IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-00691-COA

BRYANT CARTER — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Bryant Carter

THIS 19th day of October 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Bryant Carter Appellant

By: George T. Holmes
George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Pike County, Mississippi where Bryant Carter was convicted of sexual battery under MCA §97-3-95(d) (Rev. 1998)[1]. A jury trial was conducted January 24-26, 2007, with Honorable Michael Taylor Circuit Judge, presiding. Carter was sentenced to life in prison and is presently incarcerated with the Mississippi Department of Corrections.

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MCA §97-3-95(1) A person is guilty of sexual battery if he or she engages in sexual penetration with: ...(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.

FACTS

In 2004, V. K.[2] was eight (8) years old and her parents were separated. [T. 333-37]. V. K. and her younger brother lived with their mother Melissa in Pike County, Mississippi. *Id.* Some time around January 2004, Melissa became romantically involved with the appellant Bryant Carter. *Id.* About a month later in February 2004, Carter moved in with Melissa and V. K. and the younger child. [T. 334-35]. They initially lived in an apartment, then in March they moved into a run down pink mobile home and lived there until July or August of 2004 at which time they moved to a nicer trailer. [T. 336-37].

Carter and Melissa broke up in January 2005, and Melissa "put him out". [T. 338-39]. In April 2005, three months after Carter moved out, V. K. allegedly told Melissa that Carter "touched her". [T. 338]. Melissa became upset and called the Pike County Sheriff's Office, and the person who answered the phone at the sheriff's office told Melissa to go get a "rape kit" done on V. K. [T. 340-41]. Melissa became upset and called her mother instead. *Id.*

On April 14, 2005, an anonymous call was placed to the Mississippi Department of Human Services ("DHS" herein) and DHS personnel left a note on Melissa's door to call in; she complied. [T. 279- 342]. The next day April 15, 2005, Melissa took V. K. to meet with a DHS social worker Kim Weaver who briefly interviewed V. K. and set up an

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[2] Following established protocol, the prosecutrix's initials are used instead of her name.

appointment with the Children's Advocacy Center ("CAC" herein) and a doctor. [T. 281-83, 343].

The CAC interview was conducted by Keith R. Stovall. The interview was video recorded and introduced into evidence at trial. [Ex. S-3; T. 394-95, 375-425].

In the interview V. K. was reticent; but, said that Carter inserted two fingers into her vagina and rubbed her buttocks on several occasions while they were in the pink trailer and subsequently. [Ex. S-3]. V. K.'s descriptions indicated that most if not all of the occurrences of alleged abuse occurred when Melissa the mother was present and nearby. [Ex. S-3]. V. K.'s trial testimony was basically the same. [T. 438, *et seq.*].

The Pike County Sheriff's Office was called in at some point. [T. 285]. The CAC set up a physical exam with a nurse practitioner. [T. 344-45] The practitioner was so rough with V. K. that Melissa took the child and left before the exam was complete. *Id.* V. K. was taken to a gynecologist who examined V. K. on May 10, 2005, five months after any possible abuse, and found that there was some redness of unknown origin and that the child's vaginal opening was slightly enlarged, consistent with digital penetration. [T. 506, 526-27].

Keith Stovall, the CAC worker who conducted the interview with V. K. testified for the state as an expert in forensic interviewing and sponsored introduction of the video of the interview. [T.388, 394-95; Ex. S-3] Another CAC social worker named Catherine Dixon testified as an expert in the field of forensic interviewing and child sexual abuse

and development. [T. 466] Both represented to the court that they were trained in and used certain interviewing techniques. Stovall and Dixon said they follow established interviewing techniques, but, swore that there is nothing scientific about what they do nor any possible way to objectively verify any of their conclusions or subjective beliefs. [T. 33-37, 410-412]. Nevertheless, they both concluded that V. K.'s statement and behavior were consistent with those of a sexually abused child. [T.405, 480-81].

The evidence which convicted Carter consisted of V. K.'s testimony plus the video of her interview combined with a total of eight (8) additional witnesses who repeated the abuse allegations under the tender years exception to the hearsay rule under Miss. R. Evid. 803(25). This included the two experts who said V. K.'s allegations were consistent with an abused child. The eight witnesses were: Karen Weathers with DHS [T. 280]; Davis Haygood, Pike County Sheriff's Investigator [T. 298-301, 312-14]; V. K.'s mother, Melissa [T. 338-39]; Keith Stovall with CAC [T.375-423]; Thomas Gonsalves a counseling social worker and his report [Ex. S-4; T. 429]; Catherine Dixon who did not repeat the actual allegations, but did expound considerably on the details of the interview and who gave her opinion on the credibility of V. K. [T. 461-481]; nurse Karen Touchstone and her report [Ex. S-6; T. 514-15]; Dr. Leigh Cher Gray [T. 526].

There was testimony that V. K.'s father had access to her. He was physically abusive towards Melissa and abused drugs. [T. 362] .

Carter testified that he never touched V. K. improperly. [T.561-90]. He explained

that any wrongful touching could not have transpired as alleged because the layout of the trailers where they lived would not have permitted such conduct to go unnoticed by Melissa. *Id.* Bryant explained that after he and Melissa broke up in January of 2005, Melissa approached him about getting back together, and he declined. *Id.* The next thing he knew, he had been accused of the wrongful acts. *Id.*

The appellant also offered the expert testimony of Gary Mooers, Ph. D. [T. 593 *et seq.*]. Dr. Mooers testified that V. K.'s testimony was not consistent with a child that had been abused. [T. 599, 602, 611, 613]. First and foremost, V. K. provided little or no detail. [T. 602-07, 609-14]. Secondly, the techniques of questioning by Stovall in the interview, were suggestive of detail, and the opinions of Dixon and Stovall were invalid. *Id.* Mooers said the CAC witnesses concluded many things consistent with abuse, which were just as consistent with not being abused, such as pausing to answer. *Id.* Dr. Mooers also explained that the protocol of the CAC itself does not insure accurate results. *Id.* He was critical that Stovall did not ask for more detail and he noted that V. K. only became emotional when she spoke of her mother allegedly being thrown down. *Id.*

SUMMARY OF THE ARGUMENT

Certain prosecution witnesses were not competent to give opinion testimony. The appellant was prejudiced by gross misuse of the tender years exception to hearsay which prevented a fair trial, and which allowed to the state to unfairly bolster and re-bolster its

case in chief. The prosecutrix was coached through her identification testimony in front of the jury and there were several admissions of seriously improper evidence. Finally, Carter should not have to die in prison for the offense charged in this case.

ARGUMENT

ISSUE NO. 1: WHETHER IT WAS ERROR TO QUALIFY DIXON AND STOVALL AS EXPERTS?

In this argument, it is hoped that the validity of the trial counsel's arguments and objections to the qualification of Dixon and Stovall as experts will be revealed. Admission of expert opinion testimony is governed by Miss. R. Evid. 702[3] and the requirements set out in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 34-36 (Miss 2003). First a person offered as an expert must be qualified, secondly, the witness' knowledge must be able to assist the fact finder. *McLemore* 863 So. 2d 34-36. The trial court's rulings on expert testimony are reviewed on appeal under a standard of whether there was an abuse of discretion. See also, *Webb. v. Braswell*, 930 So. 387,

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[3]Miss. R. Evid 702 states:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

396-97 (Miss. 2006), *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss.2007).

In the present case, State witness Keith Stovall earned a masters degree in "counseling psychology, and his job at the CAC was therapist and "forensic interviewer". [T. 375-76]. Stovall's training included interviewing technique and interview evaluation. *Id.* Stovall's job at the CAC was to evaluate whether a child's statement of reported abuse was consistent with behavior patterns of abused children in general. He seeks to determine whether a child's statement "contain indicators of reliability." [T. 387]. Stovall was asked whether V. K.'s story was "faulty". [T. 380] The quality of an "un-faulty" accusation was not disclosed. Stovall said that V. K.'s accusations were not faulty, rather were "tentative", but were otherwise consistent with a child who had been abused. [T. 380].

Stovall said that his technique involves asking open ended questions. [T. 415]. However, the tape of the interview reveals many leading questions, such as "did he move his fingers around?" during the alleged touching events. [Ex. S-3; T. 415-421]. V. K. did not tell where she was touched until after Stovall presented pictures for her to look at. [T. 416] . V. K. did not disclose if the touching occurred over or under clothing until Stovall pressed her with an either-or question. [T. 416-27]. As described by the defense expert Dr. Mooers, "the only details in the interview were ones that were provided by the interviewer." [T. 602].

Stovall said, he had never been wrong, but there were occasions when juries did

not agree with him. [T. 413-14]. Juries are wrong, not him. This self-authentification is hard to argue with since his assessments cannot be verified or tested. [T. 410-412]. Dixon concurred. [T. 33-37]. Of course, this begs the question, if Stovall's findings cannot be tested, how does he know if he is accurate or not?

State witness Catherine Dixon, also with the CAC, admitted knowing that she had been wrong in the past, but could not qualify as to why, nor give the court any information as to the quantity or frequency of invalid conclusions. [T. 33-37]. The reason for this, as Dixon succinctly put it, "We can't keep records of something that is not discoverable". [T. 34]. Dixon said there is no scientific way to judge the accuracy of their assessments. "I am not offering the forensic interview as a tested procedure." [T. 36] Their questioning techniques cannot be verified. *Id.* "[I]t's an art, not a science." [T. 37] There are too many unquantifiable variables [T. 38-40].

The record in this case reveals that Stovall and Dixon failed all three requirement of the enumerated principles of Miss. R. Evid.702. The worst violation, however, pertains to number three (3) that in the qualifying of an expert, the trial court must determine that "the witness has applied the principles and methods reliably to the facts of the case." The fact that Stovall did not ask open ended questions has already been shown above. There is more.

The third prong of Rule 702 referenced above is addressed in *McLemore*, where the court said:

> The trial court is vested with a "gatekeeping responsibility.". The trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue." [Citations omitted]. *McLemore,* 863 So. 2d 36.

As the testimony of Stovall and Dixon reveal, in applying the CAC evaluative techniques, a child's accusatory statement could be false yet credible and consistent with that of an abused child or be true yet incredible and inconsistent with the behavior of an abused child. One is reminded of the admonition of the Court in *Smith v. State*, 925 So.2d 825, 838-39 (Miss. 2006),

"this Court cautions trial judges to prudently evaluate witnesses proffered as experts, as not all who claim special expertise are so qualified."

Dixon said she looks for "elements of credibility" in a child's statement. [T. 34]. When asked to expound on this, Dixon said:

> There's some very specific and some very nonspecific indicators of a child's credibility and the credibility of their statement. Nonspecific factors would be the child's affect, the child's tone of voice, the child's eye contact, the child's – just there general presentation in the interview. I don't think that those factors have been scientifically tested or – you know, and **they fall more into the art rather than the science** of doing forensic interviewing. **Other factors which influence a child's credibility obviously would be the number and quantity and quality of contextual details that the child can provide.** [T. 36-37]. [Emphasis added].

From this last phrase it would be reasonable to conclude that "contextual details" would be an "element of credibility". Not so according to Stovall. He describes how a child not giving details is indicative of a credible story. [T. 400-02]. Another way to put

it is, according to Stovall, the less the child knows, the more likely they have been abused.

Stovall not only thinks that juries who disagree with him are wrong; but, based on testimony from other reported cases, he also thinks that nine and ten year old children are generally stupid and incapable of communicating simple perceptions. It was reported in *Lattimer v. State*, 952 So. 2d 206, 220 (Miss. App. 2006), that Stovall made the assertion, "a ten year old child can't tell us what something tasted like, what something felt like, what something looked like". Not only does this conflict with Dixon's expressed goal to look for details, it reveals a fatal flaw in Stovall's approach. So long as Stovall can convince courts and juries that children are so brainless, Stovall, whose never been wrong, can substitute his own observations for that of the child, which is what is seen in the interview.

Anyone reading this brief was once ten years old and can easily remember describing how something tasted sweet, bitter, sour or salty and can remember describing something as cold, hot, soft and on occasion "icky" and can likewise remember telling somebody how cool so-and-so looked. It follows, therefore, that Stovall's approach is flawed *ab initio*.

Stovall counted "a total of 15 questions that [V. K.] responded [with] either "I don't know" or no answers, and all but two of those were in the bulk of the interview section specifically about abuse. Stovall offered the explanation that trauma is a "diminisher to memory". [T. 404]. He concluded that V. K. was "... in what we'd call a

tentative state of disclosure...". [T 424].

The flaws are not all Stovall's. Even though Dixon swore that "quantity" and "quality" of detail garners credibility of a child's statement, almost all of Dixon's direct and cross was spent explaining why V. K.'s lack of detail and reticence indicated proof of veracity and credibility. [T. 461-502]. This would be another inconsistent application of their stated principles to the facts of this case.

It follows that, under the techniques and evaluative "art" of these two witness, giving details and not giving details both indicate credibility, veracity and truthfulness. So, according to Stovall and Dixon's testimony in this case, and the application of their technique, an indicator of trustworthiness is anything that the interviewer subjectively wants it to be. So, defense counsel's objections were totally accurate, totally valid, and totally supported by legal precedent, and the trial court's ruling was not in accord with the Rule 702 requirement that the experts' "reasoning and methodology" must be capable of proper application to the facts at issue.

The testimony from these two witnesses also establishes that Stovall did not reliably apply his "art" to the present case. Not only were the techniques revealed to be subjective, they were arbitrarily applied in this case. The application of the subjective technique was inconsistent and erratic. When asked whether he could test the reliability of his evaluation, Stovall admitted he could only evaluate himself, not the child. [T. 410].[4]

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[4] This testimony creates a Miss. R. Evid. 901 issue regarding authenticity addressed *infra*.

If Stovall is only evaluating himself, his testimony is irrelevant and in clear contradiction of the requirement that:

> The party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation. *McLemore* 863 So.2d at 35

Another defect in the methodology as applied in this case is that these witnesses only consider their findings "accurate" if there is a conviction. [T. 35]. This should be no surprise since there methods were a product of the American Prosecutor's Research Institute. [T. 407].

The state will be quick to say that the Court of Appeals has already ruled on Stovall and Dixon and the CAC in *Lattimer v. State*, 952 So.2d 206, (Miss. App.,2006), and the Supreme Court in *Smith v. State*, 925 So.2d 825, 838-39 (Miss. 2006.). Both are distinguishable.

The standards of admissibility set forth in *McLemore*, supra, are applied on a case by case basis. 863 So.2d 34-36. In *Lattimer*, some of the issues raised herein were not preserved, so, the present case is distinguishable. 952 So. 2d 221-22. In *Lattimer* there was improper testimony about witness "credibility"; but there was no preserving objection, so the court did not address it. *Id.* Here, in Carter's case that there were timely objections. In *Lattimer* there was no objection to the CAC witnesses giving an opinion about veracity. Here there was. Likewise in *Smith v. State*, there was no objection to Stovall testifying as an expert. 925 So. 2d at 834. Here there was.

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Appellant would ask the court to apply the wisdom of the decision in *Ross v. State*, 954 So.2d 968, 996-97 (Miss. 2007) where there was no error in the trial court excluding an investigator's opinion testimony as an expert based on the application of specific investigatory techniques, proffered to show the inadequacy of the police investigation. The trial court's exclusion in *Ross* was based on a finding that the accuracy of the witness' technique could not be substantiated. Since it could not be substantiated, the *Ross* court found that the proffered testimony was not going to be any aid to the jury and was not relevant under Miss. R. Evid. 401 since it did not have "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

Ross controls here. Stovall and Dixon should not have been allowed to give opinion testimony. The techniques they espoused were substantiated and not reliably nor consistently applied, were shown to be purely subjective and irrelevant not having any "tendency to make the existence of any fact that [was] of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Plus, Stovall's comment that he cannot evaluate a child's testimony, but can only evaluate himself [T. 410], leads to the legal conclusion that Stovall's testimony is not

what it purports to be, and thus is not authentic under Miss. R. Evid. 901.[5] Authenticity is a condition precedent to admission of evidence. *Middlebrook v. State*, 555 So.2d 1009, 1012 (Miss. 1990). If the evidence is not authentic it is irrelevant according to the comments to the rule.

As shown in *Walker v. State,* 878 So.2d 913, 914-15 (Miss.2004), where the prosecution failed to connect a semen laden towel scientifically with a crime. Before ruling that the evidence was not properly authenticated under Miss. R Evid. 901(a), the *Walker* court said, "To simply admit such a towel, without employing the available scientific means for authentication, fails the unfair prejudice standard set forth in M.R.E. 403, infringed upon Walker's right to a fair trial, and served only to bolster the testimony of the prosecution's witnesses.. ... With no direct link to the accused, a soiled towel would tend to mislead, confuse, and incite prejudice in the jury, especially in a capital rape trial involving a 13-year-old victim."

In *Walker* the towel was not properly authenticated, it was not established that the semen on the towel belonged to the defendant, therefore, the towel was not what it purported to be. In the present case, the State presented Stovall's evaluation of himself as an evaluation of the child statement. So, as in *Walker*, this unauthentic testimony

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[5]M.R.E. 901(a) provides:
(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

violated the "unfair prejudice standard of Miss. R. Evid. 403 and likewise infringed on Carter's right to a fair trial.

For all of the above reasons, the opinion testimony of Stovall and Dixon were improperly admitted and Carter was prejudiced to the extent that the court cannot say with confidence, in a case where a man is sentenced to die in prison, that Carter received a fair trial.

ISSUE NO. 2: WHETHER THERE WAS PREJUDICIAL MISUSE OF THE TENDER YEARS EXCEPTION?

The tender years exception to the hearsay rule[6] is a powerful weapon for prosecutors. It is an aid to the child victim as well. In this case, however, this weapon for good was overused.

The prosecutor used the rule to repeat V. K.'s accusatory statements a total of eight (8) times. Plus the video makes nine. Adding V. K.'s live testimony makes a total of ten times the jury heard the state's most damaging evidence. The eight hearsay exception witnesses were listed in the facts, so will not be restated here.

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M. R. E. 803 (25) 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.

Carter only one chance to tell his version. Carter's position is that the excessive use of the tender years exception in this case irreparably prejudiced his right to a fair trial. The issue is raised under Miss. R. Evid. 403 which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Mississippi does not have a reported case directly on point. Other court's have addressed the issue. In *State v. Burr,* 392 N. J. Super. 538, 921 A.2d 1135, 1156-57 (N. J. Super. A. D. 2007) the court said:

> when considering the admissibility of repetitive corroborative statements under the tender years exception to the hearsay rule, the trial court 'should be cognizant of its right under [Rule] 403 to exclude evidence, if it finds in its discretion, that the prejudicial value of that evidence substantially outweighs its probative value." [Citations omitted,], and ... "trial courts, in a proper case, must serve as gatekeepers when repetitive corroborating hearsay evidence is proffered pursuant to [the tender years exception]. [cites omitted]

When does the "may be excluded" become "should be excluded"? Is it after the third repetition, or maybe the sixth repetition, or is it the eighth?

In *Ross v. State*, 954 So. 2d 968 (Miss. 2007) our court reiterated, that admissibility of evidence is discretionary with the trial court, and reversal is required only when there is an abuse of discretion which causes prejudice to a defendant, and said "evidence may be excluded under M.R.E. 403 if it is merely cumulative." In Carter's case, merely cumulative was passed after the third repetition, thereafter, an abuse of

discretion occurred and reversal is warranted and respectfully urged; because, a misuse of the well intended exception infringed upon Carter's fundamental right to a fair trial.

ISSUE NO. 3: WHETHER THE APPELLANT WAS PREJUDICED BY THE PROSECUTOR COACHING THE PROSECUTRIX IN OPEN COURT?

During V. K.'s testimony, the prosecutor asked her:

Q. Do you see Bryant Carter in this courtroom today?
A. I'm not – no, sir.
Q. Okay. I want you to stand up. Okay. Now I want you to look around and see if you see him.
A. No, sir.
Q. Okay. I want you to look over here.
(Objection by defense counsel, no ruling)
A. (Shakes head negatively.)
Q. Okay. Do you recognize this man over here?
By defense counsel: Object to that, Your Honor.
By the Court: I'll overrule. Open to cross-examination.
Q. Do you recognize this man right here? I want you to look at him real good.
A. I remember seeing him before going through the courtroom.
Q. Okay. And do you recognize this man right here?
A. No, sir.
Q. Okay. And I want you to look real good at this man right here. Look at him close. Do you recognize him?
A. Yes, sir.
Q Who is that?
A. Bryant Carter. [T. 449]

Then, outside the presence of the jury the record was made that once the witness answered three times that she did not see Bryant in the courtroom, the prosecutor then stood first behind one defense counsel who had blond hair, then behind defense co-

counsel who is African American, and lastly behind the black haired defendant and said "And I want you to look real good at this man right here. Look at him close. Do you recognize him?". [T. 449,459-461].

The argument is that this is an improper coaching or leading of the witness. In *Williams v. State*, 539 So.2d 1049, 1052-53 (Miss. 1989), during cross-examination of a state witness, the prosecutor made certain gestures signaling to his witness. The issue raised on appeal was whether the coaching gestures of the prosecutor interfered with a fair trial for the defendant, who was charged, like Carter, with sexual battery. In reversing on this and other grounds, the *Williams* court said:

> An attorney should never signal to a witness, regardless of how innocent the action may be, because this leaves with the jury the impression of covertness and partiality between the witness and the signaling party. If, during examination and due to some unusual circumstances, an attorney wishes a witness to be instructed, he should address his request to the trial judge. Therefore, we find that these actions by the prosecutor also denied Williams a fair trial.

The signaling in *Williams* was not as prejudicial to the defendant there because the witness was not an identifying witness, like the situation against Carter. If coaching was reversible error in *Williams,* it certainly is reversible error here, more so.

ISSUE NO. 4: WHETHER SEVERAL OF THE TRIAL COURT'S EVIDENTIARY RULINGS PREJUDICED THE DEFENSE?

Under this issue Carter now asks the Court to review the following occurrences singularly and for cumulative error under *Glasper v. State*, 914 So.2d 708, 729 (Miss.2005) and *Byrom v. State*, 863 So.2d 836, 847 (Miss.2003). The appellant's position is that any one or more rendered the trial unfair under established precedent, and when taken in combination clearly entitled him to a new trial.

First, The trial court limited the defendant's cross-examination of a state expert. [T. 413-414]. During a crucial cross examination of state witness Keith Stovall, defense counsel was asking him about his assertion that he had never been wrong, but, there were cases where juries had disagreed with him. *Id.* Defense counsel asked whether in such circumstance, Stovall thought the jury was wrong and the state objected, on unspecified grounds, and the trial court sustained, with the comment that the questions called for a legal conclusion. *Id.* at 414.

The question calls for Stovall's subjective belief as a basis for his claim to have never erred, it did not call for Stovall to render a legal opinion under Miss. R. Evid. 701, nor call for legal analysis of any kind whatsoever. See *Alexander v. State*, 610 So.2d 320, 329 (Miss. 1992).

The error is made apparent by reading *Sayles v. State,* 552 So.2d 1383, 1385-86 (Miss.1989) where the Supreme Court reversed after the trial court stopped defense counsel short during cross examination of a state witness.

In doing so the *Sayles* court said:

> Mississippi allows wide-open cross-examination of any '... matter affecting the credibility of the witness." M.R.E. 611(b). A witness on cross-examination may be interrogated regarding his interest, bias or prejudice in a case. *Hill v. State*, 512 So.2d 883 (Miss.1987). The same rule is provided in Miss. Code Ann., Section 13-1-13 (1972). *Id.*

Even though the trial court has broad discretion in the extent of cross-examination, "the arbitrary curtailment upon a proper subject of cross-examination may be grounds for reversal." *Id.* See also, *Suan v. State*, 511 So.2d 144 (Miss.1987). It goes without saying that limiting cross-examination of key witnesses on key points violates the confrontation clauses of federal and state constitutions requiring reversal. U.S. Const. Amend. VI and XIV; Miss. Const. Art. 3, Sec. 26; See also, *Foster v. State*, 508 So.2d 1111 (Miss.1987).

The next point is the trial court here allowed the prosecutrix's mother to testify about being a victim of abuse when she was a child under the pretext of explaining that she "did not know what to do" when learning that V. K. had possibly been abused. The real reason, however, was to create a sympathetic emotional reaction with the jury.

In *Lester v. State*, 692 So.2d 755, 785-86 (Miss. 1997), over objection, a state witness was allowed to describe how the deceased child's mother held the child in the hospital after her death. The same witness, over objection was also allowed to testify he had visited the child victim's grave and taken flowers.

The court said, in reversing, that:

> this testimony regarding events occurring after [the child's] death had absolutely no relevance in determining whether Lester was guilty of capital murder. This evidence worked only to invoke sympathy toward the victim's family, and had no place in the guilt phase of trial. [citation omitted] It otherwise created unfair prejudice in violation of Miss. R. Evid. 403. Therefore, the trial court erred in allowing this testimony over Lester's objection. Admission of this evidence contributed to the reversible error resulting from the combined admission of other incompetent, highly prejudicial evidence which was erroneously admitted at Lester's trial. *Id.*

Testimony about any alleged abuse that V. K.'s mother might have suffered as a child was similarly remote and prejudicial, creating a feeling in the jury that they would be obligated to render some remedy for the mother's unsubstantiated suffering too.

Thirdly, the trial court did not allow Cater to explain why he looked different at the trial than at the time of the alleged instances, even though the prosecutrix was allowed to testify about the defendant's looks. [T. 450, 571].

The following transpired during V. K.'s direct examination just after she was coached into identifying Carter:

> Q. Okay. Does he look any different now that he did before?
> A. Yes, sir.
> Q. In what way?
> A. His hair.
> Q. Okay. Is that why you had a hard time recognizing him?
> (Objection to hearsay overruled)
> Q. Is that why you had a hard time recognizing him?
> A. Yes, sir.
> Q. How is his hair different?
> A. He shaved it kind of around. [T. 450]

To counter the conclusion that Carter had cut his hair to try to cause

misidentification or from some other bad motive, defense counsel tried to offer testimony explaining the different look. [T. 571]. On Carter's direct examination, we see from the record:

> Q. Since the last time that you saw either [Melissa] or [V. K.], what, if anything about your appearance has changed?
>
> A. I've taken off my mustache and goatee that I had worn for several years, and I'm dressed in a suit. I normally don't dress in suits.
>
> Q. Okay. And what was the purpose in taking off your goatee?
>
> A. Prospective job interview. It was recommended that I shave it, I'd be more likely to –
>
> (State's non-specific objection sustained) *Id.*

Simply put, the Cater was not allowed to answer the state's evidence on this point. The door of due process was slammed in his face.

In the case of *Williams v. State*, 539 So.2d 1049, 1050-51 (Miss. 1989), a defense expert was prevented from testifying on a topic upon which a state expert had expounded. The *Williams* court said, "this, obviously, was error. The purpose of rebuttal testimony is to explain, repel, counteract or disprove evidence by the adverse party." See, *United States v. Delk*, 586 F.2d 513 (5th Cir.1978); *Roney v. State*, 167 Miss. 827, 150 So. 774 (1933).

See also *Darby v. State*, 538 So.2d 1168, 1174 (Miss.,1989), where the Court reversed upon the prevention of a defendant from putting on evidence in support of his defense, and in doing so, said:

> However, we find that the trial court did prevent Darby from putting on his defense of self-defense ... the right to raise defenses and to put on evidence in support of these defenses is a substantial right-that of due process.

Therefore, we reverse and remand on this assignment of error.

The state cannot argue that the haircut evidence was character evidence, because, as stated in *King v. State,* 857 So.2d 702, 723 (Miss. 2003), "Though character evidence is not permissible to show conformity therewith on the occasion of the alleged crimes, ... it is admissible as rebuttal evidence to explain, repel, counteract or disprove evidence of the adverse party." Citing *Williams v. State, supra* at 1051.

All of the above alone or together would entitled Carter to a new trial under the authorities cited. The Court is respectfully requested to remedy the errors.

ISSUE NO. 5: WHETHER THE SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE TO THE OFFENSE?

Carter was sentenced to life in prison.[7] [R. 52- 53; T. 671-78] This will be served without parole pursuant to MCA §47-7-3(1)(b) and (d)(ii)(g).(Rev. 2005).

Carter's position is that a sentence of life without parole for the offense conduct in this case is unconstitutionally disproportionate and constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and Article 3 §28 of the Constitution of the State of Mississippi.

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[7]MCA§ 97-3-101. Sexual battery; penalty.

...(3) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(d) who is eighteen (18) years of age or 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.

According to *Tate v. State*, 912 So.2d 919, (Miss. 2005), normally, sentencing within statutory limits is within the discretion of the trial court not subject to appellate review. See also, *Nichols v. State*, 826 So.2d 1288, 1290 (Miss.2002); *Hoops v. State*, 681 So.2d 521, 537 (Miss.1996).

Notwithstanding, if a sentence is "grossly disproportionate" to the criminal offense, "the sentence is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment". *Hoops*, 681 So.2d at 537.

With life sentences, an extended proportionality analysis is appropriate under the Eighth Amendment *Barnwell v. State*, 567 So.2d 215, 221 (Miss.1990).

The factors to evaluate the constitutional proportionality of a sentence are:

> (1) The gravity of the offense and the harshness of the penalty;
> (2) Comparison of the sentence with sentences imposed on other criminals in the same jurisdiction; and
> (3) Comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case. *Id.*

See: *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), *Stromas v. State*, 618 So.2d 116, 122-23 (Miss.1993); *Wallace v. State,* 607 So.2d 1184, 1188 (Miss. 1992); *Hoops v. State*, 681 So.2d 521, 538 (Miss.1996) *Smallwood v. Johnson*, 73 F.3d 1343, 1347 (5th Cir.1996).

In *White v. State,* 742 So. 2d 1126, 1135-38 (Miss. 1999) the defendant was convicted of selling $40.00 worth of crack cocaine within 1500 feet of a church and was sentenced to sixty (60) years. White appealed the sentence on the basis that it was

unconstitutionally disproportionate and the court remanded finding that there was nothing in the record to justify such a harsh penalty, since White was apparently a first offender. The *White* court found that the trial court did not exercise any discretion and simply arbitrarily rendered the maximum penalty. The same scenario transpired the same way in *Davis v. State*, 724 So. 2d 342, 344-45 (Miss. 1998), where again the court remanded a sixty year sentence for selling drugs within 1500 feet of a church, finding there was no justification on the record for such a sentence. See also *Towner v. State,* 837 So.2d 221, 227 (Miss. App. 2003).

Applying the *Solemn* test here, it is clear that the gravity of the offense of sexual battery of a minor is very serious and the harshness of the penalty is most severe. In performing the two comparison aspects of the test, comparing Carter's sentence with sentences imposed on other criminals in Mississippi, and, comparing sentences imposed in other jurisdictions for commission of the same offense:

The following reported Mississippi cases are comparable. In *Dawkins v. State,* 919 So.2d 92 (Miss. App. 2005), the defendant was sentenced to 20 years with 10 years suspended. In *Caldwell v. State*, 953 So.2d 266 (Miss. App.,2007), the defendant sentenced to thirty-five years with eighteen years suspended. In *Hodgin v. State,* --- So.2d ----, 2007 WL 2128353 Miss., 2007, the defendant was sentenced to 20 years. In *Penny v. State,* 960 So.2d 533, (Miss. App. 2006), the defendant sentenced to 15 years. In *Mason v. State* --- So.2d ----, 2007 WL 1412975 Miss. App., 2007, the defendant was

sentenced to 30 years. In *Roles v. State* 952 So.2d 1043 (Miss. App., 2007) the sentence was 20 years. The defendants in all of the listed cases will get out long before Carter.

Nationally, according the United States Department of Justice, *Office of Juvenile Justice Bulletin*[8], "Offenders Incarcerated for Crimes Against Juveniles" by David Findelhor and Richard Ormrod, pp. 10-11, Dec. 2001, the median sentence for sexual offenses against victims less than twelve (12) years of age is 180 months and in only ten per cent (10%) of all sexual assaults against children result in a life sentence.

If Carter had been charged federally under 18 U. S. C.§ 2242, his sentence under that section could not exceed twenty (20) years. The advisory United States Commission, *Sentencing Guidelines Manual*, §2A3.1 (Nov. 2005), provides that the penalty for violation of §2242 with factors similar to Carters situation being a first offender should be between 151 to 188 months (12.6 years to 15.7 years).

Comparing other sentences in general, it appears as though the trial court here in Carter's case did not exercise a sufficient quantum of discretion. It is unclear why Carter, a first offender, received the maximum sentence.

A good example of a trial court exercising discretion can be found in *White v. State*, --- So.2d ----, 2007 (WL 1675089 Miss. App. 2007) (June 12, 2007), where a first time offender was sentenced to fifteen years, ten to serve, five suspended, for an aggravated assault. In *White,* the court noted that the sentence was proportionate and

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[8] Available on the Internet at http://www.ncjrs.gov/pdffiles1/ojjdp/191028.pdf

reasonable because the crime was serious, the maximum was twenty years, and the defendant had no prior felony convictions, steady employment and an otherwise "relatively clean record."

The court should also consider cases like *Denton v. State*, 955 So.2d 398, 399-400 (Miss. App. 2007), where a defendant committed a home invasion with a pistol and assaulted the victims "leaving them traumatized" and still received a lesser sentence to serve than Mr. Carter.

There was no evidence that Carter was violent with the child, never was accused of exposing himself to the child, and did not abduct the child. All of the alleged penetration was digital. V. K. was more emotional about Carter's alleged mistreatment of her mother than of any conduct against herself. Carter is a first offender, his family spoke up for him and he had a good record. [T 674-75].

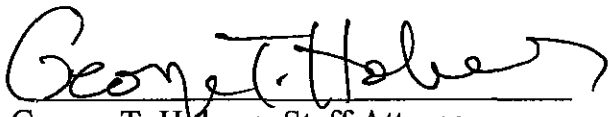
It follows that Carter's sentence is not proportionate to his offense and should be vacated, and if the Court does not reverse the conviction, at a minimum, Carter's case should be remanded for resentencing.

CONCLUSION

Bryant Carter is entitled to have his conviction reversed with remand for a new trial, or at a minimum, remand for re-sentencing.

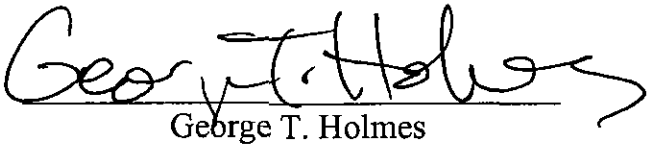
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Bryant Carter, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 19th day of October, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Michael M. Taylor, Circuit Judge, P. O. Box 1350, Brookhaven MS 39602, and to Hon. Rodney Tidwell, Dist. Atty. , 284 E. Bay St., Magnolia MS 39652, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.


George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200