 to $1000 - are ameliorative in nature [and] the trial court was required to apply them at trial in order to properly sentence Moore for felony shoplifting." (Brief of the Appellant at 10)

Moore, therefore, invites " . . . this Court to remand this case for re-sentencing for misdemeanor shoplifting or, alternatively, to remand this case for a new trial." (Brief of the Appellant at 12)

Relying upon Judge Diaz's dissenting opinion in **Wilson,** Moore insists that " . . . contrary to the **Wilson** majority, the legislative changes to the shoplifting punishment statutes - subsections (5) and (7) - do not 'relate[ ] to the elements of the criminal offense.' " (Brief of the Appellant at 11) Rather, Moore claims here and now the changes relate directly to sentencing.

Interestingly enough, Moore's present position in this regard is contrary to the position taken by Moore prior to trial in his Motion to Quash the indictment returned against him on December 16, 2013.

Grounds 2 and 3 of that motion read as follows:

> 2. On or about July 1, 2014, House Bill 585 took effect, which raised the

threshold amount for felony Shoplifting from $500 to $1000. Therefore, the crime alleged in the indictment could fail to rise to the level of a felony.

3. **That the $1,000 threshold for felony shoplifting is an essential element of the crime of felony shoplifting, and as such, the State of Mississippi can no longer prove the essential elements of felony shoplifting as charged in the indictment in this cause,** the Defendant respectfully requests the Indictment be quashed. (C.P. at 43) [emphasis ours]

See also defense counsel's pre-trial argument to Judge Dodson wherein Moore made the following claims: "[W]e're challenging that an element being the $500 amount versus the $1,000 amount. We're not challenging whether or not he should be sentenced as a misdemeanor or a felon, we're not contending that." (R. 9)

In his appellate brief, Moore, by and through learned appellate counsel, claims the **Wilson** Court erred in finding that Miss.Code Ann. §99-19-33 and **Daniels** were "totally irrelevant" in that "[w]e are not dealing with an amended sentencing statute, but instead an amended statute as it relates to the elements of the criminal offense." *Id.* at (¶22). Moore now says " . . . the changes relate to amended punishment statutes" as opposed to the elements of the criminal offense. (Brief of the Appellant a 11)

The complete answer to this contention is that the two dissenting justices, Diaz and Graves, are no longer serving on the Supreme Court and the seven (7) other justices, four (4) of whom are still serving on the Court, correctly observed that ". . . section 99-19-33 and **Daniels** are totally irrelevant to today's discussion [because] only the elements of the crime of felony shoplifting changed and not the penalty, which has remained the same during this amendment process." **Wilson v. State,** *supra,* 967 So.2d 32, 42 (¶22).

By virtue of Miss.Code Ann. §97-23-93 (7) the punishment remained the same, *viz.,* ". . . as provided in Section 97-17-41 for the offense of grand larceny."

II.

THE TRIAL JUDGE DID NOT ABUSE HER JUDICIAL DISCRETION IN ALLOWING OFFICER OWENS TO TESTIFY AS TO THE MERCHANT'S STATED PRICE FOR THE STOLEN WALLETS.

Moore argues the trial court erred by allowing Officer Owens, over Moore's objection that Owens lacked personal knowledge (R. 68-69) " . . . to testify as to the price of the wallets." (Brief of the Appellant at 13)

The testimony assailed here is found in the following colloquy:

> BY [PROSECUTOR] BAKER:
>
> Q. Officer Owens, do you know how many wallets were found on Mr. Moore's person in total?
>
> A. Total was 14.
>
> Q. Do you know the stated price for those items?
>
> MR. McNAIR: Objection, your Honor, unless he has personal knowledge as to the total number of wallets found.
>
> MR. BAKER: I'll rephrase the question.
>
> THE COURT: He can testify to what he knows and what he observed.
>
> BY MR. BAKER:
>
> Q. Based upon your own personal knowledge, do you know the value of the 14 wallets that were found on Mr. Moore's person?
>
> MR. McNAIR: Objection.
>
> THE COURT: Basis of the objection.
>
> MR. McNAIR: He is talking about five wallets he found, he has personal knowledge of. He has no knowledge about the nine wallets or any wallets that were found at Dillard's. He is asking him to give a price for all 14.
>
> THE COURT: He asked him if he knew. He can testify to what he knows. That will be overruled to that extent. If he knows, he may answer, Mr. Baker. If not,

he will have to say he doesn't know.

BY MR. BAKER:

Q. Do you know the value?

A. Of the total of 14 wallets or 5?

Q. The total of the 14 wallets?

A. Over $1,700, sir.

MR. BAKER: Court's indulgence.

Tender the witness, Your Honor. (R. 68-69)

Defense counsel, as well he should, thereafter propounded followup questions with respect to Officer Owens's testimony concerning the number and value of the wallets.

> Q. [BY DEFENSE COUNSEL:] Okay. So you don't know, from our personal knowledge, other than what - - how much the total value of these wallets were, all 14?
>
> A. No, sir. (R. 71)

The prosecution thereafter followed up on the defendant's followup testimony as follows:

> Q. [BY PROSECUTOR BAKER:] [A]s part of your process or investigation in determining the value of items, who typically supplied the value of the items that were stolen?
>
> A. The victim.
>
> Q. Okay. And the victim in this case was who?
>
> A. Dillard's.
>
> Q. And can you tell the jury whether or not the victim in this case, Dillard's supplied you with a value for items that were stolen?
>
> A. Yes.
>
> Q. And what was that value?

A. In excess of $1,700.

Q. That was for how many wallets?

A. Fourteen.

Q. And how many did you recover?

A. Five.

Q. And how many did you observe that were reported to you as being recovered by Dillard's at Dillard's?

A. Nine. (R. 73-74)

Officer Owens' personal knowledge was derived from what he learned during his investigation of the theft.

In any event, State's exhibits 2 and 4 introduced without objection as business records of Dillards during the testimony of Andre Correa, securities supervisor for Dillards, reflect a value for the wallets.

Q. BY PROSECUTOR BAKER:] Whose responsibility is it to keep and maintain that document for Dillard's?

A. It is mine.

Q. And could you tell the jury briefly what that document - in general, what that document is?

A. This document is for recovery. Basically, it states the merchandise, what color, what make it was, the sku number, and the price tag. In said event of a shoplifting we make one.

Q. Do you do that for every shoplifting?

A. Yes, we do. (R. 32-33)

State's exhibit 2 identifies and describes nine (9) wallets with an individual price for each wallet and a total sales value of $926.

State's exhibit 4, redacted and admitted as exhibit 6 (R. 35-36), identifies and describes five (5) wallets with an individual sales price for each wallet and a total value of $800.

The total value of all fourteen (14) wallets was thus $1,726.

Officer Owens's subsequent testimony that the value of the fourteen (14) wallets was "[o]ver $1,700," if error, was clearly harmless beyond a reasonable doubt. This is because the same testimony had already been admitted without objection during the testimony of Andre Correa. (R. 32-36)

The Supreme Court has consistently held that "[t]he relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." **Fulks v. State,** 110 So.3d 764, 769 (¶19) (Miss. 2013), quoting from **Johnson v. State**, 567 So.2d 237, 238 (Miss. 1990).

One thought driven home is better than three left on base.

Therefore, we reiterate.

In making evidentiary rulings trial judges enjoy "a great deal of discretion as to the relevancy and admissibility of evidence." **Love v. State,** 121 So.3d 952 (¶11) (Ct. App. Miss. 2013), citing **Shaw v. State,** 915 So.2d 442, 445 (¶8) (Miss. 2005).

"The standard of review of an admission or exclusion of evidence is abuse of discretion." **Huggins v. State**, 911 So.2d 614, 617 (¶4) (Ct. App. Miss. 2005), quoting from **Smith v. State,** 839 So.2d 489 (¶17) (Miss. 2003).

More precisely, the abuse of discretion must be clear. "[U]nless this judicial discretion is so abused as to be prejudicial to the accused, then, the ruling of the lower court must be affirmed." **Flora v. State,** 925 So.2d 797, 821 (Miss. 2006).

What is judicial discretion? An answer to this question is found in **January v. Barnes,** 621 So.2d 915, 927 (Miss. 1992).

> * * * A solid definition of judicial discretion is found in *Bowman v. Hall,* 83 Ariz. 56, 316 P.2d 484, 486 (1957), as follows:
>
> > Discretion of court is a liberty or privilege allowed to a judge, within the confines of right and justice, to decide an act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law, to be exercised in accordance with a wise, as distinguished from a mere arbitrary, use of power, and under the law.
> >
> > "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards." *Shuput v. Lauer,* 109 Wis.2d 164, 325 N.W.2d 321, 328 (1982).

See also **Bell v. State,** 797 So.2d 945, 951 (Miss. 2001) ["Judicial discretion is defined as a 'sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable in circumstances and law, and which is directed by the reasoning conscience of the trial judge to just result.' "

Can it be said the trial judge, to the prejudice of Moore, *clearly* abused his judicial discretion in admitting into evidence the testimony of Officer Owens that the total value of the wallets was "over $1,700."

We *think* not.

CONCLUSION

To be sure, had Lester Moore committed his offense after July 1, 2014, his crime might have only amounted to a misdemeanor. After July 1st the felony threshold for the value of shoplifted goods is $1000.

Regrettably, Moore's offense was committed on March 5, 2013.

A reasonable and fair-minded juror could have found from the evidence beyond a reasonable doubt that Lester Darrell Moore shop lifted goods valued in excess of $500.

Appellee respectfully submits no reversible error took place during the trial of this cause. Accordingly, the judgment of conviction, as a habitual offender under Miss. Code Ann. §99-19-81, of felony shoplifting and the five (5) year sentence to be served in the MDOC "without hope of parole or early release" imposed in its wake should be affirmed. (C.P. at 74-75)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BILLY L. GORE, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Hunter N. Aikens, Esq.
Indigent Appeals Division
Office of State Public Defender
P. O. Box 3510
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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Honorable Lisa P. Dodson
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

Honorable Joel Smith
District Attorney
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This the 14th day of August, 2015.

/s/ Billy L. Gore
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