IN THE SUPREME COURT OF MISSISSIPPI

2006-TS-01728

LESLIE W. SMITH
Appellant

VS.

STATE OF MISSISSIPPI
Appellee

APPEAL FROM THE CIRCUIT COURT OF PONTOTOC COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, LESLIE W. SMITH

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REASONS FOR GRANTING ORAL ARGUMENT

For the reasons and authorities set forth herein, Leslie W. Smith state that oral argument is absolutely required for proper resolution of the case.

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A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN DISPOSITION IN COURT BELOW.

Leslie Smith was indicted on June 20, 2002. After a jury trial, a Pontotoc County Circuit Court Jury found the defendant, Leslie Smith, guilty of the charge of Sexual Battery as to Count I. The Jurors found the defendant, Leslie Smith, guilty of the charge of Sexual Battery as to Count II. The Jury found the defendant, Leslie Smith guilty of the charge of Sexual Battery as to Count III.

Leslie Smith was sentenced on December 16, 2005. On the charge of Count I, the defendant was sentenced to a term of 30 years in the custody of the Mississippi Department of Corrections. Ten of those years will be suspended on the condition that the defendant violate no law of the United States, the State of Mississippi, or any other State. On the charge of Count II, the defendant was sentenced to a term of 30 years in the custody of the Mississippi Department of Corrections. Ten of those years will be suspended on the same conditions. On the charge of Count III, the defendant was sentenced to a term of 30 years in the custody of the Mississippi Department of Corrections. Ten of those years will be suspended on the same conditions. Each of the sentences will run consecutively. The Defendant filed a Notice of Appeal on September 18, 2006.

PROPOSITION NO. 1

The Trial Court committed manifest error in refusing to dismiss the Indictment, with prejudice, based upon a jurisdictionally defective indictment.

The Indictment in the case is fatally flawed on its face. Specifically, the Indictment against Mr. Smith is a combination of two separate and distinct sections of the sexual battery statutes, with separate and distinct penalties, which have been improperly grafted together.

The indictment reads as follows:

CIRCUIT COURT

JULY TERM, 2002

CAUSE NO. CR02-114

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful men and women of PONTOTOC COUNTY, in the State of Mississippi, elected , impaneled, sworn and charged to inquire in and for said County and State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

LESLIE W. SMITH

COUNT 1

in said County and State between the 1st day of December, A.D., 2001 and the 9th day of December, 2001, did willfully, unlawfully and feloniously commit sexual battery upon Courtney S.

Clayton, a human being, by penetrating the victim's anus/rectum with his penis, and at the time of the said offense, Defendant was above the age of 18 years, having a date of birth of March 21, 1975, and the victim was under the age of 16 years, having a date of birth of November 11, 1992;

COUNT II

in said County and State between the 1st day of July, A.D., 2000 and the 30th day of November, 2001, did willfully, unlawfully and feloniously commit a sexual battery upon Courtney S. Clayton, a human being, by penetrating the victim's mouth with his penis, and at the time of said offense, Defendant was above the age of 18 years, having a date of birth of March 21, 1975, and the victim was under the age of 16 years, having a date of birth of November 11, 1992;

COUNT III

in said County and State between the 1st day of July, A.D., 2000 and the 30th day of November, 2001, did willfully, unlawfully and feloniously commit a sexual battery upon Courtney S. Clayton, a human being, by performing cunnilingus on the victim, and at the time of said offense, Defendant was above the age of 18 years, having a date of birth of March 21, 1975, and victim was under the age of 16 years, having a date of birth of November 11, 1992; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

Section 97-3-95 states:

1 A person is guilty of sexual battery if he or she engages in sexual penetration with:

(a) Another person without his or her consent;

(b) A mentally defective, mentally incapacitated or physically helpless person;

(c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older that the child; or

(d) A child under the age of fourteen (14) years of age, if the pers9on is twenty-four (2) or more months older that the child.

2 A person is guilty of sexual batter if her or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

Section 97-3-101 establishes the penalties for sexual battery:

1 Every person who shall be convicted of sexual battery under Section 97-3-95 (1) (a), (b), or (2) shall be imprisoned in the State Penitentiary for a period of not more that thirty (30) years, and for a second or subsequent such offense shall be imprisoned in the Penitentiary for not more than forty (40) years.

2 (a) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(c) who is at least eighteen (18) but under twenty-one (21) years of age shall be imprisoned for not more than five (5) years in the State Penitentiary or fined not more than Five Thousand Dollars ($5000.00), or both;

(b) Every person who shall be convicted of sexual batter under Section 97-3-95(1)(c) who is twenty-one (21) years of age or older shall be imprisoned not more than thirty (30) years in the State Penitentiary or fined not more than Ten Thousand Dollars ($10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense.

3 Every person who shall be convicted of sexual battery under Section 97-3-95(1)(d) who is eighteen (18) years of age of older shall be imprisoned for life in the State Penitentiary or such lesser term of imprisonment as the Court may determine, but not less than twenty (20) years.

4 Every person who shall be convicted of sexual batter who is thirteen (13) years of age or older but under eighteen (18) years of age shall be sentenced to such imprisonment, fine or other sentences as the Court, in its discretion, may determine.

In Lee vs. State, the Court addressed an issue similar to the defective indictment in the instant case. Lee argues the Trial Court erroneously allowed the State to amend the indictment on the morning of the trial. Counts III through VI of the original indictment alleged four separate instances of sexual battery with a child in violation of subsection (1)(d) of Miss. Code Ann. Section 97-3-95. However, each of these counts included the phrase "without her consent," an element of subsection (1)(a). Four days before trial, Lee filed a motion to quash counts III through VI of the indictment, claiming they tracked the language of both subsections (1)(a) and (1)(d), and thus did not provide him sufficient notice of the charged crime. The statute provides, in relevant part:

(1) A person is guilty of sexual batter if he or she engages in sexual penetration with:

a Another person with his or her consent;

b A mentally defective, mentally incapacitated or physically helpless person;

c A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or

d A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

Miss. Code Ann. 97-3-95 (emphasis added).

The Court of Appeals properly held that the Trial Court did not commit error by allowing the State to amend the indictment and remove the phrase "without her consent." However, this Court has followed two lines of analysis when addressing whether the removal of excess words in

an indictment is proper.

Our precedent establishes that the "surplusage" in an indictment may be removed without prejudice to the defendant. See, e.g., Mixon v., State, 921 So.2d 275, 279-80 (Miss. 2005); Schloder v. State, 310 So.2d 721, 723-24 (Miss. 175); Sullivan v. Cook, 218 So.2d 879, 880-81 (Miss. 1969). However, in Richmond v. State, 751 So.2d 1038, 1046 (Miss. 1999), this Court held that the State was required to Prove an unnecessary element alleged in the indictment. We find it appropriate to now clarify our holding in Richmond, so that it is not misread as inconsistent {2} with our precedent concerning motions to amend indictments to remove surplusage.

Defendants in criminal cases have Constitutionally protected right to be informed of the nature and cause of charges brought against them. U.S. Const. Amend. VI & XIV; Miss. Const. Art. 3, _26. See also Jones v. State, 856 So.2d 285, 289 (Miss. 2003). This requires that an indictment describe with precision and certainty each element of the offense charged. Peterson v. State, 671 So.2d 647, 653 (Miss. 1996) (citing Love v. State, 211 Miss. 606, 611, 52 So.2d 470, 472 (1951).

Lee directs us to our language in Richmond, whereby we held that "the State handicapped itself through th{e} indictment by adding an unnecessary element of proof," 751 So.2d at 1046. Thus, Lee argues, the State should be precluded from amending his indictment. Although this Court's holding in Richmond seems, at first blush, inconsistent with other cases, cited infra, where we held that mere surplus age may be removed from an indictment by amendment, Lee's case is easily distinguishable. We shall first address the holding in Richmond.

In Richmond, the defendant was charged with motor vehicle theft. Id. At 1042. The indictment included a dollar amount for the vehicle, which was not a necessary element under the statute. Id. This Court stated that "{h}aving specifically informed Richmond of the offense charged, as the detailed code section number, the State handicapped itself through this indictment by adding an unnecessary element of proof." Id. At 1046. Lee interprets this language to mean

that any indictment which includes an unnecessary element cannot be amended, and the State is required, as a matter of law, to prove the unnecessary element. However, Lee completely misreads the import of our holding in Richmond.

Richmond was clearly on notice of the charge against him. The indictment charged him with motor vehicle theft under Miss. Code Ann. Section 97-17-42, a crime which does not require proof of any specific value. Id. at 1042. Nevertheless, the indictment alleged that the vehicle taken by Richmond had a "total value of more than $250.00." Id. Prior to trail, the State moved to amend the indictment by removing the language relating to the value of the automobile. Id. Richmond objected and moved to quash. Id. at 1042-43. Referring to the requested amendment as "substantive," the Trial Court refused to allow the State to amend. Id. at 1046. The trial went forward and the State presented proof that the value of the vehicle exceeded $250.00. Id. at 1049. Richmond was convicted of motor vehicle theft. Id. at 1050.

The Trial Court in Richmond would have committed no abuse of discretion had it found that the language related to value was mere surplus age and allowed the State to amend the indictment by removing the language. However, the Trial Court refused o allow the State to amend and required the State to prove not only the elements of motor vehicle theft, but also the additional element of value. Id. at 1046. During the discussion of jury instructions, the prosecutor succinctly summed up the State's position:

> Your Honor will recall that before the trial started, the State made a motion to amend out of the indictment the allegation of value in excess of $250.00 as being surplus age under The Motor Vehicle Theft Statute.
>
> ...for this trial , the State made a motion to amend it out, to make it conform with the exact amount of proof. Defense objected to that amount and allowed it to remain in there. They said they wanted that additional burden in there. Your Honor then stated that, since the State had voluntarily put that additional element on itself, we should

continue to have to bare it, and we did.

What I may have said we were trying is of no moment. The State is bound by the indictment, which was an allegation of motor vehicle theft with the additional element, the unnecessary additional element which we had to prove-and did- beyond a reasonable doubt of a value of more than $250.00. Any embarrassment or trouble at trial caused to the defendant was caused by the defendant's prevailing on his opposition to our motion to mend. If this was a wound to the defendant, it was a self-inflicted wound.

Id. at 1044.

In Richmond, this Court was not presented (as we are today) with the question of whether an amendment to the indictment by removal of surplus age was appropriate. Thus, in Richmond, this Court had no need to address or discuss our precedent, which analyzes the removal of surplusage and sets forth the test therefore. Accordingly, Richmond does not serve as precedent for the issue of whether a motion to amend an indictment should be granted or denied. Rather, Richmond remains authority in cases where the indictment includes surplusage, which was not removed prior to trial.

The requested amendment in Richmond would easily have meant the test for amendments to indictments espoused in Griffin v. State, 584 So.2d 1274, 1275-76 (Miss.1991) (discussed infra), and the Trial Court would have been fully justified in allowing the State to amend. However, because the Richmond Trial Court denied the State's motion to amend the indictment, the issue in that case is different from the issue before us today. We must, therefore, analyze this case by evaluating whether the amendment to the indictment violated Lee's constitutional right to a fair trial.

III

In many instances, mere "surplus age" {3} may be stricken from an indictment without

any prejudice to the defendant. For example, in Mixon, the defendant was charged with motor vehicle theft, but the indictment included the work "felonious," an element under the grand larceny statute. 921 So.2d at 279. This Court held removal of the felonious intent language was proper. Id. at 280. Similarly, in Schloder, the indictment charged that the defendant "did willfully, unlawfully and feloniously possess more than one ounce of marijuana with intent to sell..." 310 So.2d at 722 (emphasis in original). The defendant argued that " there is no such offense in the State of Mississippi as possessing marijuana with intent to sell." We pointed out that the relevant statute made it:

> unlawful for any person to knowingly or intentionally possess more than one ounce of marijuana and prescribe {d} as a penalty therefore a fine of $3,000 or imprisonment in the state penitentiary for not more than three years, or both. Therefore, the demurrer was properly overruled since the indictment charged appellant with the crime of possession of more than one ounce of marijuana. The words "with intent to sell" were surplusage...

Additionally, and more on point with the present case, the defendant in Simmons v. State, 109 Miss. 605, 614, 68 so. 913, 914 (1915), was indicted for statutory rape. This Court held that the language "without her consent" in the indictment was mere surplus age that could properly be removed without prejudicing the defendant. Id. at 915.

In analyzing the amendment to an indictment against the previously mentioned background of constitutional protection, we look first to our Uniform Rules of Circuit and County Court Practice. Rule 7.09 provides that "{a}ll indictments may be amended as to form but not as to the substance of the offense charged." The rule further states that an "{a}mendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." Moreover, where a defect of substance exists, the indictment must be corrected by the grand jury. Spann v. State, 771 So.2d 883, 898 (Miss. 2000). Amendments to an indictment are permissible if they do not prejudice the defendant by (1) materially altering the essential facts of the

offense or (2) materially altering a defense under the original indictment. Griffin, 584 So.2d at 1275-76. Thus, taken together, this authority sets forth the following test for analyzing an amendment to an indictment for the purpose of removing surplusage (1) the removal of surplus age must not change the substance of the offense charged; (2) the defendant must be afforded a fair opportunity to present a defense and must not be unfairly surprised; (3) the removal of the surplus age must not materially alter the essential facts of the offense; and (4) the removal of the surplus age must not alter a defense under the original indictment. Applying each part of the test, it is clear that the Trial Court did not err in amending Lee's indictment.

1 The removal of the surplusage must not change the substance of the offense charged.

Lee was indicted under Section 97-3-95 of the Mississippi Code, which addresses the crime of sexual battery. Subsection (1) of that statute provides four separate and alternative acts, any one of which constitutes a violation of the statute. Lee was indicted and ultimately convicted under the fourth alternative, subsection (1)(d), which charged Lee engaged in sexual penetration with "a child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child." The surplusage in the indictment was the inclusion of an additional alternative act which, if proven, would constitute a separate and additional violation of the same statute.

Specifically, the indictment, before it was amended, included the language, "without her consent." Miss. Code Ann. 97-3-95(1)(a). Stated another way, the original indictment charged that Lee committed two separate acts of sexual battery, one under subsection1(a) and one under subsection 1(d).

Lee was fully on notice of both claims. The fact that the Trial Court allowed the State to amend the indictment and remove one of the claims is no more prejudicial to Lee than if the two claims of violation had charge under two separate counts in the indictment, with the Trial Court

later dismissing one of the counts. By allowing the amendment to the indictment which removed the claim that Lee engaged in sexual relations with the victim "without her consent," the State's burden of proof as to the charge that Lee engaged in sexual penetration with a child under the age of fourteen, when Lee was twenty-four or more months older than the child, did not change. Likewise, Lee's defense to this charge did not change. Thus, the amendment did not alter the substance of the offense charged, and the first prong of the test allowing the amendment is satisfied.

2 The defendant must be afforded a fair opportunity to present a defense and must not be unfairly surprised.

There is not allegation, suggestion, or evidence in this case that Lee was not afforded the opportunity to defend the claim. Although Lee may validly assert he was surprised that the State moved to amend the indictment and remove the claim that his sexual relations with the child were without her consent, his surprise cannot be characterized as "unfair." The net effect of the amendment was that Lee only had to defend one claim that he violated the statute, rather than two. Thus, the second prong of the test allowing the amendment is met.

3 The removal of the surplusage must not materially alter the essential facts of the offense.

The essential facts of the offense, that is, that Lee engaged in sexual penetration with a child under the age of fourteen at a time when Lee was twenty-four or more months older than the child, were the same at the time of conviction as the time of indictment. Thus, the third prong of the test allowing the amendment is satisfied.

4 The removal of the surplusage must not alters defense under the original indictment.

As previously discussed, Lee was originally indicted for violating the statute in two separate and distinct ways. The removal of the surplusage did not alter Lee's defense to the claim

which remained after the amendment. Thus, the fourth prong of the test allowing the amendment is met.

For the reasons stated, we find that the Trial Court did not abuse its discretion in allowing the amendment to remove the surplusage from the indictment. Lee v. State 2006 So.2d (2005-KA-G1238-SCT)

As a result of the grafting of the two sections in the indictment, it is impossible for Mr. Smith to determine under which section he is exposed for purposes punishment, 93-3-101 (1) or 97-3-101 (1). The difference between the two penalties is tremendous: 30 years vs. life. The defect in the indictment is substantive and the Mississippi Supreme Court has repeatedly ruled that the vagueness or lack of specificity in the penalty to which a defendant is exposed is a fatally defective flaw in the indictment. The ages of both the defendant and plaintiff are clearly essential elements of the crime, in order to determine the penalty for purposes of negotiating a possible plea, and for the purpose of preparing the defense. This is not a defect as to form, it is a defect as to substance. See State v. Mosley, (2005-CP-01881-COA). Unlike the Mosley case, the possible sentences to which the defendant was exposed are not the same.

Furthermore, this issue was timely raised at trial.

Alright. On the State's announcing that they will rest, do you have a motion, Counsel?

Mr. Knight: I do, Your Honor. Can I wait until my client gets... he should be... may I proceed, Your Honor?

The Court: Yes, sir.

Mr. Knight: Actually, I have two motions. Your Honor, the defendant would move the Court to dismiss all the counts in the indictment for the fact that the indictment is fatally defective in this cause.

An indictment must contain all the essential elements of the crime for which he is charged

being effective. 97-3-95 (1) is a person is guilty of sexual battery if he or she engages in sexual penetration with (a) another person without his or her consent, (b) a mentally defective, mentally incapacitated, or physically helpless person, (c) a child at least 14 years but under 16 years of age, if the person is 36 or more months older than the child, or (d) a child under the age of 14 years of age, if the person is 24 or more months older than the child.

Each of those are four distinctly separate crimes, each with their four distinctly separate punishments for each crime that's alleged. If you look at the indictments in this cause, Count I of the indictment, Your Honor, alleges that in the county and state, 1st day of September--- between the 1st day of September and the 9th day of December, defendant did willfully, unlawfully and feloniously commit a sexual batter upon Courtney S. Clayton, a human being, by penetrating the victim's anus or rectum with his penis. At the said time—at the time of said offense, defendant was above the age of 18 years, having a birth date of March 21st, 1975, and victim was under the age of 16 years, having a date of birth of November 11th, 1992.

The other two counts in the indictment, although they charge different instances of penetration, all allege the same thing, that the victim--- the defendant above the age of 18 and the victim under the AGE of 16 with the same date of birth.

Your Honor, there is no statute that says it is a sexual battery to commit any type of penetration on a child under 16 years of age. Either the child has to be between 14 and 16 or the child has to be under 14. That's exclusive of each other. So a child under 16 does not qualify as a child under 14 unless it's proven that the child is under 14. It's got to be between 14 or 16 in (c) or below 14 in (d).

The indictment alleges that the child is below the age of 16. Nowhere in the indictment does it allege that the child is between the age of 14 and 16, or under the age of 14.

For that reason,--- and the case law is very clear that every fact which is an element in a prima facie case of guilt must be stated in the indictments. Well, the indictment had to state one of

two things: she is under the age of 14, as in (d), or she was between the ages of 14 and 16, as in (c). It fails to do that.

Now, we've already talked about whether or not this indictment could be amended, and the Court ruled correctly that it is a substantive amendment. And now I have case law to support that in ***Ryan versus State***, Mississippi Supreme Court case, 1994. The State moved to amend the indictment from section---actually it was the other way around here. It was an indictment, an amendment of the indictment was the defendant with sexual battery of a female over the age of 14 years was substantive, but a trial court lacked the authority to order the amendment.

That's what we are, just reversing it. It it's substantive and if it does--- because it changes the cause here, it changes the crime, the Court lacks the authority to change it. If it's substantive and it's wrong, then it's defective, Your Honor. It's defective.

Now, another instance where that has been stated is a case ***Peterson versus State***, a Mississippi Supreme Court case of 1996. It says an indictment for sexual batter was insufficient where it failed to notify the defendant he was being charged with sexually penetrating the victim without the victim's consent. It lacked the word--- it lacked the consent charge, just as here. And it's not exactly on point, but it's real close. Our indictment lacks the element of between 14 and 16.

Therefore, Your Honor, that indictment is defective. It's just clear as case law. Every essential material fat and ingredient of the offense must be alleged. Here, it's not.

Now, I expect that Mr. Joyner will argue that, well, Your Honor, it really doesn't make any difference because the indictment says the birth date of the child being in 1992, and anybody could read it and say that she was below the age of 14, and that's what it should be amended to. Your Honor, that's just not the case.

Reading from the case of ***Hawthorn versus State***, '99 Supreme Court case, it says notice is not an issue. It will be hard to argue--- and this is one of the cases where the penetration was not

alleged--the 'without consent' was not alleged in the indictment. It would be hard to argue that Hawthorn was unaware that he was being charged with penetration. The obligation is on the State to include each statutory element of the offense. It is a hurdle, on which the State occasionally trips, as shown in the various precedent, a hurdle that requires careful attention to detail, but that is all.

Your Honor, the indictment fails to allege either of the two, and therefore it's fatally defective.

Mr. Joyner: Your Honor, may I argue this first motion now, in light of the fact that this is very easily disposed of?

In the case Mr. Knight cited, in none of those cases was the age of both defendant and victim placed into the indictment. And that's done for a reason. In this case, you know, that heavens it was done, because the indictment, I will admit, is inarticulately pled.

But, unless they are blind, or they don't have access to a calculator or a pencil and paper, between the 1st day of December, 2001 and the 9th day of December, 2001, he did willfully, unlawfully and feloniously commit a sexual batter upon Courtney S. Clayton, a human being, by penetrating the victim's anus or rectum with his penis, and at the time of said offense, the defendant was above the age of 18-- and here's the important-- having a date of birth of March 21st, 1975. And it says, "and the victim was under the age of 16 years, having a date of birth of November 11th, 1992," which is why Monday, I made a motion essentially that the above the age of 18 and under the age of 16 be deleted as surplusage, because not only does this indictment adequately advise him that this indictment clearly places her at the time of this offense as being nine years old, he placed his penis in her rectum at nine years old. That's what Count I charges. No ifs, no ands, no buts.

And above the age of 18, below the age of 16 is surplusage, because the ages-- the dates that establish that-- are already there.

Now, the same goes for the dates included in Count II, except they place her at possibly being eight or nine years old. And Count III, same exact thing, except that places her at being eight or nine years old.

So what these three indictments charge is when she was nine, he anally raped her. When she was eight or nine, he stuck his penis in her mouth. And when she was eight or nine, he put his mouth on her vagina. That's what each of these indictments clearly charges.

And I'd state that deleting above the age of 18 and under the age of 16, as I stated Monday, is not a substantive amendment at all, because the indictment itself, as to that language, clearly charges the offense of sexual battery. And Mr. Knight says, 'well, there are four distinct crimes.' No, there's not. What's charged in each of these indictments is when she is under 14, clearly established by the date of birth, she was raped in various and sundry ways by the defendant- Count I, Count II, Count III. All of it is clearly established, clearly defined.

The excess language of above the age of 18 years, under the age of 16 years, should not be in any of the three counts. But, the fact that it is there, does not invalidate the indictment in any way, because the indictment– none of the case law Mr. Knight has cited is a case where the birth dates are included in the indictment. He's clearly advised of what he is charged with. He's clearly advised of each of the ages, at the time of the offense. And therefore, the State has three solid indictment with just some surplusage language in them regarding above the age of 18 and under the age of 16.

I would say this The State, especially in light of this motion, Your Honor, and with all apologies to the Court, we've established the victim's date of birth. We have not established the defendant's date of birth. The State would put on one additional witness, or recall a witness, to establish the date of birth of the defendant in this case, if we're allowed to do so. It is going to be necessary for us to do that, and I would beg leave of the Court, at this time, for that to be done.

But, as far as the indictment itself, there is absolutely no problem with the indictment.

And, actually, the only reason I wanted to be sure to delete the above the age of 18 and under the age of 16, is that this defendant is clearly charged with raping a child under the age of 14, in various and sundry ways, basically, or committing sexual batteries on that child. And that language of under the age of 16, if that's removed, he's going to be facing the penalty he should be facing for that offense. I think, in my view, he's facing it anyway, because of what the ages in the indictment clearly delineates, and that is life as to each count. Thank you, Your Honor.

Mr. Knight: Your Honor, may I respond?

The Court: Yes, sir.

Mr. Knight: Your Honor, we know Mr. Joyner's opinion. Unfortunately-- or I guess, fortunately for my client, Mr. Joyner is not the Supreme Court, and Court doesn't agree with him.

They say that the fact that I could read his birth date doesn't make any difference. It's the State's burden to prove it with particularity. Look at the indictment, and it says a child under the age of 16. There is not a crime for child under the age of 16. There is a crime for a child between the age of 14 and 16, and there is a crime for a child below the age of 14. Your Honor, he doesn't think it's substantive. Well, the Court says it is. It's a separate penalty. The State failed to put it on notice and give each and every element of the crime in their indictment. That's their-- the Court even says notice is not of importance. That's what they have to do. This time, they failed to do it. They've rested. We would ask that all three counts of the indictment be dismissed on these grounds.

The Court: Motion to dismiss will be denied. *See trial transcript pages 404-13 lines 12 through 10.*

Finally, the following exchange occurred between the Court, the prosecutor and the defense counsel.

Mr. Joyner, I will allow the State to reopen for purposes of establishing the date of the

birth of the alleged victim, Courtney Clayton. Counsel, I-- well, we'll proceed as it is. So the record will be complete in this case, at the motion of the defendant or the objection of the defendant, or the objection of the defendant, rather, to the State's motion to amend, change the alleged age of the victim to 14 or under 14 years of age, the Court is of the opinion, and I think correctly so, that ***Grimes*** prohibits the amendment. More particularly in view of the fact that it, in effect, escalated the possible penalty in the case, I considered that to be a very serious and substantial change in the indictment.

Because the indictment does, in fact, put the defendant on notice. I will not consider this as being a case that involves the maximum penalty of life imprisonment.

Mr. Knight: Your Honor, for clarification, for the remainder of the trial, are you saying that they are proceeding under (c) or (d)?

The Court: (c).

Mr. Knight: Under (c).

The Court: Yes, sir.

Mr. Knight: Okay.

The Court: The maximum penalty is 30 years. *See trial transcript pages 413-14 lines 11 through 12.*

At this point, neither the prosecuting attorney, nor defense counsel, were certain under which section the prosecutor was proceeding. It is clear that this indictment was fatally defective.

PROPOSITION NO. 2

Leslie Smith was denied effective assistance of counsel at all stages of the sexual battery Prosecution.

Mr. Smith had ineffective assistance of counsel in the following respects:

1. Failure to properly conduct an investigation. Specifically, the defense attorney failed to either interview, or properly interview, the following witnesses:

A. Debbie Bolden

That between March, 2005 and December, 2005, she and her son, Leslie, had a least 20-25 unreturned phone calls to his attorney, William Knight, in attempt to prepare for court.

"That when the first accusation against my son was made, my husband, Bob Bolden and I went to Leslie and Christy's home where present was Christie, Courtney and Brent Swords. During our conversation, Brent informed us that Courtney had previously accused him of sexually molesting her. He refused to go into detail about it, when we pressed him for details." That the "shed" that was described as one of the crime scenes by the alleged victim, occurring in "June (2000) when it was cold" was torn down in May 2000 and belonged to Charlie and Margaret Swords. That alleged "swimming pool" crime scene, down the road from her house, is in plain public view and close to the road and could have easily been photographed prior to trial and shown to the jury. It is still in the exact location today, as it was in 2000. That the alleged "laundry area" crime scene, at their house, is outside on the porch and in plain view of a church across the street from her home. That she often interacted with Leslie Smith, Courtney Clayton and Christy Clayton prior to, and after the allegations against Leslie were made and that she observed no change in Courtney's behavior. That based on her observations and knowledge, she believes that Kurt Clayton influenced his daughter, Courtney, to restate her allegations to gain custody of her, in order to avoid jail for lack of paying child support arrearages. That Courtney told her, and others, that Nicky Swords, who is the same age as Courtney, told her (Courtney) that Andy Swords had molested her. Debbie and Bob Bolden believe that this was what gave Courtney the idea to accuse Leslie. (There should also be a DHS case file where Nicky Swords, daughter of Andy and Vickie Swords, previously made a sexual abuse allegation against her step dad, Andy.) Leslie was God

fearing, honest and an all around good person, and has never had an accusation made against him of any sort of perverse behavior with a child or adult. That she witnessed Courtney Clayton recant her allegations. That after Courtney Clayton recanted her statements, Bob, Debbie, Christy, Courtney and Leslie resumed life as normal during 2001, until Kurt Clayton became involved. Courtney acted peculiar and out of control on a regular basis, especially when she could not get her way. The law enforcement and defense counsel failed to interview her prior to the trial, before she testified. **See Exhibit 1, Affidavit of Debbie Bolden; RE # 13.**

B. Robert "Bob" Bolden

That between March, 2005 and December, 2005, he, his wife and her son, Leslie, made at least 20-25 unreturned phone calls to his attorney, William Knight, in attempt to prepare for court. That no one came out to investigate the alleged crime scene, which supposedly occurred at his home. "That when the first accusation against my son was made, my wife, Debbie Bolden and I went to Leslie and Christy's home, where present was Christy, Courtney and Brent Swords. During our conversation, Brent informed us that Courtney had previously accused him of sexually molesting her. He refuse to go into detail about it, when we pressed him for details." A "shed" that was described as one of the crime scenes, by the alleged victim, occurring "in June (2000) when it was cold" was torn down in May 2000 and belonged to Charlie and Margaret Swords. That the alleged "swimming pool" crime scene, down the road from her house, is in plain view and close to the road and could have been photographed prior to trial and shown to the jury. It is still in the exact location today, as it was in 2000. That the alleged "laundry area" crime scene, at their house, is outside on the porch and in plain view of a church across the street from her home. That he often interacted with Leslie Smith, Courtney Clayton and Christy Clayton, prior to and after the allegations against Leslie were made, and that he observed no change in Courtney's behavior. That Courtney told her, and others, that Nicky Swords, who is the same age as Courtney, told her (Courtney) that Andy Swords had molested her. Debbie and Bob Bolden believe this is what gave

Courtney the idea to accuse Leslie. (There should also be a DHS case file where Nicky Swords, daughter of Andy and Vickie Swords previously made a sexual abuse allegation against her step dad, Andy.) Leslie was God fearing, honest and an all around good person, and has never had an accusation made against him of any sort of perverse behavior with a child or adult. That he witnessed Courtney Clayton recant her allegations. That after Courtney Clayton recanted her statements, Bob, Debbie, Christy, Courtney and Leslie resumed life as normal during 2001, until Kurt Clayton became involved. That, based on his observations and knowledge, he believes that Kurt Clayton influenced his daughter, Courtney, to restate her allegations, to gain custody of her in order to avoid jail for, and avoid paying, child support arrearages. Courtney acted peculiar and out of control on a regular basis, especially when she could not get her way. That law enforcement and defense counsel failed to interview him, prior to the trial of this case. That he was not called as a witness in this case and was available to testify. **See Exhibit 2, Affidavit of Robert Bolden; RE #14.**

C. Brenda Harris

That she often interacted with Leslie Smith, Courtney Clayton and Christy Clayton, prior to and after the allegations against Leslie were made and that she observed no change in the alleged victim's behavior. That, based on her observations and knowledge, she believes that Kurt Clayton influenced his daughter, Courtney, to restate her allegations, in order to gain custody of her, to avoid jail time for, and paying, child support arrearages. Leslie was God fearing, honest and an all around good person. Courtney acted peculiar and out of control on a regular basis, especially when she could not get her way. That she witnessed Courtney Clayton recant her allegations. That after Courtney Clayton recanted her statements, she, her husband, Andre, Bob, Debbie, Christy, Courtney and Leslie resumed life as normal during 2001, until Kurt Clayton became involved. That law enforcement and defense counsel failed to interview her, prior to the trial of this case. That she was supposed to have been subpoenaed and was not. The D.A. spoke with her

and her husband, Andre, alone, and became very agitated, because their testimony helped Leslie. Her husband was not allowed to testify. **See Exhibit 3, Affidavit of Brenda Harris; RE #15.**

D. Andre Harris

That he often interacted with Leslie Smith and Courtney Clayton, prior to an after the allegations against Leslie were made, and he observed no change in the alleged victim's behavior. That he had known Leslie Smith since 1996, and that the allegations made against Leslie are not in his character. That he was supposed to have been subpoenaed nd was not. Leslie was God fearing, honest and an all around good person. Courtney acted peculiar and out of control on a regular basis, especially when she could not get her way. That law enforcement and defense counsel failed to interview him, prior to the trial of this case. "Only discussed case with Leslie's attorney 5 minutes during the trial, before he (Leslie) testified. I was not allowed to testify." That he was not called as a witness in this case, and had been available to testify. **See Exhibit 4, Affidavit of Andre Harris; RE# 16.**

E. Terry McCain

That he deer hunted with the defendant on one of the days Courtney accused Leslie of molesting her, thereby offering alibi evidence which was not presented in court, on Leslie's behalf. That Daily Hunter's Permits can be subpoenaed to support his testimony for the Upper Sardis Management Authority, because all hunter have to sign in and out of the are to hunt, and Leslie and Robert "Bob" would have done so, on the day in question. That based on his observations and knowledge, he believes that Leslie Smith is innocent of molesting Courtney Clayton on at least one of the days in question, as it was impossible, because Leslie was hunting in the woods with his father. That law enforcement and defense counsel failed to interview him, prior to the trial of the case. That he was not called as a witness in this case, and had been available to testify. **See Exhibit 5, Affidavit of Terry McCain; RE # 17.**

F. Alvin Ray Noland

A "shed" that was described as one of the crime scenes by the alleged victim, occurring "in June (2000) when it was cold" was torn down in May, 2000, and belonged to Charlie and Margaret Swords. That he often interacted with Leslie Smith, Courtney Clayton and Christy Clayton, prior to and after the allegations against Leslie were made, and that he observed no change in the alleged victim's behavior. That based on his observations and knowledge, he believes that Kurt Clayton influenced his daughter, Courtney, to restate her allegations to gain custody of her, in order to avoid jail for, and paying, child support arrearages. Leslie was God fearing, honest and an all around good person. Courtney acted peculiar and out of control on a regular basis, especially when she could not get her way. That law enforcement and defense counsel failed to interview him prior to the trial of the case. That he, Leslie, Robert and Charlie went deer hunting after the allegations were made. It is his belief that Courtney's grandfather had to know of the allegations, because his nephew, Andy Swords, husband of Vicky Swords, was the first person that Courtney allegedly told that she had been molested by Leslie. That he was not called as a witness in this case and was available to testify. **See Exhibit 6, Affidavit of Alvin Ray Noland; RE #18.**

G. Eloise Bozeman,

A "shed" that was described as one of the crime scenes by the alleged victim, occurring "in June (2000) when it was cold" was torn down in May, 2000 and belonged to Charlie and Margaret Swords. That she often interacted with Leslie Smith, Courtney Clayton and Christy Clayton, prior to and after the allegations against Leslie were made and that she observed no change in the alleged victim's behavior. That based on her observations and knowledge, she believes that Kurt Clayton influenced his daughter, Courtney, to restate her allegations to gain custody of her, in order to avoid jail for, and paying, child support arrearages. Leslie was God fearing, honest and an all around good person. Courtney acted peculiar and out of control on a regular basis, especially when she could not get her way. That law enforcement and defense counsel failed to interview her prior to the trial of the case. That she was not called as a witness in this case and had been

available to testify. **See Exhibit 7, Affidavit of Eloise Bozeman; RE #19.**

H. Thomas Bozeman

A "shed" that was described as one of the crime scenes by the alleged victim, occurring "in June (2000) when it was cold" was torn down in May, 2000 and belonged to Charlie and Margaret Swords. That he often interacted with Leslie Smith, Courtney Clayton and Christy Clayton, prior to and after the allegations against Leslie were made and that he observed no change in the alleged victim's behavior. That based on his observations and knowledge, he believes that Kurt Clayton influenced his daughter, Courtney, to restate her allegations to gain custody of her, in order to avoid jail for, and paying, child support arrearages. Leslie was God fearing, honest and an all around good person. Courtney acted peculiar and out of control on a regular basis, especially when she could not get her way. That law enforcement and defense counsel failed to interview him prior to the trial of the case. That he was not called as a witness in this case and had been available to testify. **See Exhibit 8, Affidavit of Thomas Bozeman; RE #20.**

I. Angela Michelle Smith

That she has known Leslie Smith for 6 years, dated him for 3 ½ years and had been married to him for three weeks. That she was introduced to Leslie by Ray Noland. That, after their first date, Leslie told her about the allegations that Courtney had made and said that he would understand if she no longer wanted to date him. She agreed to date him, believes he is innocent and has gone to court with him on every occasion. That he is an honest, caring, loving man. Leslie was God fearing, honest and an all around good person. That law enforcement and defense counsel failed to interview her, prior to the trial of this case. That she was not called as a witness in this case and was available to testify. **See Exhibit 9, Affidavit of Angela Michelle Smith**

See Re #13; Motion for JNOV and New Trial, RE # 21.

2. Defense counsel was further ineffective in submitting absolutely no mitigation evidence testimony at sentencing.

3. Defense counsel was further ineffective in failing to submit expert testimony in the form of the opinion of Dr. Zimmerman.

4. Defense counsel was further ineffective in failing to submit character evidence during the defense case in chief.

5. Defense counsel was further ineffective in failing to properly cross examine Debbie Bolden, Robert Bolden, Brenda Harris, Andre Harris, Terry McCain, Alvin Ray Noland, Eloise Bozeman, Thomas Bozeman and Angela Michelle Smith with evidence that could have easily been obtained by a proper investigation.

In ***Hodges v. State***, the Court states the standard for ineffective assistance of counsel:

"The benchmark for judging any claim of ineffectiveness {of counsel} must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. ***Strickland v Washington,*** 466 U.S. 668, 686, 104 S. CT. 2052, 80 L.Ed.2d. 674 (1984). A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. Id. At 687, 104 S, Ct. 2052. 'Unless a defendant makes both showing, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.' ***Stringer v. State***, 454 So.2d. 468, 477 (Miss. 1984) (citing ***Strickland v. Washington***, 466 U.S. at 687m 104 S. CT. 2052). The focus of the inquiry must be whether counsel's assistance was reasonable, considering all the circumstances." Id.

Judicial scrutiny of counsel's performance must be highly differential...(citation omitted)...A fair assessment of attorney performances requires that every effort be made to eliminate the distorting effects of hindsight, sot reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'

Stringer, 454 So.2d at 477 (citing ***Strickland***, 466 U.S. at 689, 104 S. Ct. 2052). Defense counsel is presumed competent. Id.

Then, to determine the second prong of prejudice to the defense, the standard is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***"Mohr v. State,*** 584 So.2d 426, 430 (Miss 1991). This means a "probability sufficient to undermine th confidence in the outcome." Id. The question here is:

> Whether there is a reasonable probability that, absent the errors, the sentencer- including the Appellate Court, to the extent it independently reweighs the evidence, would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death (***Strickland***, 466 U.S. at 695, 104 S. Ct. at 2068).
>
> There is no constitutional right then to errorless counsel. ***Cabello v. State***, 524 So. 2d 313, 315 (Miss. 1998); ***Mohr v. State***, 584 So. 2d 426, 430 (Miss 1991) (right to effective counsel does not entitle defendant to have an attorney who makes no mistakes at trial; defendant just has the right to have competent counsel) If the post-conviction application falls on either of the Strickland prongs, the proceedings end.
>
> ***Davis v. State***, 743 So.2d 326, 334 (Miss 1999) (citing ***Foster v. State***, 687 So.2d 1124, 1130 (Miss 1996).

PROPOSITION NO. 3

The Trial Court committed reversible error in allowing heresay testimony to be admitted into evidence under rule 813 (25) (tender years exception). In *Penny v. State*, the court reiterated the standard for admission of heresay testimony under the "tender years

exception."

While a particular hearsay statement may not violate the Confrontation Clause, it may offend state hearsay rules. ***Crawford***, 541 U.S. at 51, "Hearsay is not admissible, except as provided by law." M.R.E. 802. One such exception is known as the tender years exception:

A statement made by a child of tender years, describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the Court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide substantial indicia of reliability, and (b) the child either (1) testifies at the proceedings, or (2) is unavailable as a witness, provided that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. M.R.E. 803 (25). There is a rebuttable presumption that children under twelve are of tender years. ***Veasley v. State***, 735 So.2d 432, 436 (paragraph 16) (Miss. 1999). The indicia of reliability must be shown from the totality of the circumstances that surround the making of the statement. ***Garrison v. State***, 726 So.2d 1144, 1148 (Miss. 1998). Idaho v. Wright, 497 U.S. 805, 823 (1990). Some factors that the Trial Court should look at to determine indicia of reliability are (1) whether the child has an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statement, (4) whether the statements were made spontaneously, (5) the timing of the declarations, (6) the relationship between the child and the witness, (7) the possibility of the child's faulty recollection is remote, (8) certainty that the statements were made, (9) the credibility of the person testifying about the statements, (10) the age or maturity of the child, (11) whether suggestive techniques were used in eliciting the statement, and (12) whether the child's age, knowledge and experience make it unlikely that the child lied. M.R. E. 803 (25) cmt.

It is clear that the alleged victim's testimony was unreliable under factor one (1) of ***Wright***. The child, by her own testimony, clearly had motive to lie (1) because of her fear of going to a foster home and because of the child custody dispute, in which she was engaged with the

natural parents. *See trial transcript page 238 , lines 7 through 10* , **Q.** Nervous and scared. After all of these things about the foster home and the doctor, you ended up going back and changing your story, didn't you? **A.** Yes, ma'am. .

It is clear that the alleged victim's testimony was unreliable, under factor six (6) of ***Wright***. The relationship between the child and the witness from the Child Advocacy Center was coercive, to say the least. . **Q.** And you don't deny that there are some discrepancies between what the sexual acts that she described in the forensic interview and what she disclosed to you? **A.** Discrepancies. What discrepancies? **Q.** Well, there is no mention of oral sex in the forensic interview. Are you aware of that? **A.** I think so. I'm not sure. *See trial transcript page 62 , lines 20 through 27.*

It is clear that the alleged victim's testimony falls under factor seven (7) of ***Wright***. The child's recollection was repeatedly faulty and inconsistent. *See trial transcript page 37 , lines 3 through 6,* **Q.** Okay. And then you said that Les had done something else? What did you say to Mama Sharon after that? **A.** I forgot. *See trial transcript page* 47, *lines 18 through 20,* **Q.** Did he -- you don't remember if he ever spanked you or slapped you before then or-- **A.** I don't remember. *See trial transcript page 48, lines 4 through 6,* **Q.** Did you ever get hurt at your mamaw's house like that that you recall? **A.** I'm not sure.

It is clear that the alleged victim's maturity was insufficient, in regards to the age and maturity of the child, as stated in factor ten (10) of ***Wright***. *See trial transcript page 32, lines 4 through 5* . **Q.** And, Courtney, how old are you? **A.** Ten. *See trial transcript page 43,lines 24 through 27.* **Q.** And so you're ten now. When this happened, this stuff with Les, I guess you were about eight, nine years old; is that right? **A.** I don't know.

It is clear that suggestive techniques were used in the eliciting of statements from the alleged victim, as prohibited in factor eleven (11) of ***Wright***. *See trial transcript page 37 , lines*

3 through 12 .**Q.** Okay. And then you said that Les had done something else? What did you say to Mama Sharon after that? **A.** I forgot. **Q.** Okay. Okay. Is that when you told her that he had touched you in your private parts? **A.** Yes, ma'am.

PROPOSITION NO. 4

The Trial Court committed plain error in denying the Defendant's challenges for cause against jurors # 17 Peggy Hall , # 23 Herman Gilbert, and # 31 Lori Davis .

Juror #17 was challenged for cause, based on the fact that she is a relative and knows many of the witnesses, including the grandmother of the child. Also one of the acts occurred at the grandmother's house.

Juror #23 was challenged for cause, based on the fact that Mr. Gilbert admitted that his wife is related to some Swords. Also Mr. Gilbert stated that some of the names sounded familiar because his children went to North Pontotoc. *See trial transcript page 176, lines 27 through 29.*

Juror # 31 was challenged for cause, based on the fact that the Juror knew the witness Mr. Rodney Tutor when he investigated the burglary of her house.

It is well settled that a "juror who may be removed for cause is on against who a cause for challenge exists that would likely affect his (her) competency or impartibility at trial. ***Hervey v. State***, 764 So.2d, 457 (Miss. App. 2000). The challenges, against the above named Jurors, easily meet this challenge. Jurors #17, #23, and #31 should have been stricken for cause.

PROPOSITION NO. 5

All motions based upon sufficiency of the evidence were improperly denied.

The evidence in this case was obviously insufficient to sustain a conviction. The overwhelming evidence in this case was the testimony of an incompetent minor, whose testimony was blatantly coached.

Ms. Carol Langendoen testified that through her interview of Courtney Clayton, Courtney was continually inconsistent with her time frames of the incidents of abuse. *See trial transcript page 21, lines 6 through 14.* Ms. Langendoen also states that Courtney stated that Mr. Smith had abused her anally twice, but then after clarification she denied that it happened the first time. Also that Cassidy King and Rodney Tutor were sitting in the room observing Ms. Langendoen's interview and they were there to suggest any questions they wanted, simply for the fact that they were having Ms. Langendoen do a forensic interview of the child rather than themselves do it. *See trial transcript page 29, lines 4 through 15.*

"Evidence of one or more of the elements of the charged offense is such that reasonable and fair-minded jurors could only find the accused not guilty.", *Wilson v. State* 936 So.2d 357 (16) (Miss. 2006).

PROPOSITION NO. 6

A Mistrial should have been granted, based upon the complete deterioration of the attorney/client relationship, which resulted in no extenuation/mitigation testimony being presented at the sentencing phase of the trial.

Pursuant with Rule 3.12 of the Mississippi Uniform Circuit and County Court Rules, the rule states that the court may declare a mistrial for the misconduct by the party's attorneys. Due to

the relationship of the attorney and client, the client was denied a fair sentencing, because his attorney did no present any testimony or further evidence to properly help his client to a fair and proper sentence.

Mr. Leslie Smith states his attorney, Mr. Bill Knight, did not want to take the case. Mr. Smith asked him to file a motion, and Judge Sharon Aycock said she would not let him get another attorney. Mr. Smith also claims that his attorney cussed at him and remarked on his poor attitude. Mr. Smith states that Mr. Knight did not admit crucial evidence for his case to create a reasonable doubt. *See trial transcript page 609-10, lines 25-23.* See also *Rucker v. State,* 2007 So.2d (2006-CP-01295-COA).

PROPOSTITION NO. 7

Jury instructions number C-7, C-8 and C-9 were not proper statements of Mississippi law and are base on a fatally flawed indictment.

It is the judge's duty to correct defective instruction requests arising from the trial court's ultimate responsibilities to assure that the jury is correctly instructed,(*People v. Fudge* (Ca 1994) 7 C4th 1075, 1110 [31 CR2D 321]). When a principle of law is extremely important to a defendant, it is reversible error for the trial court to fail to correct a defective instruction or verdict form when the error is patant or the subject of a proper objection even if the defendant fails to offer alternative instructions or verdict forms, (*State v. Lambert* (WV 1984) 312 Se2d 311). It is ultimately the responsibility of the trial court to ensure that the jury is properly instructed in criminal cases. *See trial court transcript page 558-59, lines 28 through 12.*

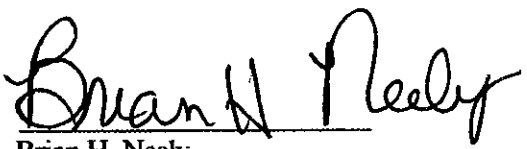
CONCLUSION

It is clear for reasons previously discussed above that the indictment in this case was

fatally defective. Leslie Smith was denied effective assistance of counsel, the trial court erred in allowing hearsay testimony to be allowed, the challenges for cause against three jurors were erroneously denied, all motions based upon insufficiency of evidence were improperly denied, and three jury instructions were not proper statements of Mississippi Law.

Wherefore premises considered, Brian H. Neely respectfully requests that the verdict of Leslie W. Smith be reversed and a dismissal of the indictment below be rendered with prejudice. In the alternative, Brian H. Neely requests that a new trial be ordered and that Mr. Smith be immediately released on his previous bond.

Respectfully submitted this the 21st day of May, 2007.



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CERTIFICATE OF SERVICE

I, **Brian H. Neely**, attorney for Leslie W. Smith, have this day by cause mailed by U.S. Mail, postage pre-paid, a true and correct copy of the above and foregoing **Brief Of Appellant** upon the following:

Honorable Thomas J. Gardner, III
Circuit Judge
P.O. Box Drawer 1100
Tupelo, MS 38802-1100

Honorable James Clayton
Assistant District Attorney
P.O. Box 7237
Tupelo, MS 38802-7237

Honorable Betty W. Sephton
Mississippi Supreme Court
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Honorable Tracy L. Robinson
Circuit Clerk of Pontotoc County
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Pontotoc, MS 38863

Respectfully submitted this the 21st day of May, 2007.

Brian H. Neely

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