IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLIE SINGLETON — APPELLANT

V. — NO. 2008-KA-0508-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

NO ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLIE SINGLETON **APPELLANT**

V. **NO. 2008-KA-0508-COA**

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CERTIFICATE OF INTERESTED PERSONS

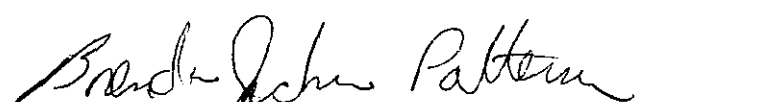
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Charlie Singleton, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 5th day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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STATEMENT OF THE CASE

Charlie Singleton was indicted by a May Term 2005 grand jury in a four (4) count indictment for attempted sexual battery and sexual battery on KS. Following a motion to amend, an order was entered amending the indictment to reflect that Charlie Singleton was KS's biological father instead of stepfather. Counts one, two, and three were dismissed by the state, leaving count four as the only charge against Charlie Singleton. Count four charged that on or about September 27, 2003, Charlie Singleton did wilfully, unlawfully, and feloniously, engage in sexual penetration with KS, a child under the age of eighteen (18) years, and that he occupied a position of trust over KS in that he was her father, in violation of MCA §97-3-95. After a jury trial, Charlie Singleton was convicted and sentenced to serve fifteen (15) years in the Mississippi Department of Corrections. Feeling aggrieved, Singleton appeals.

STATEMENT OF THE FACTS

Charlie Singleton and Bonnie Singleton were married and had a biological daughter, KS. When KS was two (2) years old, he and Mrs. Singleton separated. KS had not seen her father in fifteen(15) years and wanted to see him. She could not remember what he looked like. During July 2002, KS, her younger sister, LA, and their mother went to a family reunion in Chicago. KS' father lived on the south side of Chicago so KS , who was almost seventeen (17), her mother and LA went to visit Singleton. **T. 97.**

Mrs. Singleton testified that a short time after they left Chicago, Singleton called her asking to come to Mississippi. He wanted to come be a father to his daughter. He moved in with her and her daughters. **T. 99.** On September 27, 2003, while Mrs. Singleton was at work, LA woke up and went to KS' room and when she did not find her there she went downstairs to her mother's room

looking for her. When she made it to her mother's room, she testified that she saw KS lying on the couch. KS did not have clothes on from her waist down. Singleton had his face in between her legs on her private part. She could see his tongue in between her vagina. She ran upstairs and called her mother. **T. 82-83.** During LA's conversation with her mother, Singleton picked up the telephone and told Mrs. Singleton that LA was lying and not to believe her. Mrs. Singleton called 911 and went home. **T. 101.** Once she arrived home, she took KS to the hospital.

KS was brought into the emergency room while Carol Gartman, a registered nurse at Baptist Memorial, was on duty. Gartman performed a rape kit on KS. The procedure for the rape kit involved pulling hair from her head and pubic area, scraping under her fingernails, getting a dried secretion swab, oral swab, vulvar swab, vaginal swab, rectal swab and a blood sample. **T. 111.** KS was uncooperative and the doctor could not do a pelvic exam which involves inserting a speculum and taking specimens from the cervix or the inner vaginal area. So the only swabs that were made a part of the rape kit were the swabs that she took. She also stated that KS did not act like a normal rape victim. **T. 110, 111, 112 and 118.**

Anita Ray, Columbus Police Department detective and patrolman responded to the call at the residence of KS. While at Mrs. Singleton's residence she heard over the radio that Singleton was at the police station and she went there to talk to him. Ray testified that with Singleton's consent, she took a swab from his mouth for vaginal secretions. **T. 124.** Ray then left the police station and went to the hospital and picked up the rape kit and placed it in the evidence vault in the refrigerator at the police station.

After receiving the rape kit and a sealed manila envelop containing a swab of the inside of Singleton's mouth, **Wayne McClemore**, Lieutenant with the city of Columbus Police Department,

took the evidence to the crime lab in Meridian. **T. 131-132.** He testified that the rape kit was not in the same condition as when he took it to the crime lab. Says it was unsealed and looked to have mold on it. He was told the refrigerator went out and it was destroyed because it was considered a bio-hazard. **T. 134.**

Witness **Deedra Hughes** who was employed with the Mississippi Crime Laboratory in Jackson, Mississippi as a DNA technician, said that her duties were to oversee the bioscience section. In this section, she processes physical evidence for the presence or absence of bodily fluid to include blood and semen. During trial, she identified a picture of the rape kit, which was State's Exhibit 2. It was submitted into the crime lab to be examined for the presence or absence of seminal fluid. **T. 138.** Seminal fluid is introduced by the male prostate gland. So the tests that they use are actually looking for P30 antigen, which is antigen produced by the male prostate gland at the time of ejaculation. In the rape kit, was a collection of swabs that were obtained from the alleged victim of the sexual assault. The swabs tested for seminal fluid were dried secretions swab, vulvar swab, vulvar penile swab, vaginal swab and rectal swab. **T. 139**. Serological examination for the presence of seminal fluid was positive on the dried secretions swab. **T. 142 and 147.** Serological examination for the presence of seminal fluid and microscopic examination for the presence of sperm cells were negative on all the other swabs. **T. 142.**

Hughes further testified that the Columbus Police Department asked that the dried secretion swabs have DNA testing done on it to compare it to the victim and the suspect. They were to compare the two oral swabs that were taken from Singleton and the purple type tube of blood taken from KS and conduct DNA analysis on the question sample which would be the dried secretion swab and compare it to the DNA profile from Singleton's and KS' samples to see if there was a match.

The crime lab sent the information off to Orchid Cellmark in Dallas for DNA analysis via Federal Express on January 19th of 2006. **T. 143.**

On cross examination Hughes admitted that she did not know where on KS' body the dried secretion swabs were collected from. She believed that it was from the leg or thigh area. **T. 111, 145.** However, she was aware of where all the other swabs were taken from on KS' body.

The next witness called was **Lacey Bowen,** forensic analyst with Orchid Cellmark in Dallas, Texas. Her duties were to inspect evidence for the presence of biological material and develop DNA profiles. She then compares the profiles on the evidence to those profiles from the victim and the suspect and determines which person can be included or excluded. As of the date of this trial, she had been qualified in the courts as an expert only one time. That was a week before the trial, which was February 11th. **T. 149.**

In the present case of KS, she did not do the extraction, but did an independent review of the entire case file and the reports, and she agreed with the findings. **T. 151.** She performed a second test on the same samples that had been tested by someone else at the request of the Mississippi Crime Lab. **T. 155-156.** They received the samples via Fed Ex overnight shipped from Deedra Hughes. **T. 159.** The DNA analysis were performed on the blood card from KS and the oral swabs from Singleton. **T. 160.**

Bowen testified that a second test was done on the samples because she believed the same analyst extracted the evidence and the knowns on the same day and there should have been two different extractors of the evidence or should have been extracted on a different day or at a different lab bench. **T. 154-155** and **162**. Defense counsel objected to Bowen being qualified as an expert. She said that the result of the test was that the profile they got from the epithelial fraction is the same

profile that they got from KS. **T. 163-164.** Epithelial cells are similar to what you would find on your skin. And those skin cells matched KS. The DNA profile they obtained from the sperm fraction was identified as originating from Singleton. **T. 164.** She performed several of the steps of the process of testing. Both test results were the same as to the conclusions.

The next witness called was **Eli Perrigin**, who was a detective with the Columbus Police Department on the date Singleton was accused of sexual battery on KS. He was in the parking lot at the police station and Singleton came up to him and said he wanted to press charges against his wife. The reason he wanted to press charges on his wife was because his 13 or 14 year old daughter had come up to him trying to pull his private part out of his pants. He said Singleton told him that she had done this to everyone else on 7th Avenue and so he went ahead and let her do what she wanted to do to him. **T. 175.**

The last witness called by the state in its case in chief was Casey Freeman, supervisor with the Columbus Police Department. Freeman said that Singleton came to the information and receiving office where she was working and said that he wanted to file charges against his wife. He told her that his daughter came into his room and he woke up with her sucking his private part and he told her to stop. KS told him that's how she got money from several other people around the block. **T. 181.**

Charlie Singleton was the only witness called by the defense. He said that after he had been in the house with the kids for a month they said he was cramping their style and they were going to come up with a way to make their mother leave him. **T. 190.** Singleton said while he was sleeping KS came in his room and he woke up with her naked body coming down on his face. LA was in the door saying I'm going to tell mama and she is going to leave you for good. He said he pushed KS

and got up and went to the police station. He denied talking to Perrigin and Freeman. He also denied letting Perrigen swab in his mouth. He said he met with Ray and Ray took him to the house and she went in and got some of his clothing. Afterwards, the police let him go and he walked to the Greyhound bus station and left town.

On rebuttal, the state called Robert L. Robertson, deputy sheriff Lowndes County Sheriff's Department. Robertson testified that he was with Perrigin when a guy came up and started talking to Perrigin. He signed as a witness to the swab of Singleton's mouth.

STATEMENT OF THE ISSUES

I. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT MR. SINGLETON'S CONVICTION FOR SEXUAL BATTERY?

II. WHETHER THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE ?

SUMMARY OF THE ARGUMENT

I. LEGAL SUFFICIENCY OF THE EVIDENCE.

The trial court erred in failing to grant Singleton's motion for a judgment notwithstanding the verdict. A motion for judgment of acquittal notwithstanding the verdict tests the legal sufficiency of the evidence supporting the verdict of guilty. It is a renewal of the defendant's request for a peremptory instruction made at the close of all the evidence. It asks the court to hold, as a matter of law, that the verdict may not stand. McClain v. State, 625 So.2d 774, 778 (Miss. 1993); Tait v. State, 669 So.2d 85 (Miss. 1996) citing May v. State, 460 So.2d 778, 780-81 (Miss. 1984).

Where a defendant has moved for J.N.O.V., the trial court must consider all of the evidence, not just the evidence which supports the state's case, in the light most favorable to the state; state must be given benefit of all favorable inferences that may be reasonably drawn from the evidence. Tait v. State, 669 So.2d at 88 citing May v. state, 460 So.2d at 781. If the facts and inferences so considered point in favor of the defendant with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight, that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions,

the motion should be denied and the jury's verdict allowed to stand. Wetz v. State, 503 So.2d 803, 808 (Miss. 1987); Tait v. State, 669 So.2d at 88 citing May v. State, 460 So.2d 778, 781 (Miss. 1984).

The standard for reviewing a denial of a directed verdict and a peremptory instruction is the same as that for a denial of a judgment notwithstanding the verdict. Tait v. State, 669 So.2d at 88 citing Alford v. State ,656 So.2d 1186, 1189 (Miss. 1995). On appeal, this Court reviews the lower court's ruling when the legal sufficiency of the evidence was last challenged. Tait v. State, 669 So.2d at 88 citing Smith v. State, 646 So.2d 538, 542 (Miss. 1994) (quoting Wetz v. State, 503 So.2d 803, 807-08, n. 3 (Miss. 1987)).

Mr. Singleton was indicted and convicted under Miss. Code Ann. §97-3-95 which provides:

§97-3-95 (2).

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

KS was under the age of eighteen and her father, Singleton, was in a position of trust as was testified to by Mrs. Singleton and Singleton himself. The disputed element in the indictment was whether there was sexual penetration by Singleton.

§97-3-97. Sexual battery; definitions.

For purposes of Sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or

> pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

LA testified that she went looking for her sister and when she got mid-way in the doorway she saw Charlie with his head in between her sister's legs. She further testified that she called her mother and told her mother that Charlie was performing oral sex on KS. **T. 82-83.** The prosecutor asked her why did she say that Charlie was performing oral sex on her sister? She responded, "From what I seen - - from what I seen as far as I can remember, he had his tongue in between her vagina". **T. 83.**

During cross-examination, defense counsel questioned LA about the statement she had given to the police. This statement was admitted into evidence as an exhibit to her testimony.[1] **T. 94.** The statement Lee Ashley gave to the police is very detailed. She tells exactly what she saw. It is a step by step account of what she witnessed. She was very specific. She never mentioned oral sex or seeing Singleton's tongue in between KS' vagina. From her statement, there is reasonable doubt of sexual battery because LA may have walked in just prior to Singleton committing sexual battery. The implication here is extremely strong that her testimony was prepared for trial to prove the elements of sexual battery. Therefore, the proof is insufficient. Reasonable doubt of penetration exist.

The other evidence in this case fail to prove penetration also. A rape kit was performed and the dried secretion swab taken from KS was positive for seminal fluid which is an antigen produced

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"On September 27, 2003, I was asleep in my bedroom. I woke up and went downstairs. I saw Charlie, which is my step-dad, with his head in between my sister's legs. My sister is KS. My sister's face was covered with the blanket from my mom's bed. My sister's wrists were locked together and Charlie had one hand covering both of Krystal's wrists. Charlie's other hand was holding up one of Krystal's legs. I ran upstairs and called my mom and told her what was going on and that's when Charlie picked up the other phone and told my mom that I was lying. Charlie then got into my mother's truck and left. This statement is true and correct."

by the male prostate gland at the time of ejaculation. The dried secretion swab was taken from somewhere on KS' body; possibly her inner thigh or leg. **T. 110.** Gartman was not sure where on KS' body she got the dried secretion swab sample. However, it did not come from her mouth, vagina or rectum. **T. 115, 118, 139** and **142**.

What is necessary to commit sexual battery by [cunnilingus i.e. oral sex] has been addressed by the Supreme Court. "[P] roof of contact, skin to skin, between a person's mouth, lips, or tongue and the genital opening of a woman's body, whether by kissing, licking, or sucking, is sufficient proof of 'sexual penetration' through the act of 'cunnilingus.'" Pittman v. State, 836 So.2d 779 (Miss. 2003), citing Johnson v. State, 626 So.2d 631, 633-34 (Miss. 1993).

There is not any reliable evidence in the record to support an insertion of any part of Singleton's body or any object into the mouth, vagina or anus of KS by Singleton. Because KS did not testify, reasonable inferences could be drawn to show an attempt on the part of Singleton to commit sexual battery only. Ejaculation in some people can come from rubbing against another person's body or just from that person looking at another person's body. There was not any testimony offered to show that KS' DNA came from Singleton's mouth.

II. WEIGHT OF THE EVIDENCE.

The jury's guilty verdict is against the overwhelming weight of the evidence.

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. Bush v. State, 895 So.2d 836, 844-45 (Miss. 2005)(citing Herring v. State, 691 So.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is

addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. Amiker v. Drugs For Less, Inc., 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed in the light most favorable to the verdict. Bush v. State, 895 So.2d at 844 citing Herring v. State, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." Bush v. State, 895 So.2d at 844 citing McQueen v. State, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. Id. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Id. Instead the proper remedy is to grant a new trial. In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict. Dudley v. State, 719 So.2d 180, 182 (Miss. 1998).

In the present case, the evidence does not support the verdict. None of the evidence shows penetration which is a required element of sexual battery. The statement given by LA on September 27, 2003, never mentioned penetration. (See Footnote One). It was not until February 19, 2008, during direct examination that she mentions oral sex and seeing Charlie's tongue in between KS' vagina. T. 82-83. A rape kit was performed and the dried secretion swab taken from KS were positive for seminal fluid which is an antigen produced by the male prostate gland at the time of ejaculation. The dried secretion swab was taken from somewhere on KS' leg or thigh. It was not taken from her mouth, vagina or rectum. T. 118, 139 and 142. The dried secretion swab taken from KS' thigh or leg was examined for DNA first. Then DNA analysis was performed on the knowns, which was the two oral swabs taken from Singleton and the blood card from KS. T. 160. The

epithelial fraction or EF, skin cells, matched the profile from KS and the DNA profile obtained from the sperm fraction or SF originated from Singleton. T. 164. The only knowledge gained from this information is that Singleton's sperm was on KS' leg or thigh. There was never any evidence that KS's DNA was in Singleton's mouth.

The testimony offered by Bowen was very confusing. It is only reasonable that the juror's hearing this testimony only one time were confused with exactly where Singleton's DNA was found and the fact that KS's DNA was not taken from his mouth.

Penetration is one of the elements of sexual battery. Because the state failed to prove penetration beyond a reasonable doubt, to allow the verdict to stand would sanction an unconscionable injustice.

CONCLUSION

There is no proof in the record of penetration which is a required element of sexual battery. Therefore, the evidence was insufficient to find Singleton guilty of sexual battery. The judgment of the Circuit Court of Lowndes County should be reversed and the charges against Singleton dismissed.

Also, the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. However, because of the insufficiency of the evidence, this case should be dismissed.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Charlie Singleton, Appellant

BY: Brenda Jackson Patterson

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Charlie Singleton, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **RECORD EXCERPTS** to the following:

Honorable Jim Hood
Attorney General
Post Office Box 220
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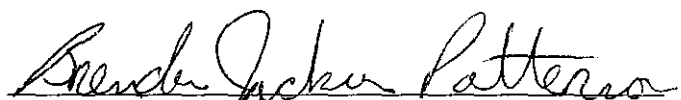
This the 5th day of August, 2008.



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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Charlie Singleton, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellant** to the following:

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This the 5th day of August, 2008.

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