IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID PAUL WILSON **APPELLANT**

VERSUS **NO: 2007-KA-01397-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

I, Doyle L. Coats, hereby certify that the following listed persons have an interest in this case. This representation is made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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This the 19th day of December, 2007, A.D.

Doyle L. Coats, Attorney for Appellant

APPELLANT'S BRIEF TABLE OF CONTENTS

Table of Cases and Authorities

Rules

Statement of Issues

Issue I.
It was plain error for Mr. Wilson to be tried on a multi-count indictment

Issue II.
Mr. Wilson's jury was not sworn with either the capital oath or the general oath as is statutorily and constitutionally required for all juries. Because of this, his jury was not legal according to Mississippi Supreme Court case law, and the verdicts are a nullity.

Issue III.
Mr. Wilson's indictment—with the time of the crime alleged in it spanning a period of six months on two separate charges—failed to give him proper notice and fails constitutionally because it is too vague to defend. It was plain error for the trial court to proceed on such an indictment.

Issue IV.
The trial court erred in giving Instructions S-3, S-4 and S-6 as they improperly singled out and emphasized "penetration", one element of the charge in Count II, and not an element at all in Count I. Additionally, S-6 was a peremptory instruction on the age of CBL, Finally, Instruction S-4 confused the jury by defining degrees of penetration and allowed further consideration of that inadmissible element in Count I.

Issue V.
Under *Daubert* and MRE 702, Mr. Wilson was entitled to a "gate-keeping" hearing regarding the admissibility of the results of a police-administered voice-stress test which showed that he was not deceptive when he denied committing the crimes set out in the indictment. The trial court abused its discretion in summarily granting the state's motion in limine to exclude the favorable results, rather than conducting such a hearing.

Voice Stress

Issue VI.
The state produced insufficient evidence to support Mr. Wilson's convictions in both Count I and Count II, and each verdict was contrary to the weight of the evidence. Thus, the trial court erred in denying Mr. Wilson's request for a peremptory instruction, his combined Motion for a Directed Verdict/Motion to Dismiss as well as his Motion for a New Trial.

Procedural History

David Paul Wilson was indicted by the March 2005 Grand Jury for the First District of Harrison County in Cause Number B-2401-2005-289. He was charged with fondling in Count I and sexual battery in Count II. After arraignment, and various continuances sought by both the state and counsel for Mr. Wilson, he proceeded to trial on June 14, 2006, represented by Hon. F. Philip Wittmann IV., acting in his role as a contract public defender for Harrison County. Voir dire was completed and a jury was seated, and on the next day, June 15, 2006, motions were had, opening statements were made, and the state completed its case-in-chief, with Mr. Wilson calling one of his witnesses. On the third and final day of the trial, Mr. Wilson testified, closing arguments were given by both the state and the defense, and the case went to the jury, which returned verdicts of guilty on both counts. The trial court sentenced him to serve a term of 7 (seven) years for fondling, and 20 (twenty) years for sexual battery, to be run concurrently, for a total of twenty years to serve in the Mississippi Department of Corrections without the possibility of parole or conditional release.

A Motion for a New Trial was filed on June 22, 2006, and an order was filed on July 17, 2007, denying the motion, with no evidence appearing in the record to show that a hearing was conducted. New counsel, Hon. Doyle L. Coats, and Hon. Ross Parker Simons, filed the required paperwork to perfect Mr. Wilson's appeal, which follows.

Statement of the Case and Facts Relevant to Review

I. Motions and Rulings

Prior to the calling of witnesses in this case, the trial court heard motions from Mr. Wilson and from the state. The trial court granted *ore tenus* motions in limine from Mr. Wilson

to exclude any testimony of past convictions, and of any bad acts of Mr. Wilson not related to this case. (Tr. 54-56). Another motion was made to limit what Donald Matherne, Ph.D, could testify to regarding the veracity or credibility of the victim. This motion was mooted because the trial judge prohibited Dr. Matherne's testimony because his examination of the child was not for the purpose of diagnosis or treatment, and thus inadmissible under MRE 803(4). (Tr. 213). The trial court did permit the state—over a defense objection—to call Rebecca Lopez, the child's mother, and detective lieutenant Rosario "Chayo" Ing finding that their testimony of what the child said to them met the requirements for admissibility under the "tender years" exception of MRE 803(25). (Tr. 83-85). Defense counsel also argued a Motion to take the jury to the scene of the alleged crime, which the trial court tacitly denied. (Tr. 85).

The state presented the court with two *ore tenus* motions in limine. The first was to exclude testimony of a *lack* of incidents similar to those charged in the indictment, while Mr. Wilson was around other children. Second was a motion in limine which successfully excluded any reference to a "voice stress analysis" administered to Mr. Wilson by a Detective Billy Strange, Certified Voice Stress Analyst for the Gulfport Police Department Detective Division, and which "deemed that [Mr. Wilson's] answers were truthful and that he was not being deceptive in his denials of these allegations." (By Assistant District Attorney Smith at Tr. 89, Bates number 40, Exhibit A, Appellant's Brief page 36). The state's third motion was more along the lines of an agreement by both sides that the child's stuffed animal could accompany her to the witness stand. (Tr. 91).

II. Testimony of State's Witnesses

The state called three witnesses: CBL[1], the ten-year old prosecutrix; her mother, Rebecca Lopez; and Rosario "Chayo" Ing, a detective lieutenant in the Gulfport Police Department in 2003, at the time of the incident alleged in the indictment.

A. CBL Direct Testimony

CBL relayed to the jury on direct examination her recollections of what was alleged in the indictment to have occurred between June and November of 2003. She testified that at the time in question she was in the first grade for the second time and that her after-school baby sitter was Ms. Ellen Wilson, who during that time sometimes kept up to four other children. David Wilson, Ms. Ellen's son, would sometimes be present and she would "play tickle" with him. (Tr. 109). Some of the tickles were "good touches" but others were not, when he touched her "in the tinkle", which she identified for the prosecutor as her "private part". (Tr. 110). She testified that Mr. Wilson touched her "tinkle" in the living room, the bathroom, his room and Ms. Ellen's room, asserting that it happened in the bathroom "more than once." (Tr. 111).

In the bathroom on one occasion, CBL testified, Mr. Wilson tried to put his fingers inside of her "tinkle" and that she had touched his "private". (Tr. 112-113). Contact had occurred more than once in the living room, according to the witness on direct examination, with Mr. Wilson putting his hand inside her underwear while the two were lying on the couch. (Tr. 114). The witness also testified that there was contact in Mr. Wilson's bedroom on more than one occasion, on top of his bed, under the covers, with each having their clothes on. The final location for the

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[1] The witness/prosecutrix was called this in the indictment, and will be referred to by this throughout this brief.

purported contact was in Ms. Ellen's room on her bed, under the covers, with this occurring more than once. At one time, according to the witness, Mr. Wilson made her swear not to tell anyone, and promised her a toy. (Tr. 117). At the end of her direct testimony, CBL stated that she had told her mother, the police and a psychologist about the incidents. (Tr. 117).

B. CBL Cross-Examination

On cross examination, CBL testified that she had talked to her first grade principal and her first grade teacher about the incidents alleged in the indictment, and that these discussions occurred after she had spoken to her mother, Detective Ing, and Dr. Matherne. (Tr. 119). She also explained that she had to repeat the first grade because of having temper tantrums "whenever I would get something wrong, I would throw a temper [tantrum] and go out of the room." (Tr. 120).

CBL described to the jury that she and David Wilson would play tickling games and that she would jump on top of him when he was watching television and was not looking. He tickled her on her feet, and in her armpits and her mother an father were never present when these tickling games were played. (Tr. 124-125).

Right before CBL reported the contact to her mother she received a book entitled "Say No To Strangers", which explained that "bad touch" occurs in areas a bathing suit would cover, and advised as its title indicates. A couple of days after she read the book CBL decided that she should tell her mother. (Tr. 125).

CBL further testified that she had an imaginary friend named Max, and that he was with her while she was on the witness stand, and that she had some dolls with her when she talked to Detective Ing. These dolls made her have the courage to tell what happened and had been given

to her by relatives, but they were replaced by a toy dog that she had with her on the witness stand because the dolls had been lost in Katrina. (Tr. 127).

In recounting an incident on the couch, CBL testified that it lasted five to ten minutes and that Ms. Ellen was around the house, performing domestic tasks or watching television. She had some difficulty in placing the furniture in the living room when shown Defense Exhibit 1, but located Ms. Ellen's rocking chair and other furniture in the living room when shown a second photograph of the room (Defense Exhibit 2), stating that Ms. Ellen was in her rocking chair near the couch where she alleged that the contact had taken place, and that Ms. Ellen "didn't even know" because "[s]he was watching TV". (Tr. 134-135). As explanation, she testified that she and David Wilson would normally be covered up to the waist with a sheet, and that while being penetrated with two of David Wilson's fingers, the only sound they made was "a little laughing noise." CBL also recalled for the jury that she told Detective Ing about the two-finger penetration that had occurred in the living room. (Tr. 136, 137).

CBL further recounted an alleged incident in the bathroom while she was weighing herself. (Tr. 139-140). She described the lock on the bathroom door in two different ways, once stating that the locking button was in the middle of the knob, then that it was below the knob, and that the lock was disengaged by simply turning the door knob. She testified that David Wilson was completely naked when he walked in and that Ms. Ellen was "out watching TV" in an area he would have traversed on his way to the bathroom. (Tr. 140,141), and that while in the bathroom, David Wilson asked her to "touch his tinkle", that she complied and that he touched her "tinkle" and that this transpired in a period of five or ten minutes. She testified that he was unclothed for this incident and that he told her not to tell because he would get in trouble, and

that she said nothing when she came out, and that she did not mention that David Wilson was naked to Det. Ing because "I didn't think that was really important". (Tr. 148).

CBL also testified that there were two bathrooms in the house, using Defense Exhibit 1 to describe in detail how a second bathroom connected to Ms. Ellen's bedroom and was reached by walking alongside Ms. Ellen's bed and making a turn to arrive at it. (Tr. 143).

CBL further testified that Ms. Ellen saw her when she opened the door to leave the hallway bathroom (not the bathroom she described as being accessed through Ms. Ellen's room) because Ms. Ellen was right outside the door watching television and could see her from there. (Tr. 145-147).

The third incident CBL recounted on cross-examination was alleged to have occurred in David Wilson's bedroom. (Tr. 150). CBL recounted that the incident happened in the bed, but that she had told Det. Ing that it happened in the closet. CBL chose this time to say that it happened in both the closet and on the bed. (Tr. 150). In the closet, CBL testified, David Wilson would touch her "tinkle" and she would sometimes touch his. (Tr. 154).

Finally, CBL testified of an incident alleged to have occurred in Ms. Ellen's bedroom and that Ms. Ellen had a waterbed. She said it was on the waterbed in Ms. Ellen's room where David Wilson inserted two fingers in her "tinkle" (Tr. 157), that it "didn't hurt at all" (Tr. 159), and that they had tried to get under Ms. Ellen's waterbed but had not been able to because it was too close to the ground. (Tr. 157). In Ms. Ellen's room, both parties were fully clothed. (Tr. 158).

C. Rebecca Lopez, CBL's Mother, Direct

Ms. Lopez testified that CBL had gone to Ms. Ellen's house for after-school baby sitting

since about June 2003, and that she would ordinarily stay there anywhere from an hour to an hour and a half until she was picked up. (Tr. 166). CBL initially liked going to Ms. Ellen's, but on November 4, 2003, on her arrival, she indicated that she was pleased that "he" was not there. The next day, CBL asked if she could not go to Ms. Ellen's, but was told she had to go there because there was no other place for her to stay. (Tr. 167, 168). After some discussion, CBL told her mother that David Wilson had toucher her "private" and that she had promised not to tell. (Tr. 168). After this Ms. Lopez did not take CBL back to Ms. Ellen's house, and contacted the Gulfport Police Department, where they reported her daughter's allegations to the Rosario "Chayo" Ing. (Tr. 170). Ms. Lopez further reported that CBL had been given a book called "Just Say No to Strangers" while she was in the first grade. (Tr. 170-171). She further testified that she noticed changes in CBL's behavior, including a reluctance to enter her school the way she previously had, that she did not want to attend Sunday school at the church/school complex, and that felt insecure at day camp and in her bedroom. (Tr. 174-175).

D. Rebecca Lopez, Cross

On cross-examination, Ms. Lopez testified that CBL had been held back to repeat first grade because she was "too immature" for the second grade. (Tr. 175). CBL had been upset about being held back for a "little bit" around August or September, the beginning of the school year the second time she went to first grade. (Tr.176). The witness did not remember exactly when in June and July 2003 that CBL went to Ms. Ellen's house to be kept until she or her husband could come to pick her up, and testified that CBL was sometimes kept by her grandmother during those months. (Tr. 178). Ms. Lopez further testified that she agreed with the teacher's assessment that her daughter was "immature" (Tr. 180).

E. Detective Rosario "Chayo" Ing., Direct

Ing testified that she interviewed CBL on November 14, 2003, (Tr. 220) about "some incidents" that occurred while she was being kept at Ms.Ellen's house. (Tr. 218). She used the sketches of a boy and a girl introduced as State's Exhibits 1 and 2 to have CBL identify body parts. (Tr. 219), and noted that CBL hesitated in naming the genital areas in both the male and female diagram because CBL did not have a name for them. Ing chose the name "private" and CBL agreed to the designation. (Tr. 222). Initially, CBL stated to Ing that the touching she alleged had occurred "inside of her clothing on top of her underwear. (Tr. 224).

Four incidents were described: one in the living room, one in the bathroom one in David Wilson's bedroom and one in Ms. Ellen's bedroom. (Tr. 224). CBL described the event alleged to have occurred in the living room as involving tickling, and stated that David Wilson's hand was inside her pants, but outside her underwear. (Tr. 225). Second, CBL described to Ing a time when she was in the bathroom weighing herself when David Wilson entered. He touched her "on the vaginal area" and nothing else happened. The third event described involved David Wilson's bedroom, where CBL and Mr. Wilson went into the closet where both had opened clothing and where Mr. Wilson had "touched on the vaginal area". At this time, CBL saw Mr. Wilson's "private" according to Ing's testimony of what CBL had told her. (Tr. 225). The fourth of the described incidents took place in Ms. Ellen's bedroom, according to CBL. She initially told Ing that they were under the bed when it occurred, then told Ing they were on top of the bed. (Tr. 225-226). She stated that on this occasion David Wilson was disrobed, and that she had touched him. (Tr. 226).

Ing further testified that CBL told her these incidents had occurred "a lot of times" but

that she, Ing, could never determine specifically how many. She testified that in most cases when a child states that the incidents happened "lots of times, it can be–to them it can be just two times; it can be 20 or 30 times....[i]t's difficult to ascertain specifically how many times it happened." (Tr. 227).

F. Rosario "Chayo" Ing, Cross

On cross-examination, Ing testified that she made an audiotape but not a videotape of her interview with CBL. When asked directly by defense counsel if CBL ever "relate[ed] that Mr. Wilson had inserted his fingers into her," Ing initially testified that CBL had described "that there was an attempt, not that he actually penetrated her," and that CBL had said "it was sort of inside." (Tr. 232-233). When pressed to find these assertions by CBL in her synopsis, Ing requested and was granted the opportunity to look at the interview itself, and could find only that CBL "indicate[d] rubbing", conceding that CBL never mentioned anything to her about insertion or an attempt to insert. (Tr. 233).

Det. Ing testified that David Wilson had contacted her and voluntarily come to her office when he heard she was looking for him about a week after she began her investigation. (Tr. 229). He told of the tickling games between he and CBL and said if there had been any inappropriate contact it would have been incidental to the tickling matches, fleeting and accidental. (Tr. 230). He also voluntarily contacted Det. Ing a few days later telling Ing his theory that CBL may have viewed a graphic T-shirt in his room that could have set off the allegations. (Tr. 232).

As to the living room incident, Ing reiterated her direct testimony that CBL had not stated that there had been any insertion, nor did CBL mention to her that there was a cover or a blanket involved in the incident. (Tr. 235).

Regarding the bathroom incident, Ing testified that CBL had told h er that David Wilson was fully clothed when he entered the bathroom, and that CBL had not told her where Ms. Ellen was during this time. Also, that the bathroom door was locked. (Tr. 236). CBL, per Ing, had described her clothing as "partially down," and had not told her of any other incidents, other than this one, which had occurred in the bathroom. (Tr. 237).

Regarding the closet in David Wilson's room, Ing testified that CBL had not told her anything about a light or any other description of the closet itself, only stating that the bedroom door was locked. CBL told Ing that her pants and underwear were down and that David Wilson's pants were down with him not wearing underwear. (Tr. 238). As to insertion, Ing testified that CBL had not told her that any penetration had taken place, but said he touched her "on her genital area." (Tr. 239).

The final of the four incidents was said to have occurred in Ms. Ellen's bedroom, more specifically in CBL's initial assertion, under the waterbed, though later she said it was on the waterbed. (Tr. 239-240). CBL also told Ing, according to Ing's testimony that David Wilson's clothes were completely removed during this testimony. (Tr. 240). Again, CBL did not mention anything to Ing about David Wilson inserting a finger or fingers into her, telling Ing that his hands were "on her vaginal area". CBL also said that she had touched his penis, after first denying this to Ing. Per CBL's statement to Ing, she only touched David Wilson in this one incident in Ms. Ellen's bedroom. (Tr. 241). CBL, in her questioning by Ing, could not tell Ing how long any of the incidents lasted. (Tr. 242). CBL never told Ing that David Wilson had threatened to harm her parents if she told anyone. (Tr. 242).

III. Testimony of Defense Witnesses

Mr. Wilson called his mother, Ms. Ellen as a witness and testified in his own behalf.

A. Ms. Ellen Wilson, Direct

Ms. Wilson testified that she lived with her son, David, at 2907 Pineland Drive, Gulfport, Mississippi and had lived at that address for about 40 years. (Tr. 252). She was a baby sitter for CBL, and three other children at her home in 2003 and 2004, but did not keep CBL after these allegations occurred. (Tr. 254). She testified that one of the rules in her house was that the children she kept could not go past her "toy room", which was the "first door on the right as you go down the hall" and identified Defense Exhibit 1 as an accurate photograph of her "living room and down the hall" in June or November 2003, pointing out her rocking chair, and where she sat. (Tr. 255). She identified her bedroom door as the last door on the right and her son's bedroom door as the last door on the left down the hallway from Defense Exhibit 1. (Tr. 256).

Ms. Wilson was shown Defense Exhibit 5, an accurate depiction of her bedroom as it appeared in 2003, and the photograph was admitted into evidence. She testified that she had not had a waterbed in fourteen or fifteen years because her "husband had open heart surgery and he couldn't lay on the waterbed.", and that she did not go back to a waterbed after her husband died in 1998. (Tr. 257).

Ms. Wilson also testified that her home had only one bathroom, that she had never had a bathroom in her bedroom, nor any sink or wash area, which could have been confused with a bathroom. (Tr. 258).

Ms. Wilson also testified that during the time period set out in the indictment—June to November, 2003—her son David was working every weekday in Bay St. Louis and he would

leave for work about 6:30 a.m. and return about 4:10 p.m. She testified that she did not drive and therefore never left CBL in her son's care since she was always home . Nor did she see David in his bedroom or in the bathroom with CBL. (Tr. 259-260).

Ms. Wilson was witness to the living room tickling matches described by CBL in her testimony. CBL and David Wilson would be on the couch and CBL would jump on his stomach and he would tickle her. She never saw them covered under a blanket and testified that she would have known it if they were. (Tr. 260).

She further testified that as to the one bathroom in her home, the one in the hallway, she could see—in the line of sight from her chair—anyone who walked out of it, as well as anyone who walked out of the bedrooms or the playroom and in the hallway, and that she never saw CBL come out of the bathroom or bedrooms and minutes later see David come out those rooms. (Tr. 261). Finally she testified that CBL's parents would come to pick her up at 5:00. (Tr. 261).

B. Ms. Ellen Wilson, Cross

On cross examination, Ms. Wilson testified that she wore glasses, had her prescription updated "about every six months", that she recognized Defense Exhibit 5, and though she did not take the photograph she was in her home when it was taken. (Tr. 262-263). She identified the frame that her foam (Tr. 265) mattress was in in the photograph as a waterbed frame that was in the house at the time she was keeping CBL, and further stated that the children were not allowed to go past the toy room with the exception of visiting the bathroom which is just past the toy room. She further testified that she did not believe in having "children in your bedrooms" as her reason for making those rooms off limits to the children she kept. (Tr. 264). She noted, however, that sometimes CBL would go into the back of the house where the bedrooms are to

hide from her mother and day when they came to pick her up, but that she would not intervene because that was the parents' job. (265-266).

As to her chair and her view when she was in it, Ms. Wilson testified that she could see down the hall from it, that she would have seen her son and CBL come out of the bathroom if they had been in it together, and that she sat in the chair most of the time, though not all of the time that CBL was in her house. (Tr. 267).

C. Ms. Helen Wilson, Re-direct

On re-direct, Ms. Wilson testified that she alone watched the children she kept, and she did not share the duties with anyone, neither her son nor her daughter. (Tr. 268), and that CBL would run off into the back of the house where the bedrooms to hide and make her parents come back to get her. Ms. Wilson did not like this, but felt it was the parents' place to put a stop to it since they were in the house. (Tr. 268-269).

D. David Paul Wilson, Direct

David Paul Wilson, the accused, testified that he worked for Hoyt Construction as a carpenter and that he was working in Pass Christian, Mississippi, in June and July of 2003, (Tr. 275). His hours at the time were from 7:00 a.m. to 3:30 p.m. (Tr 276). He testified that he lived with his Mother, Helen Wilson, (Tr. 274) and that she kept children in the home, including CBL and two other children. (Tr. 276). He was asked if he had ever inappropriately touched CBL and answered, "No, sir." (Tr. 277).

He described that on his return from work, he would rest a while, then begin cooking dinner for him and his mother at about 5:00 or 5:30 p.m. When asked if he was ever alone with CBL in his or his mother's bedrooms he replied, "No, sir, I was not. (Tr. 277). When asked if he

was ever alone in the bathroom with CBL, he answered "[N]o, sir. (Tr. 278).

Mr. Wilson was shown Defense Exhibit 4, a photograph of his closet, identified it as such and testified that there was not a light in his closet, nor was there a light switch, or anything that resembled a light switch. (Tr.278). He testified that there was a waterbed frame in his mother's bedroom, but it supported a regular mattress, not a waterbed, and that there was only a small space about three inches deep set back from the frame at the floor. (Tr. 279).

As to physical contact with CBL, he testified that they tickled each other, that she sometimes jumped on him while he was on the couch, and would jump on him at times without warning in play. (Tr. 280). He would tickle her under her arms and on the bottom of her feet in the living room, sometimes with others, including CBL's parents, present. (Tr. 281).

Through Defense Exhibit 2, a photograph of the Wilson home living room, Mr. Wilson indicated for the jury the location of his mother's chair and testified that the room layout was identical to the way it appeared in 2003. (Tr. 283).

The concluding question on direct-examination for Mr. Wilson was did he "ever have any sexual contact with CBL?" His answer was, "No, Sir." (Tr. 283).

E. David Wilson, Cross

The prosecutor questioned Mr. Wilson about his work hours and had him qualify what he considered "inappropriate" regarding touching, going through an anatomy catalog including legs, calf muscles and thighs. (Tr. 284-285). Also, the prosecutor clarified that when Mr. Wilson testified on direct that he had not been in his bedroom alone with CBL, he was not saying that she could have been in his room without him, or in his mother's room or the bathroom in the Wilson home without him. (Tr. 285).

When questioned about how many times a week CBL had been at his home in the fall of 2003, Mr. Wilson testified he was not sure (Tr. 285) and that he did not know if it was once a week or three days a week or four. (Tr. 286). The prosecutor reminded Mr. Wilson that he had testified on direct that he had tickled CBL, and again he said he did. (Tr. 287). Then Mr. Wilson was questioned further about his mother's presence during the times he tickled CBL in the living room, and he explained that that was where she always sat, in her chair in the living room. (Tr. 287).

Mr. Wilson reiterated in his testimony that he had never touched CBL in the vaginal area. (Tr. 289). When asked to recall telling Det. Ing that such contact might have happened accidentally in one of the tickling contests, he did not recall that, but testified that if it happened it was an accident. (Tr. 290). He was reminded also of his theory that the graphic T-shirt could have been in some way connected to this, as he told Det. Ing,

F. David Wilson, Re-Direct.

On re-direct questioning, Mr. Wilson testified that he had called Det. Ing to tell her about the T-shirt because he was trying to figure out some type of reason that this allegation would have occurred. (Tr. 292).

Summary of the Argument

In a case where a defendant begins a trial with the opprobrium of the public already hindering the realization of his right to a fair trial, David Wilson's right to a fair trial on his fondling and sexual battery charges was further prejudiced by errors raised by his trial counsel as well as plain errors, as follows:

First, Mr. Wilson was tried on a multi-count indictment on two separate charges requiring

different elements of proof, a practice disfavored by our courts because of the risk that a jury will consider proof unrelated to one count in another count, resulting in verdicts which are compromised by the introduction of inadmissible and prejudicial evidence of other crimes.

Next, at a trial on these incendiary charges where juror prejudices are to be expected despite all best efforts of men and women to follow an oath to suppress or ignore them, Mr. Wilson's jury was without benefit of such an oath to guide them in their solemn duties. No part of the record shows that either the general oath, sufficient for the fondling charge in Count I, or the special capital oath required for the sexual battery charge in Count II were administered to Mr. Wilson's jury. Additionally no order signed by the trial court reflects that an oath was taken.

Moreover, the indictment on which Mr. Wilson was charged did not narrow the time frame of the crime to an extent allowing him to make a defense to it. This violated the rule which requires that indictment be plain and concise enough for proper notice, as well as the constitutional protections regarding notice.

The trial court also improperly instructed the jury by granting State's Instruction S-3, 4, and 6 which not only wrongly emphasized the penetration element of the sexual battery charged in Count II, but also by its language that even the slightest penetration could be sufficient to support a conviction confused the jury and diminished the state's burden. As the victim strongly contradicted her earlier statement to the police with her testimony regarding this element and there was no medical or other objective proof of this element, this was a critically prejudicial error. Furthermore even a proper penetration instruction had no place in the deliberations in Count I, the fondling charge.

The trial court also improperly denied Mr. Wilson the right to present the fact that he had

passed a police administered voice-stress analysis test regarding inappropriate contact with CBL. The court, in sustaining the state's motion in limine to preclude such testimony failed to carry out its gatekeeper role required by *Daubert v. Dow Chemical*, and MRE 702, and accepted by the Mississippi Supreme Court as the proper procedure determining the admissibility of evidence of expert testimony.

Finally, the verdicts in Mr. Wilsons case were not supported by sufficient evidence and were against the weight and credibility of the evidence.

Argument

Issue I.
It was plain error for Mr. Wilson to be tried on a multi-count indictment

The indictment returned by the Harrison County Grand Jury was multi-count, charging two distinct crimes—fondling and sexual battery—requiring different elements of proof and having been said to have occurred over a time period spanning six months, from June to November 2003. (CP 7-8). This practice has long been condemned by our courts, even though permitted by the legislature, as noted by the Mississippi Supreme Court as recently as 2005 in *Rushing v. State*, 911 So.2d 526, (Miss. 2005):

> We have been, and remain, unwilling to allow separate and distinct offenses to be tried in the same criminal proceeding. We do so in order to avoid potential problems of a jury finding a defendant guilty on one unproven count due to proof of guilt on another, or convicting a defendant based upon the weight of the charged offense, or upon the cumulative effect of the evidence.
>
> *Rushing*, at para 20, citing *Corley v. State* 584 So.2d at 772 (Miss. 1991)

In Mr. Wilson's case the prejudice of the multi-count indictment is obvious when

comparing the elements of sexual battery and fondling. It is shown in the indictment and the elements instructions (CP 7-8, CP 47,48) that the element of penetration required for the state to prove sexual battery is not required in the proof of the elements of fondling. Thus, when Mr. Wilson's jury heard—at his combined fondling and sexual battery trial—proof[2] of penetration, this was admissible to prove the sexual battery alleged in Count II, but not relevant or admissible to prove the fondling charged in Count II. Separate trials on each count, or on separate indictments would not have permitted this prejudicial and utterly non-probative evidence of other crimes to be admitted before a jury in a separate fondling case.

In *McCarty v. State*, 554 So.2d 090 (Miss. 1989), the Mississippi Supreme Court addressed Miss. Code Ann. 99-7-2, the 1986 statute permitting, under certain circumstances, multi-count indictments. The court reversed McCarty's conviction because he was tried on a multi-count indictment, citing the rationale of *Friday v. State*, 462 So.2d 336 (Miss. 1985). The Court cited exactly the problem in Mr. Wilson's case—"that the presumption of innocence may be destroyed particularly where evidence of a crime is allowed that would not be mutually admissible in separate trials. *McCarty* at para 73.

Additionally, Mr. Wilson's case does not fit within the strict confines of Miss. Code Ann. 99-7-2, the statute allowing multi-count indictments in certain narrow instances. The indictment counts alleged that both the fondling and the sexual battery charges could have occurred over a six month period, from June through November 2003. Neither the proof nor the indictment in this case indicates or alleges that the separate incidents were "connected together or

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[2] The proof of penetration was weak and suspect as CBL contradicted at trial her own initial statements to Det. Ing, stating there that there was penetration, though not ever having told that to Ing three years earlier.

constituting parts of a common scheme or plan". As this is required by the statute for a multi-count indictment to survive scrutiny, and as this was not shown, Mr. Wilson should not have faced trial on this indictment.

Case law from the Mississippi Supreme Court permits our reviewing courts to address this issue as plain error. In *Patrick v. State*, 754 So.2d 1194 (Miss. 2000) the Court recognized—as the state had pointed out—that defense counsel had not raised an objection to the multi-count indictment at trial. However, the Court cited MRE 103(d) and *Grubb v. State*, 584 So.2d 786 (Miss. 1991) for the proposition that the Court can address an error that was not raised at trial if it affects the substantial rights of the defendant, and went on to address the issue.

Thus, the error here is reviewable, as the same error was in *Patrick*, and this court should reverse. A simple solution would have been for the state to have issued these charges via two separate indictments. Another solution would have been to sever Count I from Count II. If either of these procedures had been followed, the inadmissible and stunningly prejudicial evidence of penetration would not have been admitted at Mr. Wilson's fondling trial. Because Mr. Wilson was tried on an indictment with such built-in and insurmountable prejudice, his convictions must be reversed and he should be afforded separate trials on each charge.

Issue II.

Mr. Wilson's jury was not sworn with either the capital oath or the general oath as is statutorily and constitutionally required for all juries. Because of this, his jury was not legal according to Mississippi Supreme Court case law, and the verdicts are a nullity.

Mr. Wilson's jury was not sworn with either of the oaths mandated by statute to be administered to petit juries. The fondling charge in Count I required the general oath set out in 13-5-71, and the sexual battery charge in Count II, because it carried a potential life sentence (per

the dictates of 97-3-95(1)(d) and 97-3-101) required the special capital oath set out in 13-5-73. However, either of the oaths would have sufficed for each other, had at least one been given to the jury.

An electronic search of the record and the paper transcript reveals that at no point in the 340+ transcribed pages and 80 pages of Clerk's Papers does the trial judge (or the circuit clerk or any qualified deputy clerk) administer any type of oath. Oaths appear in the record where witnesses are sworn prior to giving their testimony, but that is the only type of oath apparent in the record. There is also no court order memorializing what occurred at trial that states that an oath was given to the jury. Instead, a boilerplate order adjourning the trial until the start of the second day decrees that a jury was "empanelled, chosen and accepted" (CP 36). Another order, styled Final Judgment, (2nd Day) reflects the jury verdict and the sentences given to Mr. Wilson, but also fails to indicate that the jury was sworn at any time. (CP 67).

In *Miller v. State*, 122 Miss. 19, 84 So.2d 161 (Miss. 1920), the Mississippi Supreme Court reversed a murder conviction and a life sentence, holding that jurors hearing a criminal case without first being subject to the oath required for petit jurors were "but little more than mere spectators." *Miller* at 84 So., p. 162. It held that Miller was entitled to a legal and constitutional jury, and one that was not sworn was not such a jury. The Miller Court also rejected the state's argument that this error was harmless and caused no substantial injury to Miller, finding that a jury not placed under oath would not give the same careful consideration to the evidence without the solemnity and influence of the oath.

The Miller Court also rejected the argument that the statutes controlling the administration of the oath were merely directory and not mandatory. As to capital cases, such as

Count II in Mr. Wilson's indictment, the Miller Court found that the error in not administering the oath violated Miller's right to a "legal" jury, as for there to be a "legal" jury in a capital case, it must be "impaneled and sworn to try the issue joined between the state and the prisoner and a true verdict render according to the law and the evidence." *Miller* at 84 So. 162-163.

Additionally, the Court's holding in *Miller* requires reviewing courts to address the failure to swear a jury in a capital case as plain error, finding that allowing an unsworn jury to hear and convict on such a case "deprive[s] the prisoner of his *fundamental and substantial right* to have the jury hear, consider and try his case under the solemn oath to try the issue joined." (emphasis added, *Miller* at 84 So. 162). The Mississippi Supreme Court held in *Foster v. State*, 716 So.2d 538 (Miss. 1998) that "plain error occurs when it is established that an error not raised previously affects *fundamental rights*." (emphasis added). According to *Miller* (which has not been overruled in its eighty-seven year existence) and *Foster* the error is plain, and failure to object to the trial court's failure to swear the jury is reviewable as such.[3]

As to Mr. Wilson's non-capital charge, set out in Count I, the trial court's failure to administer an oath invalidates the verdict. Although there is case law that states that a capital oath can serve as a substitute for a non-capital oath, and that a non-capital oath can sometimes substitute for a capital oath, there is no case that accepts as valid a verdict rendered by a jury which was not sworn in any way.

It had long been an immutable rule of all appellate courts that a trial event not appearing in the record would not be recognized, examined or ruled on by the court on appeal. If defense

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[3]This error is also structural as it undermines the very framework of a fair trial, as has been found in other Sixth Amendment cases, *McKaskle v. Wiggins* 465 U.S. 168 (1984) and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

counsel missed an objection, it did not legally exist for appellate review. If a motion was filed, but not argued, its merits could not be argued on appeal. If an exhibit was not introduced, or an argument not made, neither would be considered by a reviewing court.

However, the rule now appears to be different when a jury swearing does not appear in the record. Appellate courts in Mississippi seem now to be carving out an exception to the "if it's not in the record we don't see it rule" regarding the swearing of a jury. As to this issue, if the record does not show that a jury was sworn, a reviewing court can "...strain[] credibility in finding harmless error when the record is devoid of the jurors oath...scour[] the record to find some evidence that the oath was taken...create[] a rebuttable presumption that the trial judge performed his duty" (citations omitted, special concurrence, para. 17, *Allen v. State*, 2005-KA-00755-COA (Miss. App. 2006), to affirm a conviction in a trial before a jury that was not legally sanctioned.

There can be no credible argument made that Mr. Wilson's jury was sworn. It is not shown anywhere in the transcribed record, nor does it appear in any order that memorializes the events of his case. It would also be unfair—not just to Mr. Wilson, but to the fair administration of justice—to find that the swearing in of a jury is so unimportant that its absence is harmless rather than plain error, or that it now exists in weakened form as a rebuttable presumption, without the respect that the law requires for it.

For these reasons, this Court should reverse Mr. Wilson's conviction in Counts I and II, or pursuant to *Miller* and its holding regarding capital oaths, reverse Count II, and remand these charges for a new trial at which Mr. Wilson's jury will be legally sworn.

Issue III.

Mr. Wilson's indictment—with the time of the crime alleged in it spanning a period of six months on two separate charges—failed to give him proper notice and fails constitutionally because it is too vague to defend. It was plain error for the trial court to proceed on such and indictment.

Per URCCC 7.06, all indictments must "be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation." Indictments must also include "The date and, if applicable, the time at which the offense was alleged to have been committed (URCCC 7.06). The requirement of specificity in an indictment is also supported by the United States and Mississippi Constitutions and the case law interpreting those documents. *U.S. v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986), cited in *Moses v. State* 795 So.2d 569 (Miss. App. 2001), with *Moses* holding that the date requirement of an indictment to be an essential element of the indictment.

Mr. Wilson could not defend against a two-count indictment alleging that either or both of the two separate crimes charged could have occurred at any time over a period of approximately six months. That would mean that Mr. Wilson's jurors had fact and date scenarios before them that permitted the creation of 360 crimes: each or any one of the two events occurring on any one of the 180 plus days. days. With this in mind it is difficult to understand what crimes Mr. Wilson was convicted of and to accept that his jury reached unanimous agreement on what crime he committed and when he committed it.

The multiple opportunities to convict allowed by such a vague indictment over such a long time period also violate the mandate that all convictions be based on unanimous jury verdicts. *Markham v. State*, 209 Miss. 135, 46 So.2d 88 (Miss. 1950). Additionally, whether or

not trial counsel is to be faulted for not attacking the indictment, the right to a twelve-member jury decision cannot be waived. *Hunt v. State*, 61 Miss. 577, 580 (1884), *Arbuckle v. State*, 80 Miss. 15, 20; 31 So. 437 (1901).

In the event that this Court finds this critical and constitutional issue of Mr. Wilson's to be waived for the inaction of his trial counsel, appellate counsel would urge that to try a defendant on an indictment with such a rambling time frame and with no way to determine if his jury was unanimous on the facts that it found supported a verdict of guilty, would be plain error under *Foster, supra.* The error here is one which affected and denied Mr. Wilson's fundamental due process rights, and as such it should not be subject to procedural bar or waiver.

Mr. Wilson's right to be tried on an indictment which afforded him enough information about the crime to allow him to make an adequate defense to it was violated by a trial on the indictment as written. By such a trial he was also denied his double jeopardy protections, because the indictment did not furnish enough information about the crimes charged so that he would not later be subject to another trial for the same crimes. These violations of the 5th, 6th, and 14th Amendments of the U.S. Constitution, Article, 3, Section 14 of the Mississippi Constitution and URCCC 7.06 mandate that Mr. Wilson's convictions be reversed.

Issue IV.

The trial court erred in giving Instructions S-3, S-4 and S-6 as they improperly singled out and emphasized "penetration", one element of the charge in Count II, and not an element at all in Count I. Additionally, S-6 was a peremptory instruction on the age of CBL, Finally, Instruction S-4 confused the jury by defining degrees of penetration and allowed further consideration of that inadmissible element in Count I.

The trial court erred and violated Mr. Wilson's right to a fundamentally fair trial when it granted State's Instructions 3, 4 and 6. (RE 10,11,12; CP 49,50,51).

1. Instruction S-4 and the objection to it

Instruction S-4 (RE 11, CP 50) concluded with these two sentences regarding penetration, "However it need not be full penetration. Even the slightest penetration is sufficient to prove the crime of Sexual Battery." Trial counsel objected to the instruction as being confusing and repetitive about the element of penetration, and further objected to defining degrees of penetration. (Tr. 296-298). Trial counsel correctly pointed out that the state's key police witness, Det. Ing had to retract her testimony that CBL had told her there was an attempt at penetration, and his concern was, of course, that these diminishing degrees of penetration could reduce the state's burden to prove the elements of the crime. The judge gave the instruction. (Tr. 296-299)

The importance of this issue cannot be stressed enough since the further emphasis on the penetration element in Count II only exacerbated the error of trying the fondling charge in Count I along with it. The jury was given repeated reminders about a disturbing and irrelevant element that could only have prejudiced it in deciding its verdict on the fondling charge.

2. Instructions S-3 and S-4

As to Instructions S-3 and S-4 (RE 10, 11; CP 49-50), each of them singled out and emphasized the element of penetration in the crimes charged to Mr. Wilson. Instructions that single out a certain element of a crime should not be given. "[T]he trial judge should not give undue prominence to particular portions of the evidence in the

instructions, *Sanders v. State*, 586 So.2d 792 (Miss. 1991). In this case the instructions were particularly harmful because only one of Mr. Wilson's counts required proof of penetration. [4] No part of Instruction S-3 informed the jury that this instruction only applied when the jury was deliberating on Count II, the sexual battery count, and that it could not consider it while deliberating Count I, the fondling charge. Instruction S-4, although it made a specific reference to sexual battery also emphasized the element of penetration and did not inform the jury that it should consider the element of penetration only in deliberating Count II.

3. Instruction S-6

With language of S-6 (RE 12, CP 51) implying that CBL's age had already been proven, the trial court removed from the jury the determination of whether or not the state had proven that element. Thus the state was granted a peremptory instruction as to the age elements of each of the Counts in Mr. Wilson's indictment—the absence of which would defeat the state's case—when the trial judge directed the jury accept as proven that CBL was under fourteen. Instruction S-6, also suffers from the same flaw as S-3 and S-4, in, again calling attention to and emphasizing a particular element of the charge.

The law does not permit the state a directed verdict or a peremptory instruction on the finding of any element of a crime. No such procedure exists in our jurisprudence, and any peremptory instruction on an element is error. Similarly, in *Russell v. State*, 832

[4] See Issue I. for an analysis of why it was error to try the fondling and sexual battery counts together.

So.2d 551 (Miss. App. 2002), the Mississippi Court of Appeals reversed a conviction for aggravated assault when the state was given peremptory language in an instruction that a stun gun was a deadly weapon. There can be no argument that the element of the purported victim's age is not required in the proof of a fondling or sexual battery charge, and the trial court erred in granting the instruction.

Elemental errors in instructions have been found to be plain error because they affect fundamental rights, and are therefore subject to plain error analysis. *Sanders v. State*, 678 So.2d 663, 670 (Miss. 1996). "[P]roviding proper jury instructions and correctly weighing evidence affect fundamental rights...." *Williams v. State*, 794 So.2d 181, para. 28 (Miss. 2001). As such, the court can recognize the error in giving S-3, S-4, and S-6, even if no specific objection was made to it at the time it was submitted.

Additionally, in *Lester v. State*, 744 So.2d 757 (Miss. 1999), the Mississippi Supreme Court recognized as plain error the granting of a flawed aiding and abetting instruction, when no objection was made to it during jury instruction arguments. As the instructions given here violated a fundamental right, this court should address the issues.

It is clear that Mr. Wilson's jury was improperly instructed because S-3, S-4 and S-6 each emphasized the element of penetration, and because S-6 was peremptory as to CBL's age. It is also clear that an error this fundamental and of such magnitude is plain error and can be reviewed by an appellate court even if not brought to the trial court's attention.

Finally, this has been said regarding the proper instruction of a jury:[U]ltimately, the responsibility for properly instructing the jury lies with the trial court, *Edwards v. State*, 97-KA-00434 COA (Miss. App. 1999) citing *Newell v. State*, 308 So.2d 71,78 (Miss. 1975). For these reasons, this Court should reverse and remand Mr. Wilson's convictions for a new trial before a jury that is properly instructed.

Issue V.

Under *Daubert* and MRE 702, Mr. Wilson was entitled to a "gate-keeping" hearing regarding the admissibility of the results of a police-administered voice-stress test which showed that he was not deceptive when he denied committing the crimes set out in the indictment. The trial court abused its discretion in summarily granting the state's motion in limine to exclude the favorable results, rather than conducting such a hearing.

The prosecution provided defense counsel, through discovery, with evidence that Mr. Wilson had voluntarily taken and shown no deception in a voice-stress analysis test administered by Detective Billy Stage, Certified Voice Stress Analyst for the Gulfport Police Department. (Exhibit A, Appellant's Brief, Page 36). The test results were verified by another Gulfport detective and forwarded to Det. Ing, who was the state's key police witness against Mr. Wilson. However, prior to trial the trial court granted the prosecution's motion in limine to exclude the evidence. The prosecutor stated that the voice-stress analyst who administered the test to Mr. Wilson "deemed that his answers were truthful and that he was not being deceptive in his denials of these allegations.", and argued that any evidence of a test or its results was inadmissible. The trial court granted the motion in limine by simply finding the evidence inadmissible. (Tr. 89-90).

The prosecution cited what was likely *Weatherspoon v. State*, 732 So.2d 158 (Miss. 1999) for the proposition that so called polygraph test results and evidence of willingness to submit to them is not admissible.[5] This case, however, was decided before the Mississippi Supreme Court Modified MRE 702 to conform with the federal version of the rule and recognize "the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable." (MRE 702, comment, amended May 29, 2003.), which was a result of the United States Supreme Court holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Weatherspoon, supra, actually focused on whether or not it was an abuse of the trial court's discretion to deny funds for a polygraph test to an indigent defendant. The Court ruled that it was not, and cited the dictum that the prosecutor cited in Mr. Wilson's case. *Gleeton v. State*, 716 So.2d 1083 (Miss. 1998) involved a trial court's denial of funds for a polygraph, but, Gleeton cited *Daubert* as well as *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995), for the proposition that "polygraph evidence is sufficiently reliable under *Daubert* to be admitted as scientific evidence under Fed.R.Evid. 702."

The Mississippi Supreme Court affirmed *Gleeton* because "Mississippi has not adopted the *Daubert* test for determining admissibility of scientific evidence." para. 12. Since then, as noted above, the Court has modified MRE 702 and recognized *Daubert* as setting out the process for testing the admissibility of expert testimony. Because this was

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[5] The case appears as "Witherspoon" and is cited as a 1999 case. This is no doubt *Weatherspoon* as it was decided the same year and involved the same issue.

the state of the law at the time of Mr. Wilson's trial, the trial court should have conducted *Daubert* analysis before ruling the evidence inadmissible. For these reasons, Mr. Wilson's convictions should be reversed and remanded for a new trial at which he can seek the introduction of his voice-stress test results through a proper hearing.

Issue VI.

The state produced insufficient evidence to support Mr. Wilson's convictions in both Count I and Count II, and each verdict was contrary to the weight of the evidence. Thus, the trial court erred in denying Mr. Wilson's request for a peremptory instruction, his combined Motion for a Directed Verdict/Motion to Dismiss as well as his Motion for a New Trial.

The standard of review of a challenge to a trial court's denial of a motion for a directed verdict and for a judgment notwithstanding the verdict is the same. *Jefferson v. State,* 818 So. 2d 1099 (Miss. 2002). Each challenges the legal sufficiency of the evidence presented at trial. Under this standard, this Court considers all of the evidence in the light most favorable to the State and gives the State the benefit of all favorable inferences that may be drawn from the evidence. *Seeling v. State*, 844 So.2d 439 (Miss. 2003).

The standard of review for denial of a motion for new trial is different in that it tests the weight of the evidence, not the sufficiency. On review of a challenge to the weight of the evidence, i.e. in a Motion for a New Trial, this Court determines whether a jury verdict is against the overwhelming weight of the evidence. It accepts as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice then this Court will reverse. *Baker v. State*, 802 So.2d 77 (Miss. 2001), *Dudley v. State*, 719 So.2d 180 (Miss. 1998).

I. Sufficiency of the Evidence

Trial counsel tested the sufficiency of the state's evidence in his Motion for a Directed Verdict, citing the lack of proof of lustful purpose as to Count I and the state's failure of proof as to penetration in Count II. Both motions were denied. (Tr. 272-273).

"[I]f the facts and inferences 'point in favor of the defendant on any element of the offense with sufficient force that reasonable [jurors] could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render" *Weeks v. State*, 2006-KA-00610 (Miss. App. 2007) quoting *Edwards v. State*, 469 So.2d 68,70 (Miss. 1985).

A. Count I., Fondling

The state was mandated to prove each element of fondling beyond a reasonable doubt. One of the elements is that David Wilson's actions, if proven, were for the purpose of gratifying his lust or indulging his depraved licentious sexual desires. There is no support in the record that Mr. Wilson acted in this manner.

B. Count II., Sexual Battery

The state was mandated to prove each element of sexual battery beyond a reasonable doubt. The key element, separating sexual battery from the fondling count charged in the indictment, was penetration. Although CBL testified at trial that David Wilson had "tried" to put his fingers inside her (Tr. 112), the prosecutor led her testimony into saying that Mr. Wilson had put two fingers inside of her (Tr. 113). There was no follow up question from the prosecutor about discomfort or pain. Notably, CBL never mentioned any attempted or actual penetration to Det. Ing in her interview. When Det. Ing "recalled" on cross-examination that CBL had alleged

an attempted penetration, and that the penetration was "sort of inside", these assertions were found to be untrue. On the witness stand, Ing reviewed the interview she had done with CBL, and had to admit that CBL had never at any time alleged an attempted or an actual penetration. (Tr. 232-233).

On cross-examination, CBL testified that David Wilson had placed two fingers inside of her, but testified "No, it didn't hurt at all." (Tr. 159). Furthermore, there was no medical testimony to show even the slightest evidence of penetration, the *sine qua non* of a sexual battery charge.

II. The Weight and Credibility of the Evidence as to both Count I and Count II.

"Where the verdict is so contrary to the overwhelming weight of the credible evidence that to allow it to stand would sanction an unconscionable injustice then this Court will reverse." *Baker v. State*, 802 So.2d 77 (Miss. 2001), *Dudley v. State*, 719 So.2d 180 (Miss. 1998).

Trial counsel challenged the weight of the evidence with his Motion for a New Trial (Tr. 69-70), which was denied (Tr. 71).

Mr. Wilson's verdicts were also against the weight and credibility of the evidence. Not only does the record show that insufficient proof was presented by the state to show that beyond a reasonable doubt penetration occurred, but CBL's testimony that there was penetration—announced for the first time at trial three years after the time of the incident alleged in the indictment and brought out in a leading question—diminishes the credibility of the proof. Also, the state produced no credible proof of penetration through testimony from CBL that she suffered pain or medical evidence to prove beyond a reasonable doubt that penetration occurred in this case as required for proof in Count II.

Additionally, CBL testified that as to the incident purported to have occurred on the living room couch, that Ms. Ellen was present in a way that she would have had to have seen or heard what was going on. (TR. 134-135). CBL also testified that David Wilson was completely nude in the incident that was said to have occurred in the bathroom and had walked into the bathroom that way. (Tr. 141). However, she had told Det. Ing that he had been clothed in the bathroom incident. (Tr. 236). As to the incident that allegedly occurred in Mr. Wilson's bedroom, she testified that there was a light and a light switch in his closet (Tr. 150), and showed the jury where she thought it was using Defense Exhibit 4. (Tr. 153). David Wilson, however, testified that there was no light, light switch or anything that could be taken for a light switch in his closet, also using Defense Exhibit 4. (Tr. 279).

CBL's testimony and contradictions of that should also be measured through the window of her immaturity, recognized by both her mother and her first grade teacher at the school where she had to repeat first grade about the time of the charge alleged in the indictment. (Tr. 180). This holding back had also affected her behavior about that time. (Tr. 175).

Further evidence of CBL's inability to recall and report facts credibly appears in the record. CBL insisted on cross-examination that there were two bathrooms in the Wilson home. The hallway bathroom did in fact exist, but CBL testified in detail using, Defense Exhibit I., about how one would reach the bathroom adjacent to and entered from Ms. Ellen's bedroom. (Tr. 143). Ms. Wilson, however, the owner of the home, testified that there is no such bathroom nor was there ever in the Wilsons' home. (Tr. 258).

CBL also had an imaginary friend at the time of the incidents alleged in the indictment and at the time of her testimony. (Tr. 126). And lest anyone think this writer is an enemy of

childhood—or of imaginary friends—he points this out simply to indicate that CBL had an active imagination that, in this case, could have easily gone astray. That the jury had questions about the credibility of either CBL or Det. Ing is shown by the question it sent to the Judge asking, "Is it possible to have a copy of the interview of the child with [Detective Ing]? (CP 64, Tr. 335).

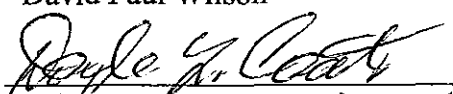
The state failed to prove beyond a reasonable doubt each of the elements of fondling and sexual battery, and the trial court erred in not granting his Motion for a Directed Verdict and his request to submit a peremptory instruction to the jury. Additionally, the jury's verdicts of guilty on each of the counts of the indictment were against the weight of the evidence, visiting an unconscionable injustice upon Mr. Wilson. Thus the trial court erred in denying Mr. Wilson's Motion for a New Trial. For these reasons, this Court should reverse and render as to the insufficiency of the evidence, or reverse and remand for a new trial.

Conclusion

For the reasons set out, and for any other errors this Court might find in the record, Mr. Wilson asks that his convictions be reversed and rendered, or reversed and remanded.

RESPECTFULLY SUBMITTED,

For: David Paul Wilson

By: 

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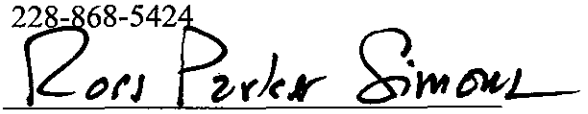

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EXHIBIT A

GULFPORT POLICE DEPARTMENT

MAYOR COUNCIL FORM OF GOVERNMENT
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Ken Combs
Mayor & Police Commissioner

Wayne H. Payne
Chief of Police

DETECTIVE DIVISION

To: Det. Lt. Chayo Ing

November 25, 2003

Subject: Subject CVSA Examination, David Wilson

Predication

This truth verification examination was predicated upon a request by Det. Lt. Chayo Ing of the Gulfport Police Department Criminal Investigation Division.

Scope

The scope of this truth verification examination shall be limited to the subject's honesty as it relates to the suspect interview process.

Pretest Interview

During the pretest interview Wilson stated that he did not touch Christine Blaize Lopez' vagina or buttocks and that the only incident of "touching" would have been playful tickling.

Report

On November 25, 2003, this agency conducted an interview with Wilson regarding allegations that he touched Christine Blaize Lopez in the areas of her vagina and buttocks. During the pretest interview we reviewed and formulated 9 questions using a Zone of Comparison testing sequence. I clarified that Wilson was rendering a statement under the Miranda Warning. I conducted the interview, and hereby submit the results to you. The following relevant questions were interspersed with irrelevant and control questions.

1. (R) Did you touch Blaize's vagina?
2. (R) Did you touch Blaize's buttocks?

Post Test Interview

Following the initial examination, Wilson stated that he did not touch Christine Blaize Lopez' vagina or buttocks.

Conclusion

Based upon my training and experience, it is my opinion that the subject showed no deception on the relevant questions number four and six. A second opinion was requested of Det. Sgt. George Chaix, who agreed that the chart showed no deception.

Detective Billy Stage
Certified Voice Stress Analyst

CERTIFICATE OF SERVICE

I, Doyle L. Coats, hereby Certify that I have this date filed via U.S. Mail or FedEx, the original and three (3) copies of the foregoing Appellant's Brief, as well as four (4) copies of Appellant's Record Excerpts, in *David Paul Wilson v. State of Mississippi*, 2007-KA-01397-SCT, with the Clerk of the Mississippi Supreme Court, and that I have provided to the Appellant, the Office of the Attorney General, presiding Circuit Court Judge Jerry O. Terry and the District Attorney for the Second Judicial District true and correct copies of the same via U.S. Mail, FedEx or hand-delivery at their usual addresses.

This, the 19th day of December 2007, A.D.

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