MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2008-KA-01621-COA

VANESSA FRANCES DECKER

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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 the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Vanessa Frances Decker, Appellant;

2. Jim Waide, Esq., Attorney for Appellant;

3. Waide & Associates, P.A., Attorneys for Appellant;

4. State of Mississippi, Appellee;

5. Charles W. Maris, Jr., Assistant Attorney General, Attorney for Appellee; and

6. Forrest Allgood, District Attorney, Attorney for Appellee.

This the 22 day of September, 2009.

JIM WAIDE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases:

Federal Cases:

Other Citations:

STATEMENT OF THE ISSUES

1. THE GRAND JURY INDICTED APPELLANT FOR EXPLOITING HER MOTHER BY OBTAINING MONEY FROM HER WITHOUT HER CONSENT AND USING THE MONEY FOR HER OWN USE. THE JURORS WERE INSTRUCTED THAT THEY COULD FIND APPELLANT GUILTY IF THEY FOUND THAT SHE OBTAINED THE MONEY WITH OR WITHOUT HER MOTHER'S CONSENT. APPELLANT WAS, THEREFORE, DENIED SUFFICIENT NOTICE TO PREPARE A DEFENSE IN VIOLATION OF UNITED STATES CONSTITUTION AMENDMENTS SIX AND FOURTEEN, AND MISSISSIPPI CONSTITUTION, ARTICLE 3, § 26.

2. THE PORTION OF MISS CODE ANN. § 43-47-5(i) WHICH DEFINES EXPLOITATION AS THE *"ILLEGAL OR IMPROPER USE OF A VULNERABLE ADULT OR HIS RESOURCES FOR ANOTHER'S PROFIT"* IS SO VAGUE, INDEFINITE AND UNCERTAIN THAT IT FAILS TO GIVE NOTICE OF THE CRIMES OR UNLAWFUL ACTS THAT IT PURPORTS TO PROHIBIT. APPELLANT'S CONVICTION WAS, THEREFORE, OBTAINED IN VIOLATION OF HER RIGHT TO NOTICE OF THE NATURE OF THE CHARGE, AS GUARANTEED BY THE UNITED STATES CONSTITUTION AMENDMENTS SIX AND FOURTEEN.

STATEMENT OF THE CASE

Appellant Vanessa Francis Decker was indicted on four counts of exploitation of a vulnerable adult by a Clay County, Mississippi Grand Jury on October 3, 2007. R. 10-12. The indictment was amended on July 23, 2008, and Count I was dismissed. R. 113-16.

Appellant was tried on July 23, 2008.

The jury found Appellant not guilty on Counts II and III and guilty on Count IV. R. 97-99. Count IV, on which Appellant Decker was convicted, states that Appellant used $4,120.00 of her Mother's money "without her consent," at a time when her mother was a vulnerable adult between December 5, 2006 and April 5, 2007. Count IV referenced the time period when Appellant was away from her mother, caring for her son who had shot himself in the face in a suicide attempt. R. 95; T. 206-07.

Appellant's post-trial motion for a directed verdict of not guilty or a new trial was filed on July 28, 2008. R. 100-102.[1] It was denied on August 25, 2008. R. 129.

On September 23, 2008, Appellant timely filed her notice of appeal. R. 131.

---

[1]Appellant has filed a Motion to Supplement Record on Appeal to include page two of the post-trial motion which, to date, has not been ruled on. See Record Excerpt No. 10.

STATEMENT OF THE FACTS

The investigation began when Ms. Morris' daughter, Ella Weese Langford, and her granddaughter, Janice Renee Nevels, complained to the Attorney General's office. T. 131. Ms. Morris had lived with Appellant in 2005, 2006 and the beginning of 2007. T. 138. Ms. Morris was living with Appellant because Ms. Morris had memory loss and could not provide for her own needs. T. 139.

The gist of the State's evidence was numerous checks Appellant had written on her mother's checking account between December 2005 and February 2007. State Exhibits 2, 3 and 4. The total amount of these checks was $10,225.02. T. 193-94, and the amount of checks written on Count IV, for which Appellant was convicted, was $4,120.00.

Ms. Norris lived with Appellant's sister, Ella Weese Langford, from January until April 2004. T. 173. However, Ms. Langford decided she did not want her mother living with her because she "couldn't keep her mouth shut" concerning (Ms. Langford's) use of her mother's money. T. 174-75. Langford packed her mother's clothes and put them in the driveway and called Appellant to pick up their mother. T. 256.

Appellant's sister, Shirley Doss, testified that her mother went to live with Appellant because she was not "able to stay by herself anymore." T. 200. Ms. Doss

did not know how Appellant spent her mother's money but she knew that "she was told by mother that she [Appellant] could use it for whatever she needed, you know, for the house or whatever." T. 201. When Ms. Doss took her mother to the beauty shop to get her hair fixed, Appellant would give her a check to pay for it and when she took her mother to lunch, Appellant would give her a check to pay for it. T. 204.

Ms. Doss testified that Appellant and her mother "had a very close relationship, about as close as any daughter and mother could be." T. 205. Ms. Doss testified that she had heard her mother "tell me many times for years that she wanted her baby [Appellant] to take care of her when she got to where she couldn't take care of herself. And she wanted her to have her money for whatever she needed." T. 205.

When asked why her mother finally left Appellant's home and care, Ms. Doss explained:

> Vanessa's [Appellant's] son had shot himself and she brought mother to me. . . . I was really sick, and I knew Fran (Appellant) was really bad – upset because Isaac shot himself. And she brought mother to me and asked me if I would take care of her. . . . But I wasn't able to take care of mother, and I called my daughter. And I told her. I said, baby, you got to come home and you got to help mother with my mother. I said, because I can't do nothing for her. I said I can't get up and down and wait on her like I need to. I said because I can't hardly get up myself. And so my daughter, she come down.

T. 206-07.

Ms. Doss' daughter ended up taking her to the hospital and Appellant's mother

to her sister, Ella Weese's home. T. 208. It was this time period, while Appellant was away from her mother and with her son in the hospital, for which Appellant was convicted on Count IV. T. 206-07.

Appellant's brother, Jimmy Norris, testified that Appellant would have not been able to take care of her mother during this time because of her son's horrendous physical condition from the gunshot wound to his face, and he needed her care. Mr. Norris testified that his mother loved her grandchildren, and that she would want her severely injured grandson taken care of. T. 217-18.

Appellant's sister, Marilyn Janice Henley, testified that her mother always wanted Appellant to take care of her when she got old. T. 253-54. She had a terrible fear of being put in a nursing home. T. 257-58.

When asked about what kind of feelings her mother had for Appellant's injured son Isaac, Ms. Henley testified that her mother loved Isaac and was always asking about him and Appellant while they were at the hospital in Texas. T. 258. She recalled her mother telling Appellant on the telephone that "if you need a check for anything, you write it." T. 259.

Appellant's son, Cleon Glenn Smith, testified that he and his step-dad built a 14 x 12 room with a bathroom onto Appellant's house for her mother to live in. He testified that his step-dad paid for it with his credit card and that it cost about

$11,000.00 or $12,000.00. They never did charge Appellant's mother for any of the work they did. T. 275-76.

Appellant's cousin, Frances Garnett, testified that she often saw Appellant and her mother after she started living with Appellant and that they had a good relationship. T. 281-84. Ms. Garnett testified that Ms. Norris had a good relationship with all of her children, except that Ella Weese was always complaining about what her mother was doing for Appellant. She explained: "Every time I met her in town anywhere, she was complaining about what her mother and what Vanessa were doing with - - Aunt Nannie Mae always wanted to give Vanessa - - inherit half what she had and help Vanessa out because she had the four children." T. 284-85.

Appellant's 12 year-old daughter, Macy Decker, testified that she and her sister and brother had a very close relationship with her grandmother and that her mother treated her mother "like a daughter is supposed to treat her mother." T. 288-89.

Ms. Norris had a checking account with BancorpSouth in West Point, Mississippi, and her income came from Social Security benefits of about $940.00 a month. T. 140, 182. Appellant had an agreement with the bank where she could cash her mother's checks and draw on her mother's checking account. T. 194; Defendant's Exhibit 1.

STANDARD OF REVIEW

Whether the trial court infringed upon the Sixth Amendment right to notice of the nature of the charge is a legal question.

Whether Mississippi Code Ann. § 43-47-5(i) is so vague that it fails to give notice of the crimes it purports to prohibit is a legal question.

Legal questions are reviewed *de novo*. *Sanders v. Chamblee*, 819 So.2d 1275, 1277 (Miss. 2002); *Roberts v. New Albany Separate School District*, 813 So.2d 729, 730-31 (Miss. 2002); and *Plummer v. State*, 966 So.2d 186, 189 (Miss. App. 2007).

SUMMARY OF THE ARGUMENTS

The indictment charged that Appellant used her mother's money without her consent. The defense prepared for trial accordingly and offered several witnesses who testified that Appellant's mother wanted Appellant to use her money the way she did. However, on the first day of the trial, the State made it known that it believed it did not matter whether Appellant's mother consented because the statute says, "with or without the consent." Over objection, the trial court's instructions allowed the jury to find Appellant guilty even though her mother did consent to Appellant's use of her money. This violated Appellant's fundamental constitutional rights under the Sixth Amendment right to know the nature of the charge against her.

The Statute under which Appellant was convicted is unconstitutionally vague,

since it allows conviction upon a finding that a defendant's conduct was "illegal" or "improper." This also violates Appellant's Sixth and Fourteenth Amendments' right to know the nature of the charge against her.

ARGUMENT I.

THE GRAND JURY INDICTED APPELLANT FOR EXPLOITING HER MOTHER BY OBTAINING MONEY FROM HER WITHOUT HER CONSENT AND USING THE MONEY FOR HER OWN USE. THE JURORS WERE INSTRUCTED THAT THEY COULD FIND APPELLANT GUILTY IF THEY FOUND THAT SHE OBTAINED THE MONEY WITH OR WITHOUT HER MOTHER'S CONSENT. APPELLANT WAS , THEREFORE, DENIED SUFFICIENT NOTICE TO PREPARE A DEFENSE IN VIOLATION OF UNITED STATES CONSTITUTION AMENDMENTS SIX AND FOURTEEN, AND MISSISSIPPI CONSTITUTION, ARTICLE 3, § 26.

The United States Supreme Court has held that "[n]o principle of procedural due process is more clearly established than that *notice of the specific charge*, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas,* 333 U.S. 196, 201 (1948) (emphasis added).

The primary purpose of an indictment is to provide the defendant with a concise statement of the crime so that he may have a reasonable opportunity to prepare and present a defense to those charges. *Burrows v. State,* 961 So.2d 701, 705 (Miss. 2007). The prosecution is held strictly to prove the allegations of the

indictment and may not vary from the proof of those allegations unless the variance is a lesser-included-offense. *Rushing v. State,* 753 So.2d 1136, 1146 (Miss. App. 2000). "Not every variance between the language of the indictment and the proof is material." *Burks v. State,* 770 So.2d 960, 963 (Miss. 2000). However, "[a] variance is material if it affects the substantive rights of the defendant." *Burks,* 770 So.2d at 963. In *State v. Berryhill,* 703 So.2d 250 (Miss.1997), the Mississippi Supreme Court held that "different theories [of the crime charged] would plainly invite different defenses. An indictment is defective if it does not give enough notice for a defendant to prepare a defense." 703 So.2d at 256.

The United States Supreme Court has held that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him," and that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-17 (1960). In *Stirone,* the offense proved at trial was not fully contained in the indictment. The trial evidence had amended the indictment by broadening the possible bases for conviction from that which appeared in the indictment and the district judge gave instructions which allowed the jury to find the defendant guilty of an offense that was not fully charged in the indictment. The Supreme Court found that "[a]lthough the trial court did not permit a formal amendment of the indictment,

the effect of what it did was the same" and held that the district judge committed error in allowing this broadening of the basis on which Stirone could be convicted. 361 U.S. at 217. See also, *Jenkins v. McKeithen,* 395 U.S. 411, 430 (1969) (plurality opinion) (the "grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court").

The Fifth Circuit recently noted that "[a] constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. In such cases, reversal is automatic, because the defendant may have been convicted on a ground not charged in the indictment." *U.S. v. Adams,* 314 Fed.Appx. 633, 643 n.33 (5th Cir. 2009), quoting *United States v. Adams*, 778 F.2d 1117, 1123 (5th Cir.1985).

Count IV charged that Vanessa Francis Decker:

> on and between December 5, 2006 and April 5, 2007, several acts and/or transactions therein being connected and/or constituting parts of a common scheme or plan, within the jurisdiction of this Court and legal boundaries of Clay County, Mississippi, did willfully, feloniously, unlawfully, and knowingly exploit Nannie Mae Morris, a vulnerable adult as defined by § 43-47-5 (n) of the Mississippi Code of 1972, as amended, to wit: by engaging in a continuous plan by which Vanessa Francis Decker wrote checks drawn on the Bancorp South checking account of Nannie Mae Morris (Checking Account Number 54105325), to herself and her husband, Billy E. Decker, or withdrew cash from said account of Nannie Mae Morris while she was not actively in the care of Vanessa Francis Decker, thereby depriving Nannie Mae Morris over $250.00 of her funds and/or resources with knowledge of Nannie Mae Morris's inability to perform normal activities of daily living or to

provide for her own care or protection due to mental, emotional, or physical impairment, disability or dysfunction, or due to the infirmities of aging, ***without the consent of Nannie Mae Morris***, thereafter using the currency obtained, $4,120.00, for her own profit or advantage, contrary to and in violation of § 43-47-19 (1) & (2) (b) of the Mississippi Code of 1972; [emphasis added].

R. 94-95.

Immediately prior to trial, after the jury was sworn, the prosecutor, Ms. Treasure Tyson, brought up a motion *in limine* for hearing, contending that it was irrelevant whether Appellant used some of Ms. Morris' money to help care for her son, Isaac, who had been severely injured and left totally unable to care for himself due to an unsuccessful suicide attempt. The prosecutor stated: "any evidence regarding his attempted suicide or any care for him is irrelevant . . ." Appellant's attorney, Jim Waide, responded:

BY MR. WAIDE: . . . In the first place, this case requires a proof of criminal intent, that she had an intent to steal from her mother. The indictment charges for her personal benefit and use. This is the alleged victim's grandson. It's totally logical that money would be utilized for the care of her grandson.

The indictment charges without consent. There will be evidence in this case that she specifically asked and directed that the money be used for his benefit, for the benefit of her grandson. . . .

BY THE COURT: Well, I'm asked to rule on an evidentiary issue prior to hearing any of the proof of the evidence. It may be proof in evidence as developed that shows that it was with consent. I do not know. I don't know what's going to happen.

BY MS. TYSON: Your Honor, the statute clearly says, with or without the consent of a vulnerable adult.

BY THE COURT: It does say that.

BY MR. WAIDE: Your Honor, if the Court please. It does, but the indictment charges without consent. It would be a fatal variance from the indictment now to start with a new State's theory, they can't bury what they charged in the indictment or what the grand jury has indicted for to change to a different theory to say it's because she's mentally unstable and not without consent.

BY THE COURT: I can see that that issue might have some relevancy during the courts of the trial. I am not going to rule on the motion in limine at this time. . . .

T. 118-19.

In moving for a directed verdict at the conclusion of the State's case, Appellant's attorney argued that:

BY MR. WAIDE: . . . Two, the indictment - - according to the indictment, the grand jury indicted for utilizing money without the grandmother's consent. Any guilty verdict, if Your Honor were to allow them to amend the indictment, and I question whether the court has that authority, would have to be contrary to the grand jury indictment. That's the only thing she's been indicted for.

T. 240.

The prosecutor responded:

BY MS. TYSON: Your Honor, the State would object to any directed verdict on the grounds that sufficient evidence has been produced by the State to meet the grounds for the statute. The indictments specifically names the statute. And the statute specifically says exploitation with or without the consent

of the vulnerable adult. Consent of the vulnerable adult is completely irrelevant in this case. Whether or not grandmother wanted the money to be used for her son and for a tragedy is irrelevant. The point is the money was given to her by social security to care for her mother. She didn't care for her.

T. 241.

In ruling on the motion for directed verdict, the trial court stated:

BY THE COURT: . . . The first thing that gave me pause was in courts two, three, and four of the indictment. It is specifically alleged in the indictment that the use of these funds by the defendant was without the consent of the vulnerable adult. That's what it said.

The statute itself when it defines exploitation in 47-7-5 Subsection I states exploitation means the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage with or without the consent of the vulnerable adult. And it even includes acts committed pursuant to a power of attorney.

At one time in our law I was confident that what was alleged in the indictment must be proved as alleged. It must be proved that it was without consent. In this case, if I go by that standard.

However, there are a number of cases in our criminal law that have come down in not so recent years but in the last decade that says that even if you allege it in the indictment, it doesn't matter if the statute says otherwise, you can just sort of shotgun it. And that's the expression that we use to use as a shotgun type indictment or statute.

The statute clearly defines exploitation. And that's what is charged here is as pecuniary exploitation. So the first issue that I'm faced with on your motion, Mr. Waide is that even though the indictment on those three counts say that it was without the concept [sic] of the vulnerable adult, that is, Nannie Mae Morris,

> the statutory definition says that it could be either with or without consent.
>
> So I do by find that the statute would control even though the indictment alleges otherwise. And the exploitation of the resources, it doesn't matter whether it's with or without consent. And that is mere surplusage in the indictment. So, I would overrule the motion for directed verdict on that issue on that ground.

T. 244-46.

Appellant's counsel renewed his motion for directed verdict once the State and defense rested, saying, "May it please the Court. The defense renews the motion for directed verdict on all the grounds at the close of the State's proof, including the following that the evidence is insufficient as a matter of law to prove guilty beyond a reasonable doubt." T. 292. The trial court stated that its "ruling is the same and the renewed motion is overruled." *Id.*

The trial court gave three instructions to the jury that were substantially the same, S-1, S-2 and S-3. R. 67-69. The only difference involved the dates and amounts of money involved. Jury instruction number S-1 stated:

> The court instructs the jury that the defendant has been charged in the Indictment with the crime of exploitation of a vulnerable adult. For you to find her guilty of exploitation of a vulnerable adult, you must believe from all the evidence in this case beyond a reasonable doubt that:
>
> 1. Vanessa Decker, on and between the 15th day of November, 2005 and the 5th day of November, 2006 in Clay County;
> 2. Did willfully and without lawful authority;

3. Exploit Nannie Morris, a vulnerable adult;
4. By illegally or improperly;
5. Using Nannie Morris, or her resources, in the amount of $4,556.00;
6. For her own profit or advantage;

7. Regardless of whether it was done with, or without, the consent of Nannie Morris.

If you find that the State has proven all of the above elements beyond a reasonable doubt, then you shall find the defendant not guilty as charged in Count II of the Indictment.

R. 67.

Appellant's counsel objected to this instruction as follows:

BY MR. WAIDE: . . . First, the grand jury indicted even though it may be - - they may not have had to in view of the statute, and the grand jury indicted for using the money without consent. There's been no indictment of a grand jury in violation of the Mississippi Constitution and the United States Constitution right to indictment by grand jury of using the money with t he consent of Nannie Morris. And because there's been no indictment by the grand jury, we believe element 7 is wrong. It would have to be with the consent.

T. 294.

The trial court responded by stating: "Okay. Mr. Waide has stated the defendant's objections. They are preserved in the record. They're overruled. S-1 is given." T. 296. Instructions S-2 and S-3 were also given. T. 296-97.

Defense instruction D-2 instructed the jury that "if Vanessa Decker's use of the money was with the consent of Nannie Mae Morris, then Decker must be found

not guilty." R. 85. The trial court refused this instruction, stating:

BY THE COURT: D-2 is refused. This, again, addresses the issue of the variance in the indictment with the definition, Mr. Waide, that you had before, with or without consent and it preserves your record for that purpose. It is refused. . . .

T. 301.

Defense Instruction D-6 stated that:

> The Court instructs the jury that under Count 2 of the indictment, Vanessa Decker is charged with writing checks for cash or withdrawing approximately $4,556.00 from Nannie Mae Morris' Bancorp South checking account for her personal benefit without the consent of Nannie Mae Morris.
>
> I charge you that in order to find Vanessa Decker guilty of Count 2 of the indictment, the State must prove all the following elements beyond a reasonable doubt:
>
> 1. That Defendant, Vanessa Decker, engaged in a scheme to willfully, feloniously, unlawfully and knowingly exploit Nannie Mae Morris, a vulnerable adult:
> 2. That the scheme consisted of Vanessa Decker writing checks for cash or withdrawing currency from the BancorpSouth checking account of Nannie Mae Morris, Checking Account No.: 54105325, in the amount of approximately $4,556.00 between November 15, 2005 and November 5, 2006;
> 3. That the checks were written and currency withdrawn for Decker's own profit and advantage and not for the benefit of Nannie Mae Morris;
> 4. That Nannie Mae Morris **did not consent** to the writing of the checks or the withdrawal of the currency.
> 5. That at the time of the checks were written and the cash withdrawn, the Defendant, Vanessa Decker, had actual knowledge of Nannie Mae Morris' inability to provide for her own care and protection; and

6. That Vanessa Decker entertained the specific criminal intent to defraud Nannie Mae Morris.

If you fail to find beyond a reasonable doubt that Vanessa Decker is guilty of all of these elements, then you must return a verdict of not guilty of Count 2 of the indictment. (emphasis added).

R. 88.

The trial court refused D-6, stating:

BY THE COURT: Well, the third sentence of the instruction states that the removal of the money by withdrawing money from an account or by writing checks for cash must have been done for her own personal benefit without the consent of Nannie Mae Morris. As I read the statute, it says either with or without the consent of Nannie Mae Morris.

. . . I know, but what I'm talking about is it is an improper instruction because it says it must be without the consent of Nannie Mae Morris

. . . The problem still is with it is it says in the third sentence of the instruction "Bancorp South checking account for personal benefit without the consent of Nannie Mae Morris." ***That's the exact language in the indictment but not in the statute.***

. . . I'm going to refuse D-6 for those reasons. (emphasis added).

T. 304-05.

The trial court also refused Defense Instructions D-7 and D-8, instructions that were the same as D-6 except for the dates and amounts of money involved. T. 305-06.

By instructing the jurors that they could find Appellant guilty if she obtained the money from her mother with or without her consent, the trial court broadened the basis on which Appellant could be convicted. However, the trial court stated it was "confident that our laws required that what was alleged in the indictment must be proved as alleged." T. 245. The Court then stated that during the last decade or so a number of cases in our criminal law have come down which allow a person to be convicted of a crime even if all the elements were not actually charged in the indictment, as long as the statute on which the indictment was based was cited and the statute contained the elements that were not in the indictment. The Court stated, "you can just sort of shotgun it. And that's the expression that we use to use as a shotgun type indictment or statute." *Id.* Under the trial court's "shotgun" theory, Appellant should have known the specific charge against her because her indictment gave her notice of the statute on which the charge was based.

However, *Quang Thanh Tran v. State* , 962 So.2d 1237 (Miss.2007), held:

> Moreover, only a grand jury can specify the crime a defendant is charged with committing. "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States,* 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). The indictment's purpose is to notify the defendant of the charges he must meet and provide enough detail so that the defendant may plead double jeopardy in a future prosecution based on the same set of events. *United States v. Green,* 964 F.2d 365, 372 (5th Cir.1992). This Court has held, "If the grand jury did

not know what crime they were charging against the defendant, how could the defendant know the nature of the crime with which he is charged?" *Brumfield,* 206 Miss. at 507, 40 So.2d 268.

The United States Supreme Court has held:

> A cryptic form of indictment in cases [where guilt depends upon a specific identification of fact] requires the defendant to go to trial with the chief issue undefined.... To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of fact not found by, and perhaps not even presented to, the grand jury which indicted him.

Russell v. United States, 369 U.S. 749, 766, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); 962 So.2d at 1243-44.

Here, the indictment charged Appellant used mother's money **without** her consent. If the Sixth and Fourteenth Amendment rights to know the nature of the charge mean anything, it was error to permit conviction on a charge for which there was no indictment.

ARGUMENT II.

THE PORTION OF MISS CODE ANN. § 43-47-5(i) WHICH DEFINES EXPLOITATION AS THE "*ILLEGAL OR IMPROPER USE OF A VULNERABLE ADULT OR HIS RESOURCES FOR ANOTHER'S PROFIT*" IS SO VAGUE, INDEFINITE AND UNCERTAIN THAT IT FAILS TO GIVE NOTICE OF THE CRIMES OR UNLAWFUL ACTS THAT IT PURPORTS TO PROHIBIT. APPELLANT'S CONVICTION WAS, THEREFORE,

OBTAINED IN VIOLATION OF HER RIGHT TO NOTICE OF THE NATURE OF THE CHARGE, AS GUARANTEED BY THE UNITED STATES CONSTITUTION AMENDMENTS SIX AND FOURTEEN.

Due process requires prior notice, or "fair warning," of proscribed conduct before a sanction may be imposed. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963). "[L]aws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. "*Grayned v. City of Rockford*, 408 U.S. at 108.

Miss. Code Ann. § 43-47-5(i) defines "exploitation" as follows:

> "Exploitation" means the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage, with or without the consent of the vulnerable adult, and includes acts committed pursuant to a power of attorney. "Exploitation" includes, but is not limited to, a single incident.

The statute makes it a criminal offense for a person who is taking care of a

loved one and who has access to the person's financial resources to use any of those resources in an "illegal" or "improper" manner. The statute is unconstitutionally vague because it fails to provide adequate notice of the prohibited conduct and allows for arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The statute does not give any real notice as to how the terms "illegal" and "improper" relate to people who are taking care of their elderly loved ones. A person of common intelligence might well be expected to know whether some type conduct is illegal, such as buying illegal drugs. Whether, for example, using a grandmother's money to care for a tragically-injured grandson is "illegal" or "improper" is undefined. There is no definition of what constitutes "improper" or "illegal" conduct. A person of common intelligence can only guess at whether some financial transaction carried out for a loved one may result in a charge of exploitation.

Not only does the vagueness of the statute make it impossible for the person who is caring for an elderly relative to determine whether a financial transaction is criminal, the vagueness of the statute makes it possible for a prosecutor to charge someone based on any financial dealings she may have had with the loved one. The prosecutor is allowed to make a subjective decision as to what is "improper." A citizen should not be prosecuted on charges based on a statute which mandate is so uncertain that it is left up to a prosecutor's unbridled discretion to charge someone

simply because a family member thinks that the conduct at issue is "improper."

In *Connally v. General Const. Co.*, the Supreme Court stated that:

> A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

269 U.S. at 393.

In *Cuda v. State of Florida*, 639 So.2d 22 (1994), the Supreme Court of Florida struck down a statute practically identical to § 43-47-5(i), finding it unconstitutionally vague for failure to define the words "improper or illegal." The Florida statute reads:

> A person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree . . .

Fla. Stat. Ann. § 415.111(5) (1993).

The Florida Supreme Court compared the statute to one containing the phrase "not authorized by law" which it had found to be "too vague, indefinite and uncertain to constitute notice of the crime or crimes or unlawful act which it purports to prohibit" and "prescribes no ascertainable standard of guilt." *Locklin v. Pridgeon,* 30

So.2d 102, 103 (1947). The *Cuda* Court held:

> The statute at issue in *Locklin* made it unlawful for any officer, agent, or employee of the federal government or the State of Florida to commit any act under color of authority of their position which is "not authorized by law." *Id.* This Court held that the act was unconstitutionally vague because it required every government employee and officer "to determine at his peril what specific acts are authorized by law and what are not authorized by law." *Id.*, 30 So.2d at 105.

639 So.2d at 23. The Court further held that:

> As in *Locklin,* this statute purports to criminalize any "illegal" act in using or managing the funds of an aged person. Further, section 415.111(5) also suffers from the same constitutional infirmities noted by this Court in *Locklin.* The statute violates due process because it is too vague to give notice. Furthermore, "the determination of a standard of guilt is left to be supplied by the courts or juries," which is "an unconstitutional delegation of legislative power." 158 Fla. at 739, 30 So.2d at 103.

639 So.2d at 24.

The *Cuda* Court found that the Florida statute was unconstitutionally vague because it contained "no clear explanation of the proscribed conduct, no explicit definition of terms, nor any good faith defense." 639 So.2d at 25. This Court should do the same in regard to the statute at issue in this case.

CONCLUSION

The case should be reversed and the indictment dismissed.

Respectfully submitted,

WAIDE & ASSOCIATES, P.A.

BY: _____
JIM WAIDE
MS BAR NO: [redacted]

WAIDE & ASSOCIATES, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 1357
TUPELO, MS 38802
TELEPHONE: 662/842-7324
FACSIMILE: 662/842-8056
EMAIL: WAIDE@WAIDELAW.COM

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a PDF-formatted CD, to the following:

Charles W. Maris, Jr.
Assistant Attorney General
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205-0220

Forrest Allgood
District Attorney
P.O. Box 1044
Columbus, Mississippi 39703-1044

Dorothy Langford
Circuit Court Administrator of Clay County
P. O. 1387
Columbus, MS 39703-1387

THIS the 22 day of September, 2009.

JIM WAIDE

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2008-KA-01621-COA

VANESSA FRANCES DECKER

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32(c), the brief contains:

   A. 5,782 words in proportionally spaced typeface.

2. The brief has been prepared:

   A. In proportionally spaced typeface using WordPerfect 12.0 in Times New Roman, 14 point.

3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Rule 32, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

This, the 22 day of September, 2009.

BY: _____
JIM WAIDE