

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**JOHNNY RAY DAVIS**

**APPELLANT**

**VERSUS**

**CAUSE NO.: 2007-KA-00504-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF OF THE APPELLANT**

**APPELLANT RESPECTFULLY REQUESTS ORAL ARGUMENT**

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## **STATEMENT REGARDING ORAL ARGUMENT**

The Appellant, Johnny Ray Davis, respectfully requests oral argument under Miss. R. APP. P. 34(b). The issues involved in this appeal are claims of prosecutorial misconduct; an oral argument will assist the Court in understanding the evidence and allow all parties the opportunity to respond to questions that might arise in relation to the issues before the Court.

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**CERTIFICATE OF INTERESTED PERSONS**

The Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the justices of the Supreme Court and /or the justices of the Court of Appeals may evaluate possible disqualification or recusal.

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## **STATEMENT OF ISSUES**

**I.** The United States Constitution and the Mississippi Constitution guarantee the right to a fair trial. Johnny Ray Davis, Appellant, was denied these constitutional rights by the prosecuting attorney, James Ronald Parrish, by way of several statements made during the State's closing arguments. Johnny Ray Davis opted to exercise his Constitutional right not to testify in his own trial, the prosecuting attorney used this choice to portray Mr. Davis in a negative light. The issue presented here is, was Johnny Ray Davis' Constitutional right to a fair trial violated by the prosecuting attorney by way of the prosecuting attorney's comments in his closing arguments of Mr. Davis's choice not to testify?

**II.** The second issue to be addressed is whether Johnny Ray Davis was denied his Constitutional right to a fair trial when the prosecuting attorney deviated from his role as administer of justice, used improper remarks in his closing argument and entered evidence of Mr. Davis's character which was not in evidence?

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition in Court Below

The Appellant, Mr. Davis was convicted of fondling in violation of § 97 -5 – 23(1) of the Mississippi Code on February 16, 2007 in the Circuit Court of Jones County. *State v. Davis*, NO. 2005-67-KR2. On the 26<sup>th</sup> of March, 2007 Mr. Davis was sentenced to 15 years in the state penitentiary with five years suspended. (R.E. 1.) An appeal bond was denied on March 30<sup>th</sup> 2007. (R.E. 2). This case now comes to the Mississippi Court of Appeals.

### B. Statement of Facts

This case involves an allegation of fondling, of Jamie Tucker, by Mr. Davis. (R.E. 3.) Mr. Davis is the step-grandfather of Jamie Tucker and the stepfather of Tammy Tucker, the mother of Jamie. (R.E. 3.) Mr. Davis has been in this patriarchy role for over twenty years and helped raised not only Tammy, but also all of his grandchildren. (R.E. 4.) Mr. Davis even took custody of Amber Tucker, Tammy's oldest daughter, when Tammy was having drug problems. (R.E. 5.) This act caused fighting among Mr. Davis and the accuser's mother. (R.E. 5.)

The State presented Officer Brad Grunig, the investigator with the Jones County Sheriff's Department, as a witness. (R.E. 6,7. ) Officer Grunig taped an interview he conducted with Mr. Davis, without his attorney present. (R.E. 8.) The tapes of the interview last approximately three hours. (R.E. 9.) These tapes were entered into evidence and a portion was played for the jury. (R.E. 10,11.) The State produced Tammy Tucker as a witness, the mother of the alleged victim. (R.E. 12.) Jamie Tucker, the alleged victim, was



also called as a witness for the State. (R.E. 13.) The State then called two expert witnesses, one being Dr. Patricia Tibbs, a pediatrician. (R.E. 14) This witness testified that she believed that the victim had been abused, even though there were no physical signs of abuse. (R.E. 15,16.) Dr. Tibbs also testified that 40 percent of adults and children generally do not tell the truth in sexual abuse cases. (R.E. 17,18.) The other expert witness for the State was Sharon McMahan. (R.E. 19.) McMahan was a counselor at the Child Advocacy Program when she conducted an interview with the alleged victim; conversely McMahan now works for The Salvation Army. (R.E. 19.) McMahan taped this interview, however the audio on the video was of poor quality. (R.E. 20,21.) McMahan testified that she believes that the victim was abused as well, even lacking the physical signs of abuse. (R.E. 22.) Johnny Ray Davis did not testify in his own defense.

The prosecuting attorney, James Ronald Parrish, began the State's closing argument with a statement that the Defense's closing argument was specious. (R.E. 23,24.) The Defense objected to the statement, and the court sustained the objection. (R.E. 24.) However, the court did not address this remark or instruct jury on this matter. (R.E. 24.)

Mr. Parrish then proceeded to attack the Defendant's choice not to testify by stating that the defense was going to let them (the jury) hear from the Defendant through the videotape, but all that the tape was, was three hours of "bull" and the Defendant talked about everything but the alleged victim. (R.E. 24,25.) The prosecutor, Mr. Parrish, then introduced evidence of Johnny Ray Davis' character and social behavior that was not in the record, by calling Johnny Ray Davis a "pervert", a very harsh and seditious word that was meant to inflame the jury. (R.E. 25.) The prosecuting attorney continued to deviate from his role as an administrator of justice by offering his influential "opinion" that Mr. Davis was guilty.

(R.E. 26.) Mr. Parrish unrelenting pursued this approach of arousing the jury's emotions and adding credit to his own opinion by stating that "I would cut off my arm before I would knowingly prosecute an innocent man." (R.E. 27.)

The prosecutor maintained his transgressions on Mr. Davis by implying a confession of guilt because of lack of objection to the expert witnesses. (R.E. 28) Mr. Parrish finished his closing argument with a statement that crossed the line, a "send a message" argument, when he told the jury that he has done all he could do, it was up to the jury now to punish the guilty, if not they would be punishing the victim. (R.E. 28, 29.)

## **SUMMARY OF ARGUMENT**

Johnny Ray Davis was unconstitutionally denied his fundamental right to a fair trial by the prosecuting attorney's improper remarks during the state's closing argument. The prosecutor's closing argument contained numerous prejudicial statements against Johnny Ray Davis that overwhelmingly swayed the jury into a guilty verdict when the evidence before them was weak. The prosecutor, Mr. Parrish, departed from his role as a representative of a sovereignty which has a commitment to govern impartially, and became a representative of a party involved with a controversy, in opposition to the holding of the United States Supreme Court.

The prosecutor, Mr. Parrish, also denied Johnny Ray Davis his 5<sup>th</sup> Amendment constitutional right. Johnny Ray Davis choose to exercise this right, Mr. Parrish denied him this right by commenting on Johnny Ray Davis's lack of testimony. It is well established that this type of commenting denies the Defendant a fair trial and denies him of his constitutional right not to testify.

Mr. Parrish deprived Johnny Ray Davis of a fair trial when he introduced evidence of Johnny Ray Davis's character and social behavior to the jury, when this evidence was not admitted to the record. Mr. Parrish labeled and classified Johnny Ray Davis with a word that was intended to inflame the passions of the jury, this word was "pervert". This clearly goes against case law dealing with the introduction of evidence of character on in evidence.

Johnny Ray Davis was deprived of a fair trial when Mr. Parrish, prosecuting attorney, argued that there was an implied confession because of the Defendant's lack of testimony and lack of objection to the State's expert witness, which was reinforced by the prosecutor's comments about the defenses' lack of expert witness.

It is clear that Johnny Ray Davis was denied a fair trial when these improper comments are view in context of the entire closing argument by the State. The State's closing argument was used to sway the jury to a guilty verdict by unacceptable means. These means were name calling and by violating legal professional codes and precedence. Therefore, the decision of the trial court should be reversed or at least remanded.

## ARGUMENT

- II. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION GIVES THE DEFENDANT THE RIGHT NOT TO BE COMPELLED TO TESTIFY AGAINST HIMSELF. WHEN THE PROSECUTOR COMMENTED ON JOHNNY RAY DAVIS NOT TESTIFYING AGAINST HIMSELF IT WAS A VIOLATION OF THESE CONSTITUTIONAL RIGHTS.

The Mississippi Supreme Court has set the standard of review by stating that the trial court has discretion when reviewing the propriety of statements made during the closing arguments. *Roundtree v. State*, 568 So.2d 1173, 1178 (Miss. 1990). However, the Mississippi Supreme Court set the test of misconduct in closing arguments with *Sheppard v. State*, 777 So.2d 695 (Miss. 2000). “The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.” *Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2000). The misconduct in the case before the court runs throughout the closing argument. The prosecuting attorney, Mr. Parrish, opened with improper comments, continued with improper comments and closed with an improper comment. The amount of misconduct by the prosecuting attorney can only be seen as creating prejudice that can not be over come by the defense or a correction from the judge. The first issue to be addressed is when Mr. Parrish, the prosecuting attorney, commented on the Defendant, Johnny Ray Davis, exercising his constitutional right not to testify against himself.

“It is a violation of ‘an elementary and long established principle of law’ for a prosecutor to comment on a defendant’s failure to take the stand at trial.” *Livingston v. State*, 525 So.2d 1300, 1306 (Miss. 19988) (quoting *Brown v. State*, 340 So.2d 718). Mr. Parrish,

the prosecuting attorney, made a reference to a videotape that was introduced as evidence. This videotape was to be a stand in for the Defendant, in a way countering the negative effect of the Defendant not testifying. However, Mr. Parrish made the statement: “we are here about one case, this little nine year old girl. And he (defense attorney, Eric Tiebauer) says, oh, I let you hear from Johnny Ray Davis through the videotape... you can listen to all that...bull again if you want... he’s (the Defendant) talking about everything in the world... except about this little girl.” (R.E. 24, 25.) This is a direct comment on the Defendant not testifying as well as an implication that the information provided in the videotape was fallacious. However, even if it is viewed as an implication or indirect comment this would still be improper and a violation of the Defendant’s Constitutional rights. In *Wilson v. State*, a burglary and grand larceny conviction was reversed and remanded because of improper comments by the district attorney. “District attorneys must not directly, or by innuendo and insinuation, comment on a defendant’s not testifying.” *Wilson v. State*, 433 So.2d 1142, 1146 (Miss. 1983).

“A prosecutor may violate a defendant’s right not to be compelled to testify against himself not only by making a direct statement but also by a comment that a jury may reasonably construe to be a comment on the defendant’s failure to testify. *Jimpson v. State*, 532 So.2d 985, 991 (Miss. 1978). The jury in the case at hand could surely construe the statement: “you can listen to all that...bull again if you want... he’s (the Defendant) talking about everything in the world... except about this little girl” as a comment on the Defendant not testifying. (R.E. 25.) However, unlike in *Jimpson*, the comment is not about the Defendant’s defense, or his failure to put on a successful defense. *Jimpson*, 532 So.2d at 991. Throughout the State’s closing arguments the prosecuting attorney made reference to the

defense's lack of expert witnesses. (R.E. 30.) That is not an issue with the case at bar. Nevertheless, what is at issue is when the prosecuting attorney made the remark "we are here about one case...this little nine year old girl...[and] he talked about everything in the world... except about this little girl". This pointed out to the jury that the Defendant did not testify and what evidence that was introduced by the videotape was to keep the Defendant from testifying and to hide the Defendant from the jury. (R.E. 25) This comment is clearly improper and is prohibited as it directly violates the Defendant's Constitutional rights.

The comment was not objected to at the time. However, the Defendant had objected to earlier comments by the prosecuting attorney and did not want a continuing string of objects in front of the jury. A constant raising of objections by the defense would counter their set trial strategy and could have an adverse affect on the view of the jury towards the Defendant. Nevertheless, "[w]ith such a fundamental right, even the failure to timely object to the prosecution's comment at trial will not waive the right on appeal." *Whigham v. State*, 611 So.2d 988, 995 (Miss. 1992). Another issue that faces the Defendant is the "invited response" review. However, the United States Supreme court seeks to minimize "invited response" and does not feel that it is an appropriate assessment. *U.S. v. Young*, 470 U.S. 1 (1985). The invited response review evolved in a way not contemplated and is poor policy considering the judge can interrupt the defense and stop the argument before it begins, thus dealing with an improper argument before it encourages the prosecutor to make a responsive improper argument. *Id* at 13. Nevertheless, in the case before the court the Defendant did not make an improper argument, or any statement that would invite a closing argument that created such prejudice as the one given by the prosecutor.

**II. JOHNNY RAY DAVIS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE PROSECUTING ATTORNEY ENTERED EVIDENCE OF MR. DAVIS'S CHARACTER AND MADE STATEMENTS THAT WAS INTENDED TO INFLAME AND RAISE THE PASSIONS OF THE JURY AGAINST MR. DAVIS.**

“While the prosecuting attorney may characterize accused or his conduct by terms of opprobrium appropriate to the facts in evidence, it is improper for him to indulge in intemperate characterization, personal abuse, or vilification of accused, tending solely to arouse or to inflame the passion and prejudice of the jury against him, even where such comments are to some extent supported by the evidence.” *Craft v. State*, 84 So.2d 531, 438 (Miss. 1956). The prosecuting attorney, Mr. Parrish, did use intemperate characterization and vilification to arouse the passion of the jury and create a prejudice that was not, nor could be overcome during the trial. During the closing arguments the prosecuting attorney explicitly called the Defendant a “pervert.” (R.E. 25.) The word “pervert” is used in today’s society to describe the worst of sexual activity. Merriam-Webster dictionary defines “Pervert” as “one given to some form of sexual perversion.” *Merriam-Webster Online Dictionary*. 2007. <http://www.merriam-webster.com> (5 July 2007). The dictionary then continues to define “perversion” as “an aberrant sexual practice or interest especially when habitual.” *Id.*

The use of this word characterized the Defendant as a deviant; the word itself was used to inflame the jury. The prosecuting attorney used this word to create a prejudice against the Defendant. There can be little doubt that any adult in this country imagines anything other than the vilest person when that person is labeled a pervert.

In using this word to characterize the Defendant the prosecutor offered his personal opinion of the Defendant and did so in a way that was meant to inflame the passions of the



jury and appeal to their prejudices. “The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.” ABA Standard for Criminal Justice 3-5.8(c) (1993). This characterization goes against case law and the ABA Standards for Criminal Justice.

The ABA Standards for Criminal Justice also states “The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt of the defendant.” ABA Standards for Criminal Justice 3-5.8(b) (1993). This was reinforced by the United States Supreme Court when it stated “Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant’s guilt and offering unsolicited personal views on the evidence.” *United States v. Young*, 470 U.S. 1, 27 (1985).

Mr. Parrish, the prosecutor in the case at bar, breached his duty here as well, when he made the statement “ Mr. Davis (the Defendant), he’s guilty. I’m telling you. That’s my opinion.” (R.E. 26.) The prosecutor clearly disregarded his duty to the Defendant and justice system by clearly violating the Defendants right to a fair trial by not only offering his opinion that the Defendant was guilty to the jury, but claiming that “I (the prosecutor) would cut off my arm before I would knowingly prosecute an innocent man.” (R.E. 27.) These two statements alone, much more so together, presented a view to the jury that created prejudice in the jury. The power of these words coming from the prosecuting attorney is not lost on the United States Supreme Court, when the court was addressing improper methods and the prosecution’s obligation to govern impartially the court stated:

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge

are apt to carry much weight against the accused when they should properly carry none.

*Berger*, 295 U.S. at 88.

The weight of these statements surely produced prejudice in the jury. The jury looks to the prosecution with a favorable eye, the jury looks to the prosecution to take the high ground and uphold the law. When the prosecuting attorney falls below these standards set forth by the courts and the legal profession, the jury does not see the prosecuting attorney as being in the wrong or violating the Defendant's rights, they see a guilty defendant no matter how lacking the evidence is. The United States Supreme Court supports this position in *United States v. Young* when it said "[i]t has been held that a prosecutor may not use his personal beliefs and the prestige attendant to his office to bolster his argument or the witnesses or evidence which he deems most damaging to a defendant." *Young*, 470 U.S., at 5.

The prosecution unrelenting broke from the legal profession's guideline when he misstated evidence to the jury. "The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." ABA Standard of Criminal Justice 3 -5.8(a) (1993). Three times the prosecuting attorney stated that the defense agreed with the State's expert witnesses. "Mr. Tiebauer (defense attorney) says, I agree with the experts. I got no problem with them." (R.E. 26.) "He (defense attorney) agrees with the experts but don't believe anybody." (R.E. 30.) "He (defense attorney) says they experts. He don't quarrel with what they say. They said the girl told the truth to you, that she was consistent... If he don't quarrel with them his client is guilty because they believe it. They told you they do." (R.E. 28.) Mr. Parrish, the prosecuting attorney, repeatedly told the jury that the Defendant's attorney agreed with the State's expert witness and then told them

because of this agreement; it was an admission of guilt. However, the defense only agreed to accept them as experts in the interest to save the court's time, not with their testimony. (R.E. 14, 31, 32.) The defense questioned both experts on the validity of their findings and the evidence that they gathered. (R.E. 33, 17, 22, 34-37, 20, 38, 39.) The Defendant's counsel questioned the experts in regards to their finding and their interviews with the victim, in doing so the defense tried to establish the fact that the victim's statement was uncorroborated and contradicted. (R.E. 40.) One key point the defense counsel was trying to make was that the State's expert (Doctor Tibbs) testified that 40% of children lie in these cases. (R.E. 17, 18.) The prosecuting attorney, Mr. Parrish, turned this into a personal attack on the defense counsel by saying "[h]e (defense counsel Tiebauer) agrees with the experts but don't believe anybody." (R.E. 30.) Nevertheless, the prosecutor mislead the jury by stating continually that the defense agreed with the State's expert witness and therefore their client was guilty.

Mr. Parrish, the prosecuting attorney, continued the onslaught of misconduct by using the "send a message" argument in his closing argument. While the Defendant's attorney did not object to this argument at trial, it should not be procedurally barred because of the inflammatory nature of the argument and the surrounding misconduct. "[I]f the argument is so 'inflammatory' that the trial judge should have objected on his own motion the point may be considered." *Payton v. State*, 785 So.2d 267, 270 (¶10) (Miss. 1999). The prosecuting attorney ended his closing argument with "When the guilty go free the innocent are punished. She's been punished enough. I did all I could. It's up to you now." (R.E. 29.) This closing is very similar to the closing that the prosecutor in *Alexander v. State* gave when he ended with "[t]here is nothing further we can do. It's up to you." *Alexander v. State*, 736 So.2d

1058, 1064 (¶16) (Miss.App. 1999). In *Alexander v. State* this court “condemn[ed] the use of the “send a message” argument by prosecutors[.]” *Id.* This court recognized that prosecutors continuously use this improper argument in their closing. *Id.* The Supreme Court of Mississippi held “we find that use of the “send a message” argument may, depending upon the surrounding circumstances, constitute reversible error on its own.” *Payton*, 785 So.2d at (¶14) 271. In the light of the surrounding circumstances of the case at bar, this use of the improper “send a message” argument should constitute a reversible error on its own.

The United States Supreme Court made it clear about the adversary system, “while he (prosecutor) may strike hard blows, he is not at liberty to strike foul ones.” *Berger v.*, 295 U.S. at 88. While one of these blows might not be fatal, the combination of these blows is overwhelming to the fairness of the case at bar. The “probable cumulative effect upon the jury which cannot be disregarded as inconsequential,” this effect could not be countered at trial and should rise to the level of reversible error. *Id.*

## CONCLUSION

This court should reverse or remand the trial court’s ruling on Johnny Ray Davis, the Defendant, because he was denied a fair trial by the prosecution. The prosecution opened its closing argument by using an improper statement, “I hope you don’t buy into that bull.” This set the stage that the defense was not being completely honest with the jury. The prosecutor then moved on to say that the Defendant did not talk about the girl, and that was the only reason that the trial was taking place. And, imply that the Defendant should have told the jury about the case and not “just shooting the bull.” The prosecutor then sought to inflame the passion of the jury by calling the Defendant a pervert. Then the prosecutor bolsters his argument by claiming that the Defendant was guilty, in his opinion. Mr. Parrish, the

prosecutor, then said that the defense knew the Defendant was guilty because they accepted the State's expert witness's testimony. The Prosecutor then implied that the Defendant was guilty, because he would cut his own arm off before he would prosecute an innocent man. The Prosecutor then ended by saying that the victim had been punished enough and he had done all he could, that it was now up to the jury to punish the Defendant.

The whole closing argument was a violation of the Defendant's fundamental right to a fair trial. Even if the comment on the Defendant not testifying is lacking enough to require a reversal, when the improper remarks about "send a message", the twisting of the defense's acceptance of the State's experts testimony, the prosecutor offering his opinion, the name calling to inflame the jury and the overall conduct of the prosecutor is added to the list, it is clear that Johnny Ray Davis did not get a fair trial. The prosecuting attorney was in contempt of precedence and legal professional standard during this trial and violated the Defendant's Constitutional rights in order to win a case he was supposed to be administering justice in. The Defendant seeking a reversal or a new trial is only in search of a fair trial which was denied to him by the prosecution.

RESPECTFULLY SUBMITTED, this the 6<sup>th</sup> day of July, 2007.

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**CERTIFICATE OF SERVICE**

I, Eric Tiebauer, the undersigned attorney, have this day forwarded, via United Statea mail, postage pre-paid, a copy of the above foregoing document to the following:

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THIS, the 6th day of July, 2007.

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