IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-KA-00979-COA

THOMAS LEE BROWN **APPELLANT**

Brief

vs.

STATE OF MISSISSIPPI **APPELLEE**

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 Justices of this Court may evaluate possible disqualification or recusal:

Thomas Lee Brown, Appellant;

David Clay Vanderburg, Esq., trial attorney;

Jessica Banahan, James A. Cooke, and Phillip W. Broadhead, Esq., Criminal Appeals Clinic, University of Mississippi School of Law, **David Clay Vanderburg, , Esq.** Attorneys for the Appellant;

Allen B. Couch Jr., Esq., Assistant District Attorney, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Robert P. Chamberlin, presiding Circuit Court Judge; and

DeSoto County Police/Sheriff's Department, investigating/arresting agency.

Respectfully submitted,

PHILLIP W. BROADHEAD, MSB #4560
Clinical Professor, Criminal Appeals Clinic

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATUTES, CODE SECTIONS, AND CONSTITUTIONS

OTHER SECONDARY AUTHORITIES:

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-KA-00979-COA

THOMAS LEE BROWN **APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT DUE TO THE LACK OF SPECIFICITY OF THE INDICTMENT WHICH SPANNED A TEN YEAR TIME PERIOD, WHICH WAS NOT CURED BY THE PROSECUTION'S AMENDMENT TO SPAN A FIVE-YEAR PERIOD.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENSE'S MOTION TO SUPPRESS APPELLANT'S STATEMENT TO THE DETECTIVES BECAUSE APPELLANT MADE THE STATEMENT WHILE UNDER THE INFLUENCE OF ALCOHOL AND BECAUSE APPELLANT IS ILLITERATE AND COULD NOT HAVE KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY WAIVED HIS RIGHTS.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE WEIGHT OF THE EVIDENCE WAS SUCH THAT NO FAIR AND REASONABLE-MINDED JUROR COULD HAVE FOUND HIM GUILTY UNDER THE CIRCUMSTANCES OF THIS CASE.

STATEMENT OF INCARCERATION

THOMAS LEE BROWN is presently incarcerated in the Mississippi Department of

Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001)***.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

STATEMENT OF THE CASE

This appeal arises from a jury verdict in DeSoto County, Mississippi, where the Appellant herein, Thomas Lee Brown, was convicted of fondling a step-niece in the presence of other family members. This case is laden with unfairness, uncertainty, and coercion, and the jury's verdict reflects bias, prejudice, and passion against the Appellant rather than a case proven beyond a reasonable doubt.

Thomas Lee Brown (hereinafter "Mr. Brown") is a thirty-four year old, who was unable to complete the sixth grade after three attempts and was eventually promoted directly to the ninth grade due to his age. Lacking the ability to complete the ninth grade, his formal education does not exceed a sixth grade level. Unable to read and write, Mr. Brown's job opportunities were

extremely limited. A self-described homebody, Mr. Brown spent most of his time alone or in the company of his ill mother in her three bedroom home where Mr. Brown had his own bedroom. (T. I. 200, 208, 216 & 223).

The complainant in this case, J.W., the step-daughter of Mr. Brown's brother, Elbert Brown, frequently visited Mr. Brown's residence on weekends. J.W. alleged that on several occasions while sleeping at Mr. Brown's home, she was improperly touched by him. J.W. alleged these incidents of improper touching occurred while she was lying on a pallet beside her step-grandmother's bed. The complainant accused Mr. Brown of touching her legs and feet while masturbating. However, Mr. Brown maintains he always slept in his own bedroom and not, as the complainant alleged, in the bedroom with his mother. (T. I. 216). According to Mr. Brown, "[he] always slept in [his] own room because [his mom] did not like the TV on at night and [he] did." (T. I. 216). He maintains that he did not touch J.W. nor did he sleep in his mother's bedroom. (T. I. 215, 216, 217, 220, 221).

Following his mother's death Mr. Brown moved in with his brother, Elbert Brown, husband of Pamela Brown and step-father of J.W. Although J.W. alleges Mr. Brown touched her while living in her family home, Mr. Brown adamantly denied this allegation. (T. 215).

Due to these allegations the Horn Lake Police Department took Mr. Brown into custody on January 12, 2005. Earlier that morning Mr. Brown helped his sister move a piece of furniture. He had been drinking vodka. (T. I. 22). He returned home and sat alone in the back room like normal. He ate some Cheetos and drank more vodka. By the time the police picked him up around noon he had consumed a pint and a half of vodka. (T. I. 23,24).

Mr. Brown was handcuffed and taken to the Horn Lake Police Department. At the police

station, he was photographed and after that he sat in an empty room for an hour and a half. A little after three o'clock, two Horn Lake police officers, Michael Callender (hereinafter referred to as "Detective Callender") and Joshua Zacharias (hereinafter referred to as "Detective Zacharias"), arrived to conduct an interrogation of Mr. Brown. Neither detective was wearing a uniform, but both had on their weapons and badges. Together, they conducted two separate, unrecorded interrogations alone with Mr. Brown. (T. I. 36, 43, 46, 47).

Mr. Brown told the two officers that he could not read or write, so Detective Callender read Mr. Brown a Waiver of Rights form and had Mr. Brown initial by each ***Miranda*** Right to signify that, despite his limited capacity, he understood each individual right he was waiving. (T. I. 30).

The first interview lasted around thirty minutes. It was not electronically recorded in any way. At some point during this initial interview, Detective Zacharias lied and falsely told Mr. Brown that the police had done an "Alternative Light Source Test" on the house where he lived with his mother. (T. I. 47). He also falsely told Mr. Brown that as a result of this "test," they discovered evidence which supported J.W.'s allegations against him. The officers claimed that at this point Mr. Brown confessed to what J.W. had accused him of doing over a ten-year period. (T. I. 47).

The statement was taken in much the same way as the ***Miranda*** form was executed. Detective Zacharias would write down a question, then he would ask Mr. Brown the question. (T. I. 43). The detectives claim that they would then write Mr. Brown's response under the question. The response was then read back to Mr. Brown and he was asked to initial by each one to signify that it was consistent with his statement. There were no witnesses to this process and

it was neither audio-taped nor was it video-taped. (T. I. 36).

Mr. Brown's defense attorney filed a written motion and tried unsuccessfully to have the statement suppressed on the basis that all the attendant circumstances surrounding the signing of the ***Miranda*** rights waiver form and the statement of facts amounted to coercion by the police detectives. (CP. 31, RE. 16). He also argued that because Mr. Brown was intoxicated at the time of the statement and did not remember making it, the statement was involuntary, and therefore, inadmissible. (T. I. 50). He also argued that Mr. Brown is illiterate and could not have voluntarily waived his rights or signed the statement because he could not understand what it was. (T. I. 50).

The suppression argument also focused on the lie the detectives told Mr. Brown about the "Alternate Light Source Test." (T. I. 50). He argued that taking an intellectually challenged individual and lying to him in a situation where the accused is deprived of his liberty, afraid and alone, amounted to "...pulling out a gun to this guy." (T. I. 53). Defense counsel protested that these circumstances, together with the lie, improperly induced Mr. Brown to give a false confession. (T. I. 53).

Mr. Brown testified at his trial that he was "buzzing"(drunk) during the interview, which the officers denied. (T. I. 229) Mr. Brown said that he told the officers he could not read. (T. I. 24). They say he told them he simply "had trouble" reading and writing. (T. I. 30). The detectives claim that they faithfully read and explained to Mr. Brown what the ***Miranda*** Waiver said and what it meant. (T. I. 42). They also claim that they fully explained the questions, and subsequent answers, in Mr. Brown's statement. (T. I. 43). Mr. Brown has no recollection of any of it. (T. I. 221).

On June 2, 2005, Mr. Brown was indicted by a grand jury in DeSoto County, Mississippi, on the charge of fondling spanning over a ten year time frame from January 1, 1994 to January 31, 2004. (CP.8-10, RE. 22-24). Defense counsel made an *"ora* [sic] *tenus"* Motion to Dismiss the indictment within his response to the State's Motion to Amend arguing that the indictment "was still defective" because it covered a ten-year time span. (T. I. 119, 120, 122). The indictment did not list any specific dates or specific incidents. (CP. 8-10, RE. 22-24). Defense counsel objected to the indictment because its lack of specificity made it impossible to mount an effective defense. (T. I. 121). The trial judge overruled the defense counsel's Motion to Dismiss the indictment (T. I 120-123, RE. 27-32). However, the trial judge recognized that defense counsel's argument not only went to the amendment of the indictment but also attacked the legal sufficiency of the indictment by way of characterizing defense counsel's argument as a "Motion to Dismiss the indictment *ora* [sic] *tenus*." (T. I. 122).

The prosecutor did not interview Mr. Brown's accuser, J.W., until the day before the trial. (T. I. 147). After that interview he decided that there were no acts prior to January of 1999 that amounted to fondling. (T. I. 119). On the morning of the trial, the prosecutor amended the indictment to cover a five year span, from January of 1999 to January of 2004. (T. I. 118). Despite the shorter time span, defense counsel stood by his objection to the indictment. (T. I. 120).

At Mr. Brown's trial, aside from the testimony of the detectives who interrogated him, J.W. was the only witness against him to the alleged fondling. She testified that she would occasionally spend the night at the house where Mr. Brown lived with his mother, Beverly Anne Brown. (T. I. 147). She said that she would sleep on the floor at the side of the bed and Mr.

Brown would sleep on the floor at the foot of the bed. (T. I. 147). According to J.W., this is where the alleged fondling took place. On direct-examination she said that the inappropriate touching began when she was eight years old. In her next sentence, she stated that the inappropriate touching began when she was thirteen. (T. I. 135). She did not give an approximate number of times or dates the alleged inappropriate touching occurred, only saying that Mr. Brown would approach her in the middle of the night and rub her feet and her breasts while he masturbated. (T. I. 138).

The accuser also stated on cross-examination that Mr. Brown did not have his own bedroom in his mother's house. (T. I. 147). She claimed that this is why Mr. Brown would sleep on the floor in his mother's room. This was flatly contradicted by the testimony of Mr. Brown's sister, Viola "Tammy" Shenks, who testified under oath that Mr. Brown never had any reason to sleep on the floor in his mother's bedroom. (T. I. 200). Mr. Brown's other sister, Vera Sanders, also testified that Mr. Brown slept in his own room. (T. I. 208).

J.W. testified on direct examination that she never told anyone because Mr. Brown threatened that if she told, he would hurt her mother. (T. I. 140). She claimed that although she was scared of Mr. Brown, that she continued to go over to the house and spend the night where Mr. Brown lived with his mother.(T. I. 139). Viola Shenks testified that on several occasions after the alleged incidents occurred, Mr. Brown and J.W. were together and J.W. showed no palpable fear or apprehension of being around Mr. Brown. (T. I. 201). In fact, on one occasion J.W. asked Mr. Brown to lend her some money. (T. I. 201). On cross-examination, J.W. also told the court that she had been around Mr. Brown several times after the alleged fondling, but that she was not scared of Mr. Brown. (T. I. 148).

Viola Shenks testified that J.W. told her that the allegations she had made against Mr. Brown were false. (T. I. 209). When Viola asked J.W. if the things she accused Mr. Brown of doing were true, J.W.'s response was, "No, aunt Tammy, they did not happen." (T. I. 209). Additionally, Vera Sanders testified that on one occasion after the charges were filed in this case, J.W. came to her home seeking a place to stay when J.W. had been "kicked out" of her parent's house for misbehavior. (T. I. 209). Vera gave J.W. dinner and allowed her to stay until she could find a place to go. Vera told J.W. she was unhappy about what was going on with the allegations against Mr. Brown, to which J.W. responded, "it wasn't her idea." (T. I. 209).

On January 5, 2005, J.W. told a DHS social worker that nothing had ever happened between herself and Mr. Brown. (T. I. 149). On cross-examination, when J.W. was asked about that statement, she confirmed that she told the social worker that Mr. Brown had not done anything to her. (T. I. 149).

During the defense case, Mr. Brown testified that he slept in his own room every night because he liked to watch TV late at night and his mother did not. (T. I. 216). He denied ever touching J.W. inappropriately. Mr. Brown testified that when the detectives read him his ***Miranda*** rights, he did not truly understand what any of it meant. He said he was "buzzing pretty good" that day and did understand what was happening. (T. I. 229).

After deliberating for under half an hour, the jury returned a guilty verdict. (T. I. 260). At his sentencing, both of Mr. Brown's sisters testified how much they, along with the rest of their family, loved Mr. Brown and stood behind him. (T. I. 276 & 278). Defense counsel requested the court suspend some of Mr. Brown's sentence. (T. I. 284). The State sought the full fifteen year sentence which the judge imposed. (T. I. 284 & 287).

Mr. Brown was sentenced to fifteen years in prison and was ordered to pay a one-thousand dollar fine, one thousand dollars to the Children's Victim's Defense Fund, and court costs. (T. I. 287, 289, CP. 79, 80, RE. 25-26). Feeling aggrieved by the verdict of the jury and the sentence imposed by the trial court, the Appellant perfected the appeal before this honorable court today.

SUMMARY OF THE ARGUMENT

This appeal arises from the trial of Thomas Lee Brown, a thirty-four year old illiterate man accused of fondling his niece. This case is riddled with witness bias, police misconduct and jury prejudice which resulted in a gross miscarriage of justice. The jury in this case was manipulated into looking past the weakness of the State's evidence and convicting the Appellant based on charged emotions spurred on by the prosecutor's inappropriate rhetoric.

First, this Court must decide whether the trial court erred in denying the Appellant's *ore tenus* Motion to Dismiss the indictment. The indictment as originally handed down by the grand jury spanned an astonishing ten-year period of time. Additionally, there was not a specific date listed for even one alleged incident. Furthermore, the prosecutor did not interview the accuser until the day before the trial. Pursuant to this eleventh hour investigation, on the day of the trial the prosecutor, finally recognizing the glaring problems within the indictment, made an *ore tenus* Motion to Amend the indictment and reduced it down from a ten-year period to a five-year time period. (T. I. 118, 199). Although Mr. Brown was indicted, he was insufficiently informed of the charges against him. As such, defense counsel was charged with the impossible task of mounting a defense to unspecified allegations. For these reasons, the indictment was insufficient

and should have been dismissed.

Second, this Court must decide whether the trial court erred when it denied the Motion to Suppress the Appellant's statement to police because Appellant made the statement under duress. At the time the statement was made, the Appellant was under the influence of alcohol. Mr. Brown was interrogated by two police detectives, alone with no witnesses. The detectives held two separate interrogations of Mr. Brown, neither was recorded on audio nor video. During the first interview, the detectives lied to Mr. Brown about fictitious physical evidence they claimed to have recovered. At this point, Mr. Brown agreed to make a statement. Mr. Brown is illiterate, so one of the policemen wrote the statement and had Mr. Brown sign it to indicate that the statement reflected his words. Due to his inability to read and write, Mr. Brown could not verify that the statement accurately reflected his words. For these reasons Appellant's statement was coerced and should have been suppressed at his trial.

Third, the Appellant would finally assert that the trial court erred by failing to sustain the defense's Motion for a Directed Verdict or in the alternative J.N.O.V., because the weight of the evidence was not sufficient to prove Appellant engaged in the acts of fondling of which accused. (CP. 63-66, RE. 33-36). Witnesses for the defense testified that the State's only witness recanted her accusations against the Appellant on at least three occasions. For example, one witness for the defense testified that when asked about her allegations against Mr. Brown the accuser told them, "it wasn't her idea." This kind of testimony generates nothing if not doubt. Additionally, it is undisputed that the complainant denied the allegations to a DHS social worker. The State's only witness's testimony was plagued with inconsistency in direct and cross-examination. For all of these reasons this case should be remanded for a new trial on the merits.

Therefore, for the above reasons this Honorable Court should reverse the sentence of fifteen years in prison and remand or in the alternative reduce and remand for a new trial on the merits of the case.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT DUE TO THE LACK OF SPECIFICITY OF THE INDICTMENT WHICH SPANNED A TEN YEAR TIME PERIOD, WHICH WAS NOT CURED BY THE AMENDMENT BY THE TRIAL COURT TO SPAN A FIVE-YEAR PERIOD.

This case involved a thirty-four year old, illiterate man who was accused of fondling his step-niece in the presence of another family member over the course of a ten-year time period. Due to the astonishingly long period of time covered in the indictment, the Appellant was subject to a manifest injustice as the indictment failed to properly advise him of the specific charges alleged against him, the dates these offenses allegedly occurred, and the underlying factual basis for this ten-year time span, thereby depriving him of the fair opportunity to adequately prepare a defense.

The Mississippi Supreme Court in ***Westmoreland v. State***, stated the purpose of an indictment as the "pleading in the criminal case" is:

> To apprise the defendant of the charge(s) against him in fair and intelligible language (i) in order that he may be able to prepare his defense, and (ii) *the charge(s) must be laid with sufficient particularity of detail* that it may form the basis of a plea of former jeopardy in any subsequent proceeding.

246 So. 2d 487, 489 (Miss. 1971)(emphasis added); see also ***Moses v. State***, 795 So. 2d 569, 571 (Miss. Ct. App. 2001).

In the case at hand, the original indictment as issued by the DeSoto County Grand Jury, alleged that the fondling charge spanned more than a ten-year time period beginning January 1, 1994 and ending January 31, 2004. Other than the broad ten-year expanse of time referenced in the indictment, the Appellant was not apprised of any particularity of detail in either: (1) an approximation of the calendar dates of the allegations of the illegal actions contained in the indictment, or (2) the specific factual basis underlying these allegations. Due to the fact that the indictment was not laid with sufficient particularity of detail of time or facts, the Appellant was fundamentally prejudiced by a total inability to understand these over-broad charges and was subjected to a manifest injustice as he was deprived of the fair opportunity to prepare a defense to the allegations made against him.

In ***Barnes v. State***, 906 So. 2d 16 (Miss. Ct. App. 2004) this Court was tasked with determining whether the indictment adequately informed Barnes that he was charged with fondling. In determining that the indictment did, indeed, sufficiently apprise Barnes of the charges against him, this Court looked to the fact that the complainant, who was four years old when the alleged incidents began and eight years old at the time of trial, was very specific as to the dates of the offense within the indictment. ***Id.*** at 18, 19. Further, this Court noted specifically that the complainant, "even provided particular reasons or events which caused her to be at Barnes's home on the date in question." ***Id.*** at 19 Finally, the indictment in ***Barnes*** "was amended at the conclusion of the State's case to narrow to a three-month window the period of time in which the offense occurred," to conform with the very specific proof presented

by the prosecution in its case-in chief. ***Id.***

The facts in ***Barnes*** are readily distinguishable from the facts in this case. While the complainant in ***Barnes*** was able to provide particular events and explanations for her visits to the defendant's home, the complainant in the present case, who chose to frequent the Defendant's home "to get a break from her brothers and sisters," in her sworn testimony was unable to provide even a single approximate date which could effectively apprise Mr. Brown of the charges she asserted against him. (T. I. 137). While the complainant alleged that the inappropriate behavior occurred "frequently; whenever he had a chance," she could not reference one specific visit, week, or even one particular month out of the expansive ten-year time period. (T. I. 139). Therefore, due to this inability by the complainant in this case to be even minimally specific about the dates and the actions alleged to have occurred, a blanket ten-year expanse was listed in the indictment.

On the day of trial, it became apparent why the State may have had trouble ascertaining the proper time-period the complainant was asserting that these actions supposedly took place. During direct-examination the complainant, the State's only witness, fumbled a five-year divergence in identifying even an approximation of the beginning time period of the allegations she was asserting against the Appellant:

Q. There is an allegation that your step-uncle, the Defendant, touched you inappropriately. Could you tell us approximately when the first time that happened?

A. When I was 8.

Q. When he touched you?

A. No. When I was about 13.

(T. I. 135).

The apparent inability of the complainant to clearly assert when the allegations began evinces the fact that the blanket ten-year time span alleged in the indictment was arbitrary and grossly prejudicial to the Appellant. Additionally, it is significant that the five-year discrepency in the complainant's sworn testimony mirrors the five-year amendment to the original indictment.

On the morning of the trial, the trial judge allowed the prosecution to amend the original indictment to cover a five-year time period, spanning the years between January of 1999 to January of 2004. The decision by the State was an obvious attempt to cure what they realized on the day of trial was a fatally defective indictment. The decision to amend came only after an interview with the complainant on the eve of the trial which revealed that the State could only attempt to prove a five-year time span based on the dates of the complainant's allegations. Even with the amendment allowed, the complainant still "fumbled" her answer in her uncorroborated testimony concerning when all of these supposed actions began.

The indictment as amended by the trial court still failed to specifically identify the actual calendar dates or, even generally, the months during this five-year span of time of the alleged acts that resulted in the charges against the Appellant, and provided him with absolutely no specificity to assist his counsel in the preparation of a defense on the day the trial began. Thus, the Appellant argues the indictment was fatally

defective in that it failed to properly serve its statutory and constitutional purpose of providing the necessary information that the indictment serves to provide to the Defendant in specifically apprising him of the charges against him. ***Miss. Unif. Cir. & County Ct. Prac. R. 7.06(5); Westmoreland***, 246 So. 2d at 489.

The indictment as amended on the day of trial served only to further illuminate the prejudice to the Appellant. Therefore, the Appellant argues that this Court should not consider the amendment as curative of this fundamentally flawed indictment for two reasons, stated hereinbelow.

First, the indictment spanned over a ten-year period until a pre-trial, *ore tenus* Motion to Amend on the morning of the trial, so from the time the Appellant was indicted until the eleventh hour before trial the Appellant attempted to prepare a defense for a ten-year time period, not five. Therefore, the amendment only served to shed light on the fatal deficiencies built-in to the original indictment, which were magnified by the prosecution's Motion to Amend what they knew was an incorrect span of time from interviewing the complainant, apparently for the first time the day before trial.

Second, the State's amendment evidences further unfair prejudice and surprise to the Appellant, because it was completely arbitrary in nature. ***MRCCC 7.09.*** An indictment's sole purpose is to effectively apprise the Defendant of the charges against him and should be more than a piece of paper with absolutely no meaning. A half-decade cannot simply be cut off of the indictment at the last minute in order to attempt to cure what the State realizes is incurable, and still effectively apprise the Defendant

of the charges against him.

The Sixth Amendment to the Constitution of the United States guarantees defendants in criminal cases the right to notice of the nature and cause of the accusations against them. That guarantee is made applicable to the states by incorporation into the Due Process Clause of the ***Fourteenth Amendment of the United States Constitution***. Likewise, ***Article 3, Section 26 of the Constitution of the State of Mississippi***, affords the accused, "in all criminal prosecutions the right to...demand the nature and cause of the accusations by the witnesses against him..." As such it is well settled in this state that the right of the accused to be adequately informed of the nature and cause of the accusation against him is essential to the preparation of his defense and to the requirements of due process of law. ***Peterson v. State***, 671 So. 2d 647, 655 (Miss. 1996).

In ***Baker v. State***, 930 So. 2d 399, 404 (Miss. Ct. App. 2005) this Court rejected Baker's contention "that trial on the subject indictment violated [his] right to be tried on an indictment which afforded him sufficient information concerning the crime so as to allow him to make an adequate defense and so as to protect him from being subject to another trial for the same crime." This Court's reasoning for the rejection of the challenge to the sufficiency of the indictment was that Baker's trial counsel failed to object and the claim was procedurally barred as a non-jurisdictional deficiency. ***Id.***

Unlike ***Baker***, in the case at bar defense counsel made a timely pre-trial objection to the sufficiency of the indictment and moved *ore tenus* that it be striken. (T.

I. 120, RE. 27-32). Defense counsel's statement that his client was not "prejudiced" by the amendment to the already fatally defective indictment returned by the DeSoto County Grand Jury some months before, further illuminates the fact that the original indictment was grossly unfair and prejudicial to the Defendant. (T. I. 120). The amendment of the indictment on the day of trial spanning a ten-year period to an amendment alleging a five-year time period was wrought with the same problems of sufficiency and no waiver of the challenge to the constitutional due process and other claims of error timely made by the defense in this case.

Additionally, during pre-trial motions the prosecution admitted to failing to even conduct an interview with its only witness until the day before trial:

> BY MR. COUCH: In fact, Tuesday was the first time I met her or yesterday. I'm sorry. I had spoken to her I think Tuesday for the first time. We've had some difficulty locating her since all of this occurred. And in speaking with her yesterday - - now, she did give a statement, which was provided in discovery where she describes how things start when she's eight or nine years old, and that goes back to '94. But in speaking with her yesterday and went in further details, that although it was, like I said, inappropriate conduct, it was not fondling. And after interviewing her, that's when I learned when the actual fondling began.

(T. I. 121, 122).

The above transcript excerpt evidences the over-arching fact and reason why the indictment was fatally defective from its inception. Although the State attempted to

cure the fatal defect within the original indictment by amending it down from a ten-year time period to a five-year time period, as set out hereinbelow, this Court has held that a five-year time period is still too expansive to effectively apprise the Defendant of the charges against him, thereby depriving him of a fair opportunity to adequately prepare his defense.

In ***Moses v. State***, 795 So. 2d 569, 572 (Miss. Ct. App. 2001) this Court found that the indictment did not adequately fulfill its purpose under Mississippi law of providing the necessary detailed information a defendant was entitled to receive by way of indictment, thereby this Court reversed and remanded a number of the counts in the indictment due to a lack of specificity in the dates of the alleged incidents. ***Westmoreland***, 246 So. 2d at 489. In ***Moses***, the defendant was first charged under a multi-count indictment alleging various acts of criminal sexual conduct. ***Id.*** at 569. The original indictment set the alleged crimes as occurring between June 1994 and September 1997. ***Id.*** at 570.

Additionally, in ***Moses*** there was no question that the State was aware of information that would have easily permitted it to provide substantially shortened ranges of dates for each offense, together with other relevant facts that would have more specifically identified the alleged incident upon which that count was based. *Id.* at 572. In the case at hand, the State needed only to interview the complainant at the time the Grand Jury took this matter up in June of 2005, in order to ascertain the appropriate dates of the incidents that she was alleging these supposed acts occurred. Although it was within the power and ability of the district attorney's office to

interview the complainant at any time, they failed to sufficiently investigate the uncorroborated allegations of the complainant until the eve of the trial. Therefore, due to the fact that the indictment was not originally laid with sufficient particularity of detail, the Appellant was inherently prejudiced, unfairly surprised by the general content of the first indictment, and subjected to a manifest injustice as he was deprived of the fair opportunity to prepare a defense to the allegations made against him before trial.

For all of these reasons, the Appellant was subject to manifest injustice due to the fatal defects inherent in the indictment; therefore, the indictment should have been dismissed by the trial court. This case should be reversed by this honorable Court, the indictment dismissed, and the Appellant discharged from the custody of the Mississippi Department of Corrections.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENSE'S MOTION TO SUPPRESS THE APPELLANT'S STATEMENT TO THE DETECTIVES BECAUSE APPELLANT MADE THE STATEMENT WHILE UNDER THE INFLUENCE OF ALCOHOL AND BECAUSE APPELLANT IS ILLITERATE AND COULD NOT HAVE KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY WAIVED HIS RIGHTS.

1. The Appellant Made His Statement to Police Because He was Under the Influence of Alcohol and He Could Not Have Read or Understood His ***Miranda*** Rights Waiver Form or His Written Statement.

In a case where an accused person has made an inculpatory statement to the police during an interrogation the statement is admissible only if the accused made the

statement knowingly, voluntarily, and intelligently. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). In a pretrial motion to suppress a statement, the burden of proof is on the State to prove that the statement was voluntarily made. ***Simmons v. State***, 61 Miss. 243 (1883); ***Hamilton v. State***, 77 Miss. 675, 27 So. 606 (1900); ***Agee v. State***, 185 So. 2d 671 (Miss. 1966).

The voluntariness of a confession is a fact-issue determined by the trial judge. The finding of the trial judge is undone if there has been a manifest error or if it is contrary to the overwhelming weight of the evidence. ***Davis v. State***, 551 So. 2d 165, 169 (1989). The voluntariness of a confession is determined by examining the totality of the circumstances to ascertain if the accused's statement was made as a product of his "free and rational choice." ***Herring v. State,*** 691 So. 2d 948, 956 (Miss. 1997) (emphasis added).

The State in this case failed to prove beyond a reasonable doubt during the hearing on the defense motion to suppress that the Appellant's statement to the two detectives was a product of his free and rational choice. The State did not establish that the Appellant's ***Miranda*** rights waiver form was fully explained to him by the detectives and that he completely understood its implications. The following factual analysis of the evidence presented concerning the statement clearly show that there was manifest error committed when the trial judge failed to specifically enumerate on the record the factors in which the State had proven beyond a reasonable doubt that the Appellant's statement was knowingly, voluntarily, and intelligently given.

The Appellant testified that he was intoxicated the day he was questioned by the

detectives. (T. I 22). He had consumed a pint and a half of vodka by the time the police picked him up at his house. (T. I 24). The Appellant is also illiterate. He tried unsuccessfully to complete the sixth-grade three times. The Appellant's last job was cleaning up a construction site about ten years ago. The Appellant gets a monthly social security disability check and exclusively relies on his family for all other forms of sustenance and support. (T. I. 200, 208). It is undisputed from the evidence that he has a very low intellectual capacity and that he could not have understood or intelligently waived his Fifth Amendment rights. The detectives testified that the Appellant only told them he "had trouble" reading and writing. (T. I. 25). They also claimed that they took care to read the ***Miranda*** rights waiver form to the Appellant, and then supervised him as he signed it. (T. I. 25-26). The detectives never testified that the Appellant "understood" his ***Miranda*** rights, only that they had read them to him and that he had signed it. However, as this Court well knows, ***Miranda*** stands for the proposition that this precious right involving custodial interrogation can only be waived knowingly, voluntarily, and intelligently. A ceremonial reading of the rights and meaningless initials on a piece of paper do not prove beyond a reasonable doubt that the Appellant understood anything concerning the important rights that he had waived during the interrogation. The trial judge was forced rely upon this limited testimony because the detectives did not video or audio tape the interrogation

When the trial judge denied the defense's Motion to Suppress the statement, the findings of fact and conclusions of law reflected deference to the police and basically excused the State from meeting its burden of proof, beyond a reasonable doubt,

pursuant to ***Glasper v. State***, 914 So. 2d 708,720 (Miss. 2005). (T. I. 53-55, CP. 56, RE. 17-21). The trial judge asked a rhetorical question for the record, what else the State could do when confronted with an intellectually challenged detainee? The trial judge further stated for the record that for the police to end the interview would not be an option even when faced with an accused citizen who might not fully understand the implications of waiving these important constitutional rights. (T.I 53, 54). However, ***Miranda*** does not mandate that the police make a ceremonial showing of reading someone their rights. ***Miranda***, 384 U.S. at 444. The prevailing rule is that self incriminating statements have to at least be made be made "knowingly." ***Id***. A mentally challenged individual like the Appellant could not have been expected to comprehend the jeopardy he was in, nor could he have understood the implications of waiving his rights under ***Miranda***.

The Appellant's statement made to the detectives, when measured against the totality of the circumstances, was clearly the product of mental duress and was not voluntary, but rather was induced by a combination of factors that produced a false confession. Again, Mr. Brown is an intellectually challenged individual and his limitations make him especially vulnerable when looking at the totality of the circumstances surrounding this interrogation.

In ***Harvey v State,*** 201 So.2d 108 (Miss. 1968) the Supreme Court of Mississippi addressed the problem the trial court faces in reviewing the voluntariness of a custodial statement given to police by a mentally challenged person:

> Ordinarily a confession will not be excluded merely because the person making the statement is mentally weak. 23 C.J.S. Criminal Law §828

> (1961); Annot.; 69 A.L.R.2d 348 §2 (1960). However, it has been pointed out by the various courts that manifestly the will of a person who is of weak intellect or mentally deficient may be more easily overcome than that of one who is more intelligent; still, until it is shown that a weak-minded person has been overreached to the end that he has divulged that which he would not have divulged had he not been overreached, his voluntary confession is admissible. 20 Am.Jur. Evidence § 522 (1993).

Id. at 116.

The tactics that the detectives in this case used to illicit the Appellant's statement were clearly "overreaching" and took advantage of "a person who is of weak intellect or mentally deficient," which resulted in a false confession produced by the actions of the police who overcame the will of the Appellant.

The coercion in this case was subtle, but strongly calculated by the interrogators. The police held Thomas alone in a room for about an hour and a half. (T. I. 39). Then, the detectives questioned the Appellant for about thirty minutes. (T. I. 39). The detectives were both wearing their weapons and badges. (T. I. 38-39). The Appellant was intoxicated, alone, and scared. What was exactly said by everyone present during this initial interrogation is vague, because it was not committed to audio or video recording. According to the detectives, they told the Appellant what his accuser said had occurred over the years. The Appellant adamantly denied the allegations. (T. I. 46). Then, the detectives deliberately and calculatedly lied to the Appellant about their investigation conducted in this case. They told him that they had forensic, scientific, and physical evidence that would conclusively prove the allegations against him. (T. I. 47).

The voluntariness of a custodial statement made by an accused individual is to

be measured in the "totality of the circumstances."***Herring***, supra, 691 So. 2d at 948. However, the evidence of the attendant circumstances of how this interrogation was conducted were left intentionally vague to prevent detailed inquiry into the basis upon which the statement given by the Appellant. The detectives intentionally failed to record the interview, consciously declining to commit either of the interrogations to audio or video. In fact, the only evidence the State could offer was the subjective reconstruction of the interrogation through the detective's testimony. The substance of resulting "confession" was recounted by the very detectives who had just admitted to lying to the accused during the interrogation.

When the police neglect, fail, or decline to commit interrogations to audio and video recordings, they force future fact finders to rely exclusively on their oblique explanation of the attendant circumstances of the interrogations and the ensuing "confessions" made by their detainees. There is no opportunity for the objective analysis not only necessary, but absolutely essential, for a reasonable inquiry into the question of a possible violation of such fundamental constitutional rights as are guaranteed by the ***Fifth Amendment to The United States Constitution*** and ***Article 3, Section 26 of The Constitution of the State of Mississippi.***

Although the police are allowed to use deceit and outright lies in questioning investigating allegations of criminal activity, the context in which these lies are told is an important factor to consider when looking at the totality of the circumstances to determine the voluntariness of a "confession." ***Davis v. State***, 551 So. 2d 165, 169 (1989). The lie in this case was the coercive element employed by the detectives to

pressure the Appellant to falsely confess and tell the detectives what they had previously told him they wanted to hear from him. They used thirty minutes of a non-recorded interview to give the Appellant all of the information needed to make the statement that they would use to make the case against him. In the words of the Appellant's defense counsel in the Motion to Suppress this statement, the detective's lie was like the police "pulling out a gun to this guy." (T. I. 53, RE. 19).

Without the ability of the trial court to conduct an objective fact-finding process, the police subjectively interpret events that occur during interrogations, not surprisingly, sometimes in their favor. The fact finder in a motion to suppress must chose between the words of several policemen over the word of one accused individual. This is especially true where the accused is not intellectually sophisticated, is "overreached" by the actions of the police, or is under the influence of drugs and alcohol. In this case, all three of these factors are present and seriously call into question the constitutionality of this interrogation and resulting statement.

We live in a world where advanced and inexpensive media technology is readily available. There is no conceivable, legitimate reason why custodial interrogations conducted by police should not be required and preserved for judicial scrutiny by the courts. It cannot be too much to ask for the police to operate openly and transparently when there is a fundamental constitutional right at stake. The burden of recordation for proof of voluntariness is so light compared to the magnitude of the right in question, especially in a case such as this, where the police are dealing with a clearly mentally disadvantaged person. The only reason not to expect this is to perpetuate a situation

where the police maintain exclusive control over the facts of a vital phase of the justice system and allow the police to continue to use "overreaching" tactics in their interrogations of detainees.

A recent report issued by The American Bar Association that was written by Thomas P. Sullivan from the Northwestern University School of Law Center on Wrongful Convictions detailed a study on the rising use of audio and video to record custodial interrogations. This report provided statistics on the various police departments in the United States that use video or audio to record interrogations. The report enumerated several reasons that custodial interrogations should be committed to audio or video. Not only does it promote justice, fairness and the search for truth by providing fact-finders with a tool by which the legitimacy of statements can be measured objectively, it also benefits the police and prosecutors by confirming that their tactics comport with the constitution. In fact, it benefits everyone and does not hinder the ability of the police to conduct lawful investigations one iota.

The ABA report quoted several policemen, prosecutors and judges who operate under a policy that requires the police to keep audio or video recordings of interrogations. The police who were interviewed expressed overwhelming support for this policy. (Appendix "A," p. 6). It spares them from having to take volumes of notes during interviews so they can concentrate better on their suspect. (Appendix "A," p.7). It also saves them the agony of tense cross-examinations from skeptical defense attorneys. (Appendix "A," p. 6). Prosecutors were quoted as saying they preferred audio or video recorded custodial interrogations because it provides irrefutable evidence of

the circumstances surrounding them. (Appendix "A," p.12).

It also makes a trial judge's job easier, as they do not have to repeatedly sort through the conflicting testimony presented by defense lawyers and prosecutors to reach the truth. (Appendix "A," p.13, 14). The report quoted one judge as telling a policeman on the witness stand, "If you've got audio and videotape there, I think you ought to use it. I don't know why I have to sit here and sort through the credibility of what was said in these interviews when there's a perfect device available to resolve that and eliminate any discussion about it." (Appendix "A," p.14).

The American Bar Association recommended that the policy of recording custodial interrogations should be a matter of law. (Appendix "A," p.28). The Supreme Courts of the states of Alaska and Minnesota long ago required that custodial interrogations be recorded. ***Stephan v. State***, 711 P.2d 1156, 1158 (Alaska 1985); ***State v. Scales***, 518 N.W.2d 587, 592 (Minn. 1994) (Appendix "A," p.1). Illinois, Maine and the District of Columbia all require recording of custodial interrogations in homicide cases as a matter of statute. (Appendix "A," p.1).

2. The Trial Judge Abused His Discretion in Admitting the Statement Given by the Appellant Based on the Totality of the Circumstances and was Manifestly Wrong in Finding that The Appellant Had the Capacity to Intelligently, Voluntarily, and Knowingly Waive His Rights.

In a pretrial motion to suppress a statement, the State has the burden to prove beyond a reasonable doubt that the statement was voluntary. ***Payton v. State***, 897 So. 2d 921, 935 (Miss. 2003). "This Court will reverse the trial court's finding that a

confession is admissible only when an incorrect legal standard was applied, manifest error was committed, or the decision is contrary to the overwhelming weight of the evidence." ***Duplantis v. State***, 644 So. 2d 1235, 1243 (Miss. 1994) (citing ***Willie v. State***, 585 So. 2d 660, 665 (Miss. 1991) (emphasis added). The trial judge in the hearing on the defense motion to suppress the statement to the police failed to apply the proper legal standard of credible proof, which established beyond a reasonable doubt. In the trial judge's findings of fact and conclusions of law in his ruling on the motion to suppress the Appellant's statement, he expressed doubt about the circumstances surrounding the interrogation and their testimony concerning the outcome of the statement:

> BY THE COURT: First and foremost, regarding the ability of the defendant to read and write, while certainly it might have been better to have a tape recorded version of the statement, certainly the officers in question could not have handled-- other than that, the possibility of that, the officer in question could not have been asked to handle Mr. Brown's statement given his difficulty, which is their testimony, his difficulty in reading and writing, any different than they did. The only other option would be not to take his statement at all. That is certainly not the obligation of the officers.

(T. I. 53-55, RE. 19-20).

His statements that the police are not required to end an interview because of the interviewee's obvious mental limitations and that the fact that the police are not required to tape-record interrogations also infer a misapprehension of the standard of proof required by ***Miranda*** and ***Edwards v. Arizona,*** 451 U.S. 477, 483 (1981). While these two statements by the trial court may be sincere, under the current state of the law, the prosecution is required to establish beyond a reasonable doubt that custodial statements given to the police are made knowingly, voluntarily and intelligently. It simply does not matter what the police are, or are not, required to do in conducting constitutionally sound interrogations of suspects; if they choose to not electronically record the statement of a person who cannot read or write, may possibly be intoxicated, and/or is mentally impaired, then the detectives should suffer the consequences for that failure of choice. The State cannot be excused from meeting the required burden of proof simply because the police elected not to provide the prosecutor with conclusive evidence that would irrefutably show that the suspect in question understood his rights, knowingly, intelligently, voluntarily waived them, and was not overreached by coercive tactics and lies by the police into giving a false confession.

Additionally, the trial judge did not state for the record exactly what legal standard was applied in overrruling the motion to suppress the Appellant's statement, but the testimony did not establish proof beyond a reasonable doubt that the statement to police was knowingly, intelligently, voluntarily given, as required by the controlling case law. When measured against the totality of the circumstances, there is a substantial reasonable doubt that the Appellant truly understood the important

constitutional rights he was waiving by putting his initials on the ***Miranda*** rights waiver form, and there are too many other unanswered questions about the Appellant's state of sobriety and his general mental capacity when he gave the self-incriminating statement. There is also reasonable doubt raised as to whether the tactics employed by the police were "overreaching" and, therefore, took unfair advantage of the Appellant's especially low intellect in compelling the Appellant to tell the detectives exactly what they wanted him to say in his statement.

The Appellant therefore asserts that there was manifest error in the trial judge's ruling on the motion to suppress the statement, in misapprehending and misapplying the controlling principles of law, and in failing to adequately state the circumstances for the record that, as a matter of uncontroverted fact, that the Appellant made the statement to police knowingly, voluntarily and intelligently. It was an abuse of discretion for the trial judge to admit this statement for use as evidence against the Appellant at trial after erroneously finding that the State had proven beyond a reasonable doubt that the Appellant gave the statement as a voluntary exercise of his free and rational choice. The trial judge stated for the record that it was the prerogative of the police whether or not to videotape a statement. This may be true, however it does not diminish the judge's responsibility to suppress a statement where the State fails to meet the proper standard of proof required under the case law.

If this responsibility is not carried out, then the principles of ***Miranda*** truly have no meaning. The standard of "knowing, voluntary, and intelligent" would be rendered irrelevant and would necessarily have to be replaced with a subjective rule that has no

meaning under the ***Fifth Amendment***. For the above reasons, the Appellant's statement given to the detectives should have been suppressed by the trial court, and the verdict of jury and the sentence imposed by the trial court should be reversed by this honorable Court, and this matter should be remanded with proper instructions for a new trial.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE WEIGHT OF THE EVIDENCE WAS SUCH THAT NO FAIR AND REASONABLE-MINDED JUROR COULD HAVE FOUND HIM GUILTY UNDER THE CIRCUMSTANCES OF THIS CASE.

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth***, 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. ***Id.*** When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005).

In a hearing on a motion for a new trial, the trial court sits as a thirteenth juror, but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court

stated:

> A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at 737.

In the case at bar, the complainant's testimony was inconsistent even on the day of trial. When questioned by the prosecutor during direct-examination, the complainant was unable to articulate the beginning date of the abuse, and it was not until the prosecutor, himself, reworded the question, that the complainant was cued into espousing the response he was seeking:

Q. There is an allegation that your step-uncle, the Defendant, touched

you inappropriately. Could you tell us approximately when the first time that happened?

A. When I was 8.

Q. When he touched you?

A. No. When I was about 13.

(T. I. 135).

There is a five-year divergence in the dates used to originally obtain the indictment and those dates articulated by the complainant in her sworn testimony before the trial court. Interestingly, the prosecutor did not interview the complainant until the day before the trial. (T. I. 147). After that interview he decided that there were no acts prior to January of 1999 that amounted to fondling. (T. I. 119). This gross uncertainty in the dates of the alleged abuse evinces the undeniably weak evidence presented by the State in the trial.

The following scenario, as the complainant describes it, is inconceivable, implausible, and unacceptable. The complainant testified that while electing to spend the weekend at the home the Appellant shared with his mother, she slept on a pallet beside her step-grandmother's bed, while the Appellant slept on a pallet at the foot of the bed. Preposterously, this third party, a step-grandmother, never heard a disturbance in her room, nor was made aware of any improper conduct by the Appellant towards the complainant. More specifically, the pallet lay-out in which the complainant describes simply does not make sense. According to the complainant, the alleged

improper touching began with the Appellant rubbing her feet which suggests that the complainant's feet and the Appellant's head were in close proximity. Logically, if the complainant's feet and the Appellant's head intersected to form an "L" shape due to the arrangement of their pallets, it is factually incomprehensible that the complainant could actually observe the Appellant touching himself.

Additionally, the complaint lied under oath when asked whether she ever reported that the accusations she was asserting against the Appellant never actually happened, as stated hereinbelow.

Q. And you never did tell anybody that this didn't happen?

A. No, sir. I didn't.

Q. You didn't tell Viola that?

A. No, sir.

Q. Did you tell any of the Department of Human Service workers that it didn't happen?

A. Yes, sir.

Q. So you did tell somebody that it didn't happen?

A. Yes, sir.

Q. So you told the social worker that you denied that your uncle touched you inappropriately, didn't you?

A. Yes, sir.

Q. And you told the social worker that you had no knowledge of your uncle Tommy messing with you?

A. Yes, sir.

Q. And you told the social worker that you denied all allegations of abuse and about speaking about any abuse?

A. Yes, sir.

Q. So you did tell somebody that this didn't happen, didn't you?

A. Yes, sir.

(T. I. 149).

In fact, the entire premise on which the complainants's story was based was proven to be a lie by the direct testimony of the Appellant and both of the Appellant's sisters. The complainant said that the alleged fondling occurred on the floor of the Appellant's mother's room. The complainaint stated under oath that the Appellant slept on the floor of his mother's bedroom, because he did not have his own bedroom in the three-bedroom house that the Appellant shared with his mother. The following is the complainant's testimony on this fact under cross-examination.

Q. And you would go to stay with your grandmother where Thomas stayed, where Thomas lived?

A. Yes, sir.

Q. You would go spend the night, and all of y'all would spend the night in the same room?

A. Yes, sir.

Q. Your grandma had a bed. You had a pallet. You slept on the floor on the pallet, and Thomas slept where?

A. On the floor at the end of the bed.

Q. At the end of the bed. And when Thomas lived with Beverly Brown, his mother, He didn't have his own room?

A. No, sir.

Q. Are you sure about that?

A. Yes, sir.

(T. I. 147).

However, the Appellant testified on direct-examination that he had his own bedroom in the house that he shared with his mother:

Q. You heard the allegations that when you lived with your mother, that Jessica would come over there and spend the night; that you and Jessica would spend the night in your grandmother's room?

A. My mom's room.

Q. Excuse me. Your mom's room.

A. I always had my own room. I always slept in my own room because she didn't like the TV on at night and I did.

Q. Who didn't like the TV on?

A. My mom. I always laid in my room every night. I had my own room there.

(T. I. 216).

The Appellant's sisters both testified that it was in fact true that the Appellant had his own bedroom and therefore would have had no reason to sleep on the floor in his mother's room. Viola Shenks, the first of the Appellant's sisters to testify, confirmed on direct-examination that the Appellant had his own bedroom.

Q. Now, when your mother was living in Southaven, Thomas lived with her, your brother, Thomas?

A. Yes, sir

Q. And what kind of living arrangements did they have?

A. They just shared the house. My mother had her room. My brother had his room. My mother done the cooking and the cleaning.

(T. I. 199-200).

Viola Shenks testified further that the Appellant never had a reason to sleep in his mother's room.

Q. Now when Thomas lived with your mother, did he have his own room?

A. Yes, sir.

Q. Was there ever occasion or need for him to spend the night in the same room as your mother?

A. No, sir.

(T. I. 200).

Vera Sanders, the Appellant's other sister, corroborated the fact that the Appellant had his own bedroom.

Q. When Thomas lived with your mother, did he have his own bedroom?

A. Yes.

Q. Did your mother have her own bedroom?

A. Yes.

(T. I. 208)

The prosecutor never addressed the conflicting versions of the living arrangement the Appellant had with his mother. The State did not offer any corroborating or rebuttal evidence that supported the complainant's contention that the Appellant did not have his own bedroom. The State never offered any evidence that directly contradicted or impeached the testimony of the Appellant and his two sisters that the Appellant slept in his own bedroom and not on the floor of his mother's bedroom. The prosecutor did not ask the complainant about this contradiction during redirect- examination. Nor did the prosecutor ask the Appellant or his sisters about this on cross-examination. The state completely ignored this discrepancy.

The testimony of both of the Appellant's sisters, and the testimony of the Appellant himself, on this fact should have proven to any perceptive, observant, fair-

minded, and reasonable person that the complainant was not telling the truth when she said that the Appellant slept on the floor of his mother's bedroom, because he did not have his own bedroom in the three-bedroom house he and his mother shared. Therefore, if the complainant was lying about this one crucial material fact, then the incidents the complainant is alleging simply could not have happened the way in which she alleged that they had happened.

Finally, in addition to the lack of credible evidence presented, the prosecution further prejudiced the Appellant when he attempted to "send a message" to the community at the close of the State's case. In closing argument the prosecutor referenced a statue to fallen policeman on the grounds of the courthouse:

> Have y' all seen the law enforcement memorial out there for the officers who given their life in this country? Now, when an officer dies we call him a hero.

(T. I. 246).

This statement which was meant to entice the jury to find the Appellant guilty on behalf of all the fallen officers who have died in the line of duty represents a manifest injustice to the Appellant. The Appellant who was prejudiced from the start by an indictment which grossly failed to apprise him of the charges against him was prejudiced until the end when the State in closing argument "sent a message to the community" in an attempt to distract the jurors from the glaring faults with the case at hand.

The total lack of substantial supporting evidence has been amply argued hereinabove, leaving the bare conclusion that the jury must have been carried away with

prejudice and passion, fueled by the improper statements of the prosecutor. An affirmance of the conviction in this case "would sanction an unconscionable injustice" based on the tenuous, anemic weight of the evidence presented in this trial, which resulted in a guilty verdict. In addition, the "send a message" argument made by the prosecutor was directly calculated to inflame the jury with prejudice, passion, and bias against the Appellant in an already volatile case, charging improper conduct by an adult with a minor. For these reasons, the trial court erred in refusing to grant the motion for a new trial filed herein by the Appellant, and failed to set aside the guilty verdict of the jury as to the charged count of the indictment in this case, and, as a result, this honorable Court should reverse and remand this case to the lower court with proper instructions for a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter rendered because of the fatally defective indictment on a charge of fondling, or in the alternative, remanding this case to the lower court for a new trial on the merits of with proper instructions to the lower court to suppress the statement, as aforesaid. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,
Thomas Lee Brown, Appellant

by: _____

Jessica T. Banahan, Law Student/Special Counsel
Criminal Appeals Clinic
The University of Mississippi School of Law
Lamar Law Center
Post Office Box 1848
University, MS 38677-1848
Telephone: 662.915.5560
Facsimile: 662.915.6842

_____

James A. Cooke, Law Student/Special Counsel
Criminal Appeals Clinic
The University of Mississippi School of Law
Lamar Law Center
Post Office Box 1848
University, MS 38677-1848
Telephone: 662.915.5560
Facsimile: 662.915.6842

_____

David Clay Vanderburg, MSB#
Post Office Box 523
Hernando, MS 38632
Telephone: 662.429.9680
Facsimile: 662.429.9680

and

_____

Phillip W. Broadhead, MSB #[redacted]
Criminal Appeals Clinic
The University of Mississippi School of Law
520 Lamar Law Center
Post Office Box 1848
University, MS 38677-1848
Telephone: 662.915.5560
Facsimile: 662.915.6842

CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

Honorable **ROBERT P. CHAMBERLIN**, Circuit Court Judge
SEVENTEENTH JUDICIAL DISTRICT
Post Office Box 280
Hernando, Mississippi 38632;

JOHN W. CHAMPION, Esq., District Attorney
ALLEN B. COUCH, JR., Esq., Assistant District Attorney
365 Losher Street
Suite 210
Hernando, Mississippi 38632;

JIM HOOD, Esq.
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
Post Office Box 220
Jackson, Mississippi 39205; and,

Mr. **THOMAS LEE BROWN**, MDOC#121164, Appellant
MCCF
Post Office Box 5188
Holly Springs, MS 38634-5188

This the 2nd day of ~~March~~ April, 2007.

PHILLIP W. BROADHEAD, MSB #4560
Certifying Attorney

To avoid these controversies, the Commission recommended that all questioning of homicide suspects in custody in police facilities be electronically recorded.[1] The legislature and Governor acted on this proposal: Illinois became the first state (recently joined by Maine and the District of Columbia) to require by statute the electronic recording of custodial interrogations in homicide investigations.[2]

In researching this matter, it struck me that literature on this subject has an invariable theme: recording custodial questioning is necessary to prevent police from using coercive tactics during unrecorded interrogations and misstating what the suspect said.[3] But I believe that, with few exceptions, our police are honorable and law abiding, and do not use illegal tactics, commit perjury or attempt to convict the innocent. My associates and I set out to identify and learn the experiences of police and sheriff's departments that have

---

[1] Recommendation 4, REPORT OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (April 2002).

[2] The Illinois statute is summarized in Appendix C. *See also* the Maine statute, ME. REV. STAT. ANN. 15§ 801-A, *available at* www.mainelegislature.org/legis/bills/billtexts/LD089101-1.asp; Washington, D.C. Code, D.C. CODE ANN. § 5-133.20 (2003).

[3] *See, e.g.*, Steven A. Drizin and Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois' Problem False Confessions*, 32 LOY. U. CHI. L.J. 337, 345-78 (2001); Daniel Donovan and John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 245-46 (2000); Gail Johnson, *False Confessions and Fundamental Fairness: The Need For Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 735-41 (1997); Yale Kamisar, *Foreword*: Brewer v. Williams – *A Hard Look at a Discomforting Record*, 66 GEO. L.J. 209, 233-43 (1977); Ingrid Kane, *No More Secrets: Proposed Minnesota State Due Process Requirement that Law Enforcement Officers Electronically Record Custodial Interrogations and Confessions*, 77 MINN. L. REV. 983, 983-87 (1993); Richard J. Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U.L. REV. 979, 989-99 (1997); Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. & POL. SCI. 21 (1961); Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 547-52 (2001); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 153-55 (1997).

Appendix "A"

voluntarily chosen to use electronic recordings in their interview rooms.[4] We also contacted prosecutors to obtain their views. We sought to determine:

- The types of investigations in which recordings are made.
- The equipment used for recordings.
- Whether cost is a factor in the ability to record.
- Whether suspects are made aware of the recordings.
- The experiences of veteran detectives with custodial recordings: whether they favor recording custodial sessions, and whether they believe confession rates are adversely affected if suspects are aware a recording is being made.

We did not use accepted sampling or survey techniques. With few exceptions we contacted only police and sheriff's departments we had reason to believe were recording custodial interrogations.[5] I am confident that the practice of recording custodial interrogations is followed by many, many more police and sheriffs departments which our efforts failed to identify.[6] This article includes the results of our inquiries to date.

---

[4] My thanks for their assistance to my associates and staff at Jenner & Block: Zachary V. Moen, Lauren E. Moy, Karen V. Newbury, Syed Mohsin Reza, Jo Stafford, Laura A. Thomas, Wade A. Thomson, and Hillary A. Victor, and with special gratitude to Andrew W. Vail. David Zulawski of Wicklander-Zulawski Associates, Inc. of Downers Grove, Illinois, was of great help to us. He emailed a questionnaire to law enforcement officers his firm has trained. We also thank the many law enforcement personnel throughout the country who graciously responded to our inquiries.

[5] Under orders of the state Supreme Courts, all law enforcement agencies in Alaska and Minnesota have been required for many years to record custodial questioning. *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

[6] Readers who know of additional departments that record are requested to send contact information to tsullivan@jenner.com.

they shot/stabbed/strangled their victim, it is not up for subjective interpretation."

Moore, Oklahoma Police Department — Recordings "allow the judge and jury to better understand the demeanor of the defendant outside the courtroom, where false presentations are often the rule."

St. Paul, Minnesota Police Department — The judge and jury experience the full oral and visual impact of a suspect's changed story, rather than having an officer try to capture the contradictions in a few sentences.

Cobb County, Georgia Police Department — Recordings preserve the evidence in a way that written reports cannot. Perspectives about what occurred during interrogations are "incredibly unreliable" when compared to what is shown on the tapes.

* * *

Experience shows that recordings dramatically reduce the number of defense motions to suppress statements and confessions. The record is there for defense lawyers to see and evaluate: if the officers conduct themselves properly during the questioning, there is no basis to challenge their conduct or exclude the defendants' responses from evidence. Officers are spared from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations. These comments are illustrative:

Denver, Colorado Police Department — The department's regulations state in part: "Claims of improper conduct by the police, such as brutality, intimidation, threats, promises or the failure to advise of constitutional rights can be judged first hand by the viewer. A jury can be shown a particular interview and allow them to make

their own decision. The videotape is also available for the appeals process and Supreme Court review."

Mesa, Arizona Police Department — "The act of recording automatically brings with it the air of disclosure and avoids accusations of impropriety during the interview."

DuPage County, Illinois Sheriff's Office — The office policy statement provides: "Electronic recording of suspect interviews in major crime investigations protects both the suspect and interviewing officers against subsequent assertions of statement distortion, coercion, misconduct or misrepresentation. It can serve as a valuable tool to the criminal justice system, assisting the Court in the seeking of the truth."

Brown County, South Dakota Sheriff's Office — Many cases do not go to trial and many complaints about officers' conduct are dropped after the recordings are seen by the defense. "It is good to have everything recorded so there is no question in court about what took place."

Salt Lake City, Utah Police Department — Since the department has been using video to record interrogations there have been no complaints about voluntariness or coercion. "Videotaping statements helps us put forth the best case possible."

El Dorado County, California Sheriff's Office — "A motion to suppress is a swearing match between the suspect's word and the officer's word. Now we play the tape and the judge says, 'It's right there! Motion denied.'"

Norman, Oklahoma Police Department — "There is nothing better than a video and audio tape of a confession obtained by a skillful detective whose questions, demeanor, and methods are as

important as the confession. We have nothing to hide so why not document the process using modern technology."

International Association of Chiefs of Police[10] — "[W]hen asked about the effectiveness of CCTV [closed circuit television], the overall response [from more than 200 law enforcement agencies] indicates that there have been marked improvements in police operations: fewer frivolous lawsuits because defendants are unable to contradict taped evidence, protection against claims of abuse or coercion during interrogation procedures, [and] reduced court time for officers because defendants are unwilling to dispute charges when faced with taped evidence. CCTV becomes cost effective as its use increases; the videotape cost offsets litigation and settlement costs. . . ."

* * *

The use of recording devices, even when known to the suspect, does not impede officers from obtaining confessions and admissions from guilty suspects. When suspects decline to talk if recorded, the detectives simply turn the recorder off and proceed based on handwritten notes. (This subject is addressed in Part IV below.)

* * *

Recordings permit detectives to focus on the suspect rather than taking copious notes of the interview. When officers later review the recordings they often observe inconsistencies and evasive conduct which they overlooked while the interview was in progress. These were recurring themes in our discussions with detectives:

---

[10] INT'L ASS'N OF CHIEFS OF POLICE, EXECUTIVE BRIEF: THE USE OF CCTV/VIDEO CAMERAS IN LAW ENFORCEMENT 5-6 (Mar. 2001). The IACP is the world's oldest and largest nonprofit membership organization of police executives, with more than 19,000 members in 89 countries.

guilty persons being acquitted; stronger prosecution records on appeal; reduction in post-conviction claims of false confessions and wrongful convictions, in investigations into charges of police misconduct, and in civil litigation with the risk of large damage awards; and a deterrent effect on officers who might succumb to an urge to use improper tactics, or misstate what suspects said or did.

Most costs come on the front end, and they diminish once the equipment and facilities are in place and training has been given to detectives. In contrast, savings continue so long as electronic recording continues.

In the many conversations we had with police throughout the country, very few mentioned cost as a burden, and none suggested that cost warranted abandoning recordings.

VI. Safety valves for when things go wrong

It is of course inevitable that glitches will occur when a recording device is used: the machine may not operate properly, the tape may run out and not be replaced, the operator may forget to turn the machine on, etc. Only a handful of those with whom we spoke with mentioned this as a matter of concern. It is nonetheless prudent to include appropriate safety valves as part of any regulation, statute or court order relating to recording of in-custody questioning.

If no recording was made because of a mechanical failure or inadvertent lapse, evidence of what occurred should nevertheless be admissible in evidence through the testimony of those present. Various methods have been proposed so that voluntary admissions and confessions, given after appropriate *Miranda* warnings, are not lost under these circumstances. Here are two examples: