CHARLES BANKSTON — APPELLANT

V. — NO. 2007-KA-0929-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CHARLES BANKSTON **APPELLANT**

V. **NO. 2007-KA-0929-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Charles Bankston, Appellant
3. Honorable Doug Evans, District Attorney
4. Honorable Clarence E. Morgan, III, Circuit Court Judge

This the 7th day of September, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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STATUTES:

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CHARLES BANKSTON — APPELLANT

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED IN NOT SUPPRESSING THE RECORDED STATEMENTS OF CHARLES BANKSTON BECAUSE THEY WERE ILLEGALLY OBTAINED.

II. THERE WAS NO PROBABLE CAUSE TO ARREST THE APPELLANT, AND THUS THE RECORDED STATEMENTS TAKEN FROM HIM AFTER HIS ARREST SHOULD HAVE BEEN SUPPRESSED.

Charles Bankston was indicted for three counts of sexual battery pursuant to Miss. Code Ann. § 97-3-95(2). (C.P. 6-7; R.E. 4-5). The jury found him not guilty of Count I, but found him guilty of Counts II and III. He was sentence to thirty years in the custody of the Mississippi Department of Corrections on each count, with said sentences to run concurrently. (C.P. 33-34; R.E. 6-7). Charles Bankston is presently in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The alleged victim in this case was only sixteen years old at the time of the alleged incident. The recorded telephone conversation between the alleged victim and her father was illegally obtained because the alleged victim in this case did not have the legal capacity to consent to having the telephone conversation recorded. Furthermore, there was no actual, implied, or vicarious consent given by either of her parents, and therefore the trial court erred when it did not suppress the telephone conversation.

Additionally, because the probable cause to obtain the arrest warrant in this case was based solely upon the illegally intercepted telephone conversation, the resulting custodial interrogations should have also been suppressed by the trial court pursuant to the fruit of the poisonous tree doctrine. Accordingly, the trial court erred in denying the motion to suppress the custodial interrogations of the Appellant.

FACTS

On or about September 12, 2006, the alleged victim in this case, A.B.,[1] informed her mother

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[1]In keeping with the Court's protocol regarding alleged victims of sexual assaults, only the initials of the alleged victim are being used. The proper name of the alleged victim can be found throughout the record. (C.P. 6-7; Tr. 97-114).

called, and Deputy David Johnson responded to the call. (Tr. 121). After speaking with A.B., Deputy Johnson came up with the idea of having A.B. call her father on the telephone to try and get him to admit to illegal conduct. (Tr. 162). Deputy Johnson had A.B. call her father while he recorded the conversation. (Tr. 101). Also present and listening in on the telephone conversation was Kari Phillips, a social worker with the Mississippi Department of Human Services. (Tr. 101).

After Johnson recorded the conversation, he felt like he had enough probable cause to obtain an arrest warrant, so he obtained an arrest warrant signed by a local Justice Court Judge. (Tr. 122). He testified that before the telephone call was made, he was not sure that the event had actually taken place. (Tr. 122).

After obtaining the arrest warrant, Johnson arrested the Appellant. (Tr. 122). During the ride back to the Sheriff's Department, Johnson interrogated the Appellant. (Tr.123-34). The interrogation was recorded. (Tr. 123-34). Not satisfied, Johnson conducted yet another interrogation of the Appellant at the Sheriff's Department. (Tr. 141-50). After he was done with his interrogation, he called DHS social worker Kari Phillips to come and interrogate the Appellant as well. Both of these interrogations were recorded as well. (Tr. 141-50; 168-74).

Bankston was indicted on three counts of sexual battery pursuant to Miss. Code Ann. § 97-3-95(2). (C.P. 6-7; R.E. 4-5). A motion to suppress was filed by Bankston's counsel. In the motion, Bankston's counsel alleged that A.B. was not of the age to consent to allowing the telephone conversation be recorded, and thus it was illegally obtained and should be suppressed. (Tr. 2-6). Bankston's counsel also asserted that because Deputy Johnson would not have had probable cause to arrest Bankston but for the illegally obtained recording of the telephone conversation, the results

conversations, and thus denied the motion to suppress filed by Bankston. (Tr. 15).

The case was tried on April 11, 2007. The jury found Bankston not guilty of Count I of the indictment which alleged that he sexually penetrated A.B. with his penis. The jury did, however, find Bankston guilty of Counts II and III of the indictment which alleged digital penetration and oral penetration. Bankston was sentenced to thirty years in the custody of the Mississippi Department of Corrections on each count, with said sentences to run concurrently. (C.P. 33-34; R.E. 6-7).

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT SUPPRESSING THE RECORDED STATEMENTS OF CHARLES BANKSTON BECAUSE THEY WERE ILLEGALLY OBTAINED.

A. Standard of Review.

Our standard of review concerning a trial judge's ruling on a motion to suppress evidence is clear. In ***Culp v. State***, 933 So.2d 264 (Miss.2005), we stated:

> When reviewing a trial court's ruling on the admission or suppression of evidence, this Court must assess whether there was substantial credible evidence to support the trial court's findings. The admission of evidence lies within the discretion of the trial court and will be reversed only if that discretion is abused.

Id. at 274 (citing ***Crawford v. State***, 754 So.2d 1211, 1215 (Miss.2000); ***Magee v. State***, 542 So.2d 228, 231 (Miss.1989)).

McLendon v. State, 945 So.2d 372, 379 (Miss. 2006).

B. A.B. Could Not Legally Consent to Law Enforcement Recording Her Telephone Conversation with Her Father.

Before the trial of this matter, Bankston's counsel made a motion to suppress the statements.[2]

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[2]The record does not contain a written copy of the motion to suppress, but clearly it was made in writing as both the trial court and the prosecutor made reference to it during the

Bankston's counsel further argued that but for the illegally obtained recording of the telephone conversation between A.B. and her father, Deputy Johnson would not have had probable cause to arrest Bankston, and thus, the two subsequent statements taken from him should have also been suppressed. (Tr. 6).

18 U.S.C. § 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The Mississippi Supreme Court has held:

> Mississippi's wiretapping prohibition statute also has a section similar to 18 U.S.C. § 2515. It provides:
>
> > The contents of an intercepted wire, oral or other communication and evidence derived from an intercepted wire, oral or other communication may not be received in evidence in any trial, hearing or other proceeding in or before any court ... if the disclosure of that information would be in violation of this article ...
>
> Miss. Code Ann. § 41-29-503 (Supp.1995).
>
> The Mississippi wiretap prohibition is almost identical to the federal statute.

Wright v. Stanley, 700 So.2d 274, 279-80 (Miss. 1997).

However, consent of one of the parties to the conversation is an exception to both of the aforementioned statutes. ***Stewart v. Stewart***, 645 So.2d 1319, 1321-22 (Miss. 1994). Section 2511(2)(d) of 18 U.S.C.A. provides:

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suppression hearing. (Tr. 2-15).

parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Stewart v. Stewart, 645 So.2d 1319, 1321-22 (Miss. 1994)(citing 18 U.S.C. §2511(2)(d)).

Miss. Code Ann. § 41-29-531 provides in relevant part:

> This article shall not apply to:
>
> (d) A person acting under color of law who intercepts a wire, oral or other communication if the person is a party to the communication, or if one of the parties to the communication has given prior consent to the interception; or
>
> (e) A person not acting under color of law who intercepts a wire, oral or other communication if the person is a party to the communication, or if one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this state, or for the purpose of committing any other injurious act.

The problem in the present case is that A.B. could not legally consent to Deputy Johnson recording the telephone conversation in question because she was not of the age to give proper legally binding consent. Furthermore, neither her mother nor father gave actual, constructive or vicarious consent.[3]

Our sister state of Alabama has held that a person under the age of majority cannot give consent to have a telephone conversation recorded. ***Stinson v. Larson***, 893 So.2d 462 (Ala.Civ.App. 2004). There, the Court held:

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[3]At the hearing on the post trial motions, the State alleged that A.B.'s mother consented to Deputy Johnson recording the telephone conversation. (Tr. 224). However, there is no evidence in the record to support that assertion made by the prosecutor.

years, has not yet reached the age of majority so as to have the right to contract or otherwise give legally binding consent. See § 26-1-1, Ala.Code 1975.

Stinson v. Larson, 893 So.2d at 468 (Ala.Civ.App. 2004)(emphasis added).

The seminal case on the vicarious-consent doctrine involving the wiretapping statute is ***Thompson v. Dulaney***, 838 F.Supp. 1535, 1544 (D.Utah 1993). There, the Court found that a parent could vicariously consent to a telephone conversation being recorded even without the knowledge of the child "as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations." ***Thompson v. Dulaney***, 838 F.Supp. 1535, 1543 (D.Utah 1993). In so holding, the ***Thompson*** Court observed that "this case involves minor children who lack *both* the capacity to consent and the ability to give actual consent." (Emphasis in original). The Court of Criminal Appeals in Texas has held, "Unlike adults, minors do not have the legal ability to consent in most situations." ***Alameda v. State***, 2007 WL 1828371, *3 (Tex.Crim.App. 2007).

In the present case, A.B. was sixteen years old at the time Deputy Johnson recorded the telephone conversation in question. In Mississippi, a minor does not reach the age of majority until the age of eighteen. Miss. Code Ann. § 93-19-13. *See also* ***Ray v. Acme Finance Corp.***, 367 So.2d 186, 188 n.1 (Miss. 1978)("Mississippi Code Annotated section 93-19-13 (Supp.1977) removes the disability of persons eighteen years of age or older. . ."). Indeed, the law in Mississippi regarding the disability of minors is well established.

> In ***Alack v. Phelps***, 230 So.2d 789, 792-93 (Miss.1970), we held that "children are under the disability of minority and cannot act for themselves. The equity court will protect their rights." In that case, two children, adopted by their

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[4]***Silas v. Silas,*** 680 So.2d 368, 370 (Ala.Civ.App.1996).

155, 162, 33 So.2d 616, 618 (1948) (holding that "minors can waive nothing. In the law they are helpless, so much so that their representatives can waive nothing for them....")

In order to protect children, case law and statutory law have consistently provided that minors do not have the capacity to legally consent. Minors are considered incapable of making such decisions because of their lack of emotional and intellectual maturity. Furthermore, minors cannot enter into contracts, buy or sell real property, vote, own a house, or even choose the parent with whom they care to live when their parents divorce. In ***Edmunds v. Mister***, 58 Miss. 765 (1881) this Court held that when contracts for the sale of land are made by minors, they are voidable at the option of the minor. Generally, an infant has the right to disaffirm a contract of purchase of land even though it has been executed. 43 C.J.S. Infants § 138, at 405-06 (1978). In fact, a minor in Mississippi does not even have the capacity to bind himself absolutely to a contract. *See* ***Shemper v. Hancock Bank***, 206 Miss. 775, 778, 40 So.2d 742, 744 (1949)(minor did not assume liability in a partnership because the partnership was a contractual relationship in which the minor had no capacity to enter). *See also* Miss. Code Ann. § 93-19-13 (1994) (allowing only those individuals eighteen years of age or older to contract); Miss. Code Ann. § 15-3-11 (1995) (setting forth statutory steps for person of majority to ratify contract entered into as minor).

For example, Miss. Code Ann. § 97-3-65(1)(b)(2000) makes it a crime for a person of any age to have sexual intercourse with a child who is under the age of fourteen or who is twenty-four or more months younger than the person. The offender is held accountable regardless of the minor's consent or lack of chastity. ***Id.*** § 97-3-65(c). There further is a proscription against the fondling of a child under the age of sixteen years by a person over the age of eighteen years "with or without the child's consent." Miss. Code Ann. § 97-5-23(1) (2000). Section 97-5-23(2) creates a separate offense where the child is under the age to eighteen years in those instances where the offender "occupies a position of trust or authority over the child."

In recognition of minors' relative inability to act maturely on their own behalf, courts also give special protection to minors in the law of adverse possession. The ten-year term provided in our adverse possession statute simply "does not begin to run against minors until the disability of minority has been removed." ***Wilder v. Currie***, 231 Miss. 461, 483, 95 So.2d 563, 571 (1957); Miss. Code Ann. § 15-1-7 (1995). Likewise, the statute of limitations for a minor to bring a personal action is tolled until the disability of minority is removed. Miss. Code Ann. § 15-1-59 (1995). This Court also recognizes the disability and waits until minority is removed to permit the time for taking an appeal to run. M.R.A.P. 4(f). Even when the minor has a guardian ad litem, he is given two years within which to file his appeal to this

2001)(McRae, P.J., dissenting).

Furthermore, Mississippi Code Annotated § 43-21-303(3) provides that a minor under the jurisdiction of the youth court shall "invite the parent, guardian or custodian to be present during any questioning." ***Ward v. State***, 914 So.2d 332, 335 (Miss.Ct.App. 2005). Thus, it is apparent that in Mississippi, a minor does not have the capacity to legally consent except under the most limited circumstances. The present case is not one of those circumstances. Therefore, because the Fourth Amendment protections forbid the unreasonable search of conversation, ***Berger v. New York***, 388 U.S. 41, 51, 87 S.Ct. 1873, 1879, 18 L.Ed.2d 1040 (1967), the trial court erred in not suppressing the telephone conversation between the Appellant and A.B. The Appellant asserts that the Court should reverse and remand on this issue.

II. THERE WAS NO PROBABLE CAUSE TO ARREST THE APPELLANT, AND THUS THE RECORDED STATEMENTS TAKEN FROM HIM AFTER HIS ARREST SHOULD HAVE BEEN SUPPRESSED.

A. Standard of Review.

"A police officer desiring an arrest warrant must obtain a judicial determination that probable cause exists." ***Dove v. State***, 912 So.2d 1091, 1093 (Miss.Ct.App. 2005)(citing ***Conerly v. State***, 760 So.2d 737, 740 (Miss.2000)). "The test for probable cause in Mississippi is the totality of the circumstances." ***Couldery v. State***, 890 So.2d 959, 962 (Miss.Ct.App. 2004)(citing ***Haddox v. State***, 636 So.2d 1229, 1235 (Miss.1994)). In reviewing a magistrate's issuance of an arrest warrant, the Court "determines whether the facts and circumstances before the judge provided a 'substantial basis ... for conclud[ing] that probable cause existed.'" ***Byrom v. State***, 863 So.2d 836, 860 (¶ 65) (Miss.2003)(quoting ***Illinois v. Gates***, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527

By his own admission, Officer Johnson did not have probable cause before the telephone call to the Appellant was made. At trial, Deputy Johnson admitted that "he wasn't sure in his mind that this [the rape] had actually happened." (Tr. 122). He further testified, "I wanted to make sure before I destroyed anybody's life by falsely accusing somebody, so I came up with the idea of arranging a telephone call with letting her call the defendant." (Tr. 122).

"To obtain an arrest warrant for a felony, either with or without a warrant, a police officer must have (1) reasonable cause to believe that a felony has been committed; and (2) reasonable cause to believe that the person proposed to be arrested is the one who committed it." ***Conerly v. State***, 760 So.2d 737, 740 (Miss.,2000)(citing ***Henry v. State***, 486 So.2d 1209, 1212 (Miss.1986)). In ***Conerly***, the Court went on to state:

> Moreover, this Court has defined probable cause as follows:
>
> > Probable cause is a practical, non-technical concept, based upon the conventional considerations of every day life on which reasonable and prudent men, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.
>
> ***Strode v. State***, 231 So.2d 779, 782 (Miss.1970). Perhaps more simply put, "probable cause means more than a bare suspicion but less than evidence that would justify condemnation." ***Wagner v. State***, 624 So.2d 60, 66 (Miss.1993).

Conerly v. State, 760 So.2d 737, 740-41 (Miss. 2000).

Clearly the arrest warrant in this case was issued without probable cause because it was based solely on the illegally recorded telephone conversation between the Appellant and A.B. Furthermore, because the arrest in this case was made without probable cause, the subsequent

told the trial court that 'we wouldn't have found those drugs except that Mr. Toy helped us to.'"

Wong Sun v. U.S., 371 U.S. at 487 (1963). The Court went on to hold:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, **the evidence to which instant objection is made has been come at by exploitation of that illegality** or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959).

Wong Sun v. U.S., 371 U.S. at 487-88. (Emphasis added).

Here, but for the illegal arrest of Charles Bankston, the custodial interrogations would have never taken place. Thus, just as in ***Wong Sun***, the trial court should have suppressed the statements. The Appellant asserts that the Court should reverse and remand on this issue.

CONCLUSION

For the foregoing reasons, the Appellant contends that the trial court erred in failing to suppress the telephone conversation between the Appellant and A.B. Furthermore, because the arrest warrant was not based on probable cause, and thus erroneously issued, the subsequent custodial statements made by the Appellant should have been suppressed pursuant to the fruit of the poisonous tree doctrine. Therefore the Court should reverse and remand for a new trial.

Respectfully submitted,

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