IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01271-COA

CHERELLE L. GERMAN — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Cherelle L. German

THIS 10th day of November, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Cherelle L. German

By: George T. Holmes

George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lafayette County, Mississippi where Cherelle L. German was convicted of child abuse in a jury trial conducted May 12, 2008, with Honorable Andrew K. Howorth, Circuit Judge, presiding. German is presently incarcerated with the Mississippi Department of Corrections under a sentence of 40 years with ten10 suspended, 30 to serve.

FACTS

In the middle of the night November 7, 2005 Scott Mills, a Lafayette County Sheriff's investigator, received a call about a "possible child abuse case" alleged to have occurred the day before in Oxford. [T. 41-44]. Mills responded to Oxford's Baptist Memorial Hospital and was "briefed by a nurse and doctor" about an injured two-month-old girl, Makia German, who was in the emergency room. *Id.* The child was intubated,

stabilized and being prepped for transport to LeBonhuer Hospital in Memphis by helicopter. *Id.* Mills was able to take some photographs before Makia was flown out. *Id.*

Mills spoke to Makia's mother, Toya Hilliard, alone. [T. 44]. Toya said she worked from 8:00 a. m. to 7:30 p. m. at the University of Mississippi the previous day and arrived home finding Makia fussy and not wanting to eat. [T. 44-45, 127, 133-34]. Makia had bruising on her face. *Id.* Previously, she had been fine. *Id.* Makia's unusual behavior and appearance was such that Toya went to a neighbor to get some advice. *Id.* Then Toya called the baby's clinic and was advised to go on to the emergency room, which she did. *Id.* Toya reported to Investigator Mills, and testified at trial as well, that her boyfriend, the appellant, Cherrelle German, father of the two-month-old, informed Toya that Makia had turned over in a "bouncy seat". *Id.*

After speaking with Toya, Mills next interviewed Cherrelle, who was also at the hospital, and wrote out a statement based on the interview which Cherrelle signed. [T. 46-47; Ex. 10]. Without any warning under *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 6 L. Ed. 2nd 694 (1966), Cherrelle told Mills he was at home with Makia and Toya's two other children, fathered by two other men, and that the infant girl fell over in a bouncy seat while German went to use the rest room. [T. 46-48; Ex. 10]. This statement of Cherrelle was admitted into evidence without objection. [T. 58-59].

Once Makia departed to LeBonhuer, Mills went with Toya and Cherrelle back to their house at 2105 Delores Drive in Oxford where Mills took more photos and took the

bouncy seat into evidence. [T. 54]. Toya signed a consent to search the home and Cherrelle demonstrated for Mills what happened with the bouncy seat. [T. 55]. Up to this point, no *Miranda* warning had been given, and no charges filed.

About six weeks later on January 4, 2006, Cherrelle German was offered a polygraph exam. [T. 146-47]. During an hour long preparation to take the polygraph, the polygrapher apparently felt that Cherrelle had confessed to abusing Mikia. *Id.* Mills was called in and Cherrelle was then *Mirandized. Id.* Cherrelle then wrote out another statement himself purportedly admitting that he "shook" Makia. [T. 60-62; Ex. 12]. Cherrelle also said the other children in the house were rambunctious, and may have "slid into Makia". *Id.*

Greg Stidham, a pediatric intensive care physician from LeBonhuer Hospital testified that Makia was admitted to the intensive care unit once she arrived in Memphis. [T. 90]. The child's main injuries were "bleeding over the surface of the brain, swelling of the brain and hemorrhages in the retina". [T. 91, 95-97]. There was bruising on her face and a skull fracture as well. [T. 95-97]. She was having seizures which resulted from the brain injury. *Id.* The seizures involved "convulsive shaking of all four extremities ... eyes rolling back in the head" and cessation of breathing which "required the assistance of mechanical ventilation." [T. 92]. When admitted, Makia's condition was "extremely critical". *Id.*

Dr. Stidham attributed the cause of the injuries to be, as "pathognomic ... or almost

exclusively" in a two-month-old, severe shaking with impact to the head. [T. 95-97]. According to Dr. Stidham, the child's injuries were not likely caused by a fall from the bouncy seat. [T. 102-03].

Dr. Jason Waller was Makia's primary emergency doctor at Baptist Memorial Hospital in Oxford. [T. 107]. Dr. Waller saw Makia at intake and has also has followed up with her since the incident. *Id.* Dr. Waller's initial observations included bruising on both sides of the baby's face which he labeled as inconsistent with a fall. [T. 116]. Dr. Waller noted that the child's injuries have caused severe developmental delay. [T. 117]. She cannot sit up, she has a feeding tube because she cannot eat on her own. She does not walk or talk. *Id.* She has a continuing problem with brain swelling. [T. 119-20]. She is blind and has seizures. [T. 125].

Cherrelle testified that while Mills was *Mirandizing* him, Cherrelle kept saying " I didn't confess to anything." [T. 153]. Cherrelle testified that when he came back from using the bathroom and fixing something to eat, the child had turned over in her bouncy seat and that he check her out, and kept her awake. [T. 152, 156]. Cherrelle explained that in using the word "shake" in his second statement, he was not describing anything violent, just a gentle shake to see if Makia was alright. *Id.*

SUMMARY OF THE ARGUMENT

German's trial counsel was ineffective to the point of adversely affecting the outcome of the trial. The trial court should not have allowed polygraph evidence into the trial. German did not actually confess to the crime charged in the indictment, hence the state's case was purely circumstantial lacking the evidentiary weight to prove anything beyond a reasonable doubt and to the exclusion of every reasonable hypophysis consistent with innocense.

ARGUMENT

ISSUE NO. 1: WAS GERMAN'S TRIAL RENDERED UNFAIR BY INEFFECTIVE DEFENSE COUNSEL?

German asserts that his trial counsel was ineffective in the following ways: (a) by allowing a sheriff's investigator to give damaging medical opinion testimony based on hearsay without objection, and, (b) by mishandling challenges to statements purportedly given by the defendant, and, (c) by stipulating that certain injuries of the alleged victim were "profound" which exceeded the state's burden of proof, and, (d) by failing to submit a circumstantial evidence instruction. All of these rendered the trial in this case unfair.

Medical Opinion & Hearsay from Investigator

Investigator Mills gave opinion based explanation of Makia's injuries and

condition, without objection from defense counsel, including phrases like, "...you will also notice around the top of both of her eyes it appears to be redness like blood pooling behind her eyes and I observed that myself, also on her eyelids" and "[i]f you will look above the eyes on the eyelid you will see the redness which is described to me as by the doctors (sic) as blood beginning to pool behind her eyelids." [T. 49-51]. Mills was far from being qualified to give medical opinion testimony and what Mills said was rank incompetent hearsay. With counsel never objecting, the state's case was bolstered by this incompetent evidence.

Admission of expert opinion testimony is governed by Miss. R. Evid. 702. In *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 34-36 (Miss 2003), the Court ruled that to give opinion testimony, a person must be qualified. See also *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss.2007).

In *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077, 1092 (Miss. 2005), the Supreme Court found that the plaintiff was prejudiced by improper opinion testimony from an engineer on a topic which "required scientific, technical knowledge beyond that of the randomly selected adult, [and thus] ... constituted expert testimony". German's position here is that pediatric emergency care is an area requiring expert testimony under Miss. R. Evid. Rule 702.

Here, Mills was not testifying merely as to what he observed; he told the jury what he *concluded* based on his observations. The case of *Goodson v. State*, 566 So. 2d 1142,

1153 (Miss. 1990) is authority for the proposition that German was prejudiced by the admission of Mill's incompetent opinions. The *Goodson* court reversed, in part, because the physician who testified for the state did not have expertise to give an opinion with the reliability required by Rule 702 and, "[t]here was a substantial probability that the jury would be mislead by [the doctor's] opinion", and letting [the doctor] testify [outside of his field] denied Goodson the right to a fair trial. Rule 103(a) Miss. R. Evid. *Id.* at 1148. See also *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss.2007).

Here, German was prejudiced by his counsel's failure to object because, the sheriff's investigator giving medical testimony not only bolstered the state's case in chief, it also arguably added more credence to Mill's other testimony than it might have deserved, not forgetting either the dilution of German's cross examination access under the Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3 § 26 of the Mississippi Constitution.

Hearsay is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. Miss. R. Evid. 801(c); *Clemons v. State*, 732 So.2d 883, 888 (Miss. 1999). Mill's repetition of what the doctors and staff told him would be hornbook hearsay not falling under any of the relegated exceptions.

In *Ratcliff v. State*, 308 So. 2d 225, 226-27 (Miss. 1975), a police officer was allowed to testify what an informant had told him during the officer's investigation. The

court said, "[i]nvestigators cannot be permitted to relate to a jury hearsay which is incriminating in its effect as to a defendant on trial for a crime . . . [w]hat an informant told [the investigating officers] was hearsay and inadmissible to the jury." *Id.*

The victim in *Ratcliff* had testified identifying the defendant. Nevertheless, the *Ratcliff* court reversed and remanded the armed robbery conviction based, in part, on the circumvention of the defendant's cross-examination rights which resulted from the admission of the hearsay. *Id.*

> In *Anderson v. State*, 156 So. 645, 646-47 (Miss. 1934), it was pointed out that: [t]his court has consistently condemned the practice of undertaking to bolster up the testimony of a witness on the stand, and to strengthen his credibility by proof of his declarations to the same effect as sworn to by him out of court.

In *Anderson*, investigating officers were allowed to testify that they took the defendant to the victim who was in bed recouping from being shot and that the victim identified the defendant. The *Anderson* court reversed the conviction stating "[t]he testimony of [the officers] under the circumstances should not have been admitted." *Id.* If the testimony was inadmissible and reversible error in *Ratcliff* and *Anderson*, it would be inadmissible here.

This is not the kind of investigatory exception to hearsay which has been carved out to explain an investigating officers action as in *Jackson v. State*, 935 So.2d 1108, 1114 (Miss. App. 2006). In *Jackson* the testimony was offered to "to show why an officer acted as he did and where he was at a particular place at a particular time . . . [and]

not introduced for the purpose of proving the truth of the assertion."

The polygraph and character evidence.

Both of German's written statements were admitted without objection. [T. 58-62; Ex. 10, 12]. On cross-examination of Inv. Mills, defense counsel asked to be allowed to go into the fact that German had been offered a polygraph examination, a topic which was carefully avoided by the state. [T. 63-74].

Not only did counsel want the jury know about the polygraph, but wanted the jury to know that German was in jail for other charges. [T. 64-73]. The learned trial court judge initially refused to allow this evidence, but due to the persistence of defense counsel, eventually acquiesced and allowed the topics to go before the jury. [T. 71-73]. After counsel sought to have the polygraph information introduced, he sought a mistrial based on admission of the statements, which was denied. [T. 82-84].

Then, at the close of the evidence, defense counsel moved for suppression of German's statements. [T. 172-75]. Trial counsel on one hand wanted the jury to know about the facts surrounding German not taking a polygraph test, but on the other hand wanted German's statements suppressed afterwards. [T. 63-74, 172-75].

German's position now is that this was not strategy. These actions by trial counsel involve two diametrically opposed ideas, which when presented to the jury had no other result but to prejudice German. The jury here, no doubt, concluded that German was apprehensive about taking the lie detector test because he considered himself guilty.

In *McGee v. State*, 907 So.2d 380, 384-85 (Miss. App. 2005), the court pointed out that a criminal defendant's confession "is subject to attack at a suppression hearing if there is a suggestion that the confession is not knowingly, freely, and voluntarily offered. See *Palm v. State*, 724 So.2d 424, 426(¶ 7) (Miss. Ct. App.1998). A successful suppression motion results in a "total elimination of the confession from the hearing of the jury by the trial judge after considering the totality of the circumstances." *Id.* In the present case, counsel waited until the end of the trial to ask that the defendant's statement given after the polygraph situation after the jury had already heard it. [T. 172-75].

Moreover, counsel insisted that the trial judge allow testimony that not only showed that German gave the second statement on the verge of submitting to a polygraph, but also allowed the jury to hear that German was in jail on other charges as well which violated Miss. R. Evid. Rule 404(b).

In *Weatherspoon v. State*, 732 So.2d 158, 161-63 (Miss.1999), "the defendant wanted to testify that he had volunteered to take a polygraph test. The trial court refused to allow that testimony, and the court affirmed noting that "it should be made clear that any evidence pertaining to a witness's offer to take a polygraph, refusal to take a polygraph test, the fact that a witness took a polygraph test or the results of a polygraph test is inadmissible at trial by the State or by the defense." See also *Manning v. State*, 929 So.2d 885, 893-94 (¶ 22-23)(Miss. 2006).

Stipulation

During trial, defense counsel formally stipulated that Makia's injuries were "substantial and profound", worse than statutorily required for conviction. [T. 139-40, 175 ; Ex. 21]. The stipulation was reduced to writing and submitted with the regular jury instructions. *Id.*

The portion of the statute under which German was indicted, Miss. Code Ann. § 97-5-39 (2)(a) (Rev. 2005), states in pertinent part, "[a]ny person who shall intentionally .... whip, strike or otherwise abuse ... any child in such a manner as to cause serious bodily harm, shall be guilty of felonious abuse of a child."

Counsel's actions were fatal to due process and a fair trial. German was entitled to have a jury determine the extent and quality of the alleged victim's injuries. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Miss. Constitution 1890 Art. 3, §26. There is no imaginable reasonable trial strategy whereby counsel would want to agree that, not only has the state met its burden, but even surpassed it.

Circumstantial Evidence Instruction

It is the appellant's position that the statements he purportedly gave were not confessions. According to the medical testimony, Makia's injuries were allegedly the result of severe shaking with impact to the head. [T. 95-97]. German did not admit this type of conduct. Hence, the case remained circumstantial. The state through the grand

jury chose to include specific injuries in the indictment, including an alleged skull fracture. [R. 1]. No mechanism was admitted by the defendant whereby the victim received a skull fracture as required by the stated charges.

Circumstantial evidence instructions are required where all evidence of the crime is entirely circumstantial, that is, when the prosecution cannot produce an eyewitness or a confession. *Jones v. State*, 797 So.2d 922, 929 (Miss. 2001), *Givens v. State*, 618 So.2d 1313, 1320 (Miss.1993), *McNeal v. State*, 551 So.2d 151, 157 (Miss. 1989), *Harris v. State,* 908 So.2d 868 (Miss. Ct. App. 2005). Here no circumstantial evidence instructions were requested nor given at German's trial.

In circumstantial evidence cases it is mandatory for the trial court to grant two jury instructions addressing the increased burden of proof to beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence and the second "two-theory" when properly requested and supported by the evidence. See *Parker v. State*, 606 So.2d 1132, 1140 (Miss. 1992). Failure to grant constitutes reversible error. *Id.*

However, even though appropriate, the instructions must be requested by the defense. *Poole v. State*, 231 Miss. 1, 94 So.2d 239, 240 (1957). It is not a trial court's duty to prepare instructions for either party. *Samuels v. State*, 371 So.2d 394, 396 (Miss. 1979), and *Ballenger v. State*, 667 So.2d 1242, 1252 (Miss. 1995).

Failure to seek proper jury instructions deprives a criminal defendant of the

fundamental constitutional right to a fair trial; because, a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss. 2004).

General Discussion of Ineffective Counsel

The Mississippi Supreme Court has recognized that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Ransom v. State*, 919 So.2d 887, 889 (Miss. 2005) (Citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under the two-pronged test of *Strickland,* adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So.2d 468, 476 (Miss.1984), a defendant "must prove under the totality of the circumstances, that (1) his attorney's performance was defective and (2) such deficiency deprived the defendant of a fair trial." 919 So.2d 889-90 . There is a "strong, but rebuttable presumption that the attorney's conduct fell within the wide range of reasonable professional assistance." *Id.*

The defendant must also establish "that there is a reasonable probability that but for his attorney's errors, he would have received a different result in the trial court." *Id.* The actions which fall within "trial strategy" include "failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections" and do not

necessarily render counsel's actions ineffective. *Id.* Trial counsel's "performance as a whole [must fall] below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial" *Id.*

In *Payton v. State,* 708 So. 2d 559, 560-64 (Miss. 1998), the court found that defense counsel's failure to investigate rendered the representation constitutionally ineffective. Payton's counsel basically did not make any effort to interview easily available witnesses nor investigate physical aspects of the case. *Id.* By thus failing, the court found that Payton's counsel did not provide a basic defense. *Id.* In *Payton,* the case boiled down to the defendant's word against the victim's word. The court found that the lack of investigation "affecting the outcome of the trial by casting doubt on the credibility of the complaining witness". *Id.*

The *Payton* court labeled the investigation there "non-existent." *Id.* Here, the minimum standards of a criminal defense was not afforded to German's, so that his legal representation at trial was "non-existent", a situation worse than that in *Payton.* Payton's counsel was not familiar enough with the work of his investigator, his neglect rendered his investigation non-existent because the information was utterly useless due to non-disclosure. Here defense counsel's actions stripped him of several fundamental rights necessary for even a minimum accommodation of due process. The *Payton* court reversed, and the same relief is respectfully requested by German.

If the issue of ineffective assistance of counsel is raised, as is here, on direct

appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Wilcher v. State*, 863 So.2d 776, 825 (¶ 171) (Miss.2003)).

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

The prejudice to German under the *Strickland* test was multifaceted. The state's case was bolstered with incompetent opinion and hearsay evidence, the jury heard evidence that made it appear that while the defendant was in jail on other charges and he "confessed" before taking a polygraph, then counsel stipulated that not only were the victims injuries substantial, they were profound, thus lighting the state's burden; and, finally, defense counsel let a circumstantial evidence case go to the jury as a regular case with a lower burden of proof. There was no trial strategy here, and the prejudice to German is abundant. The fair result would be a new trial. *Havard v. State*, 928 So. 2d 771, 789-90 (Miss. 2006).

ISSUE NO. 2: WHETHER THE TRIAL COURT SHOULD HAVE EXCLUDED POLYGRAPH EVIDENCE?

Under the authority of *Weatherspoon v. State*, 732 So.2d 158 (Miss.1999) discussed above in issue Number 1, German suggests it was reversible error for the trial court to allow the polygraph evidence in, notwithstanding German's counsel's insistence.

Not only was it ineffective counsel to seek introduction of the polygraph evidence, but the trial court should not have allowed in under any circumstances. The resulting prejudice is described above. A new trial is requested.

ISSUE NO. 3: WHETHER THE VERDICT IS CONTRARY TO THE WEIGHT OF EVIDENCE?

To determine whether trial evidence is sufficient to sustain a conviction "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.'" *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss. 2005) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). The deciding factor is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* If the minimum conclusion is reached that, "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence is sufficient. *Id.*

As stated before, according to the medical testimony in the present case, Makia's injuries were allegedly the result of severe shaking with impact to the head. [T. 95-97]. German did not admit this type of conduct. The state is bound to prove the elements and methodology of commission of a crime charged in an indictment returned by the grand jury. *Quick v. State*, 569 So.2d 1197, 1200 (Miss. 1990). Hence, the case remained

circumstantial.

In *Pittman v. State,* 836 So.2d 779, 785 (Miss. App. 2002), a father was convicted in part of statutory rape of his daughter. There was no proof of penetration nor attempted penetration. As stated previously, the *Pittman* Court upon review said that a crime was being committed but it was not statutory rape, and reversed.

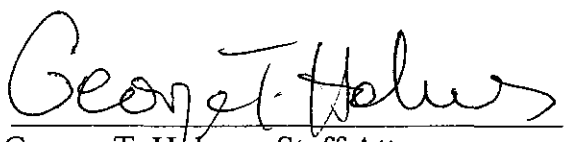
In the present case, the evidence was all circumstantial, and German's alleged confession falls far short of direct evidence of actions sufficient to result in the injuries described in the indictment in this case. The trial court, as in *Pittman*, should have granted a JNOV, because, the evidence was inadequate and the same result is appropriate here in German's case.

CONCLUSION

The conviction of Cherelle L. German should be reversed with remand for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Cherelle L. German, Appellant

By: 

George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 10th day of November, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Andrew K. Howorth, Circuit Judge, 1 Courthouse Sq., Ste. 101, Oxford MS 38655, and to Hon. Ben Creekmore, Dist. Atty., P. O. Box 1478, Oxford MS 38655, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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