IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TOBY HENRY — APPELLANT

V. — NO. 2008-KA-01648-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

William P. Starks, II
Studdard Law Firm
325 College Street (street)
Post Office Box 1346 (mailing)
Columbus, Mississippi 39703
T: 662.327.6744
F: 662.327.6799
E: william@studdardlaw.com

Counsel for Appellant

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T: 662.327.6744
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E: william@studdardlaw.com

Counsel for Appellant

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REPLY BRIEF ARGUMENT

Comes now Toby Henry, Appellant herein and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, his *Reply* to *Brief for the Appellant*. In so doing, however, Mr. Henry reiterates all errors, arguments and citation of authority in *Brief of the Appellant,* incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Reply*. In Appellant's *Brief*, Appellant made the following three assignments of error: 1) Appellant was denied his constitutional right to licensed counsel; 2) Appellant was denied effective assistance of counsel; and 3) the judicial interpretation of "serious bodily injury" in Miss. Code Ann. §97-5-39 (West 2009)(as set forth in *Buffington v. State*, 824 So.2d 576 (Miss. 2002)).

ISSUE NO. 1: APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL IN THE TRIAL OF THIS MATTER

The State makes two basic arguments with regards to this issue. First, the State argues that this issue was waived because it was not raised with the trial court, and second, that there is no evidence in the record to support the assertion that trial counsel was inactive.

A. Whether Toby Henry Was Deprived Of Right To Counsel Is Exception To General Waiver Rule

On the first issue, the State seeks to have this issue summarily dismissed on the procedural bar of waiver since no objection was lodged at the trial of this matter. Defendant Henry would point out that the person whom is charged with making such objections would be his attorney, but the unlicensed practitioner representing Henry was not likely to make such an objection and did not. However, the right to counsel is a fundamental constitutional right which is secured by the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United

States. See *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995)("The right to counsel guaranteed by the Sixth Amendment is a fundamental right.").

The Mississippi Supreme Court has routinely found that errors affecting fundamental constitutional rights should be excepted from procedural bars which would otherwise prohibit their consideration. See *Luckett v. State* 582 So.2d 428, 430 (Miss.,1991) and *Smith v. State*, 477 So.2d 191, 195-96 (Miss.1985)(citing *Read v. State*, 430 So.2d 832 (Miss.1983)("this Court has previously held that errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal"). Furthermore, a violation of a fundamental right such as denial of right to counsel is not a harmless error. See *Jasper v. State*, 871 So.2d 729, 732 (Miss. 2004)(citing *Chapman v. California*, 386 U.S. 18, 26, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

In the instant case, the issue involves the fundamental right to counsel since Henry was not represented by an active member of the Mississippi Bar at trial. Furthermore, it is an issue which was obviously concealed from Toby Henry by trial counsel[1] and not disclosed to the Court by trial counsel. For the foregoing reasons, this issue should be excepted from the procedural bar that the issue was not raised at trial.

B. Court May Take Judicial Notice Of Bar Status Or Alternatively Allow Record To Be Supplemented

On the second issue of the membership status of Toby Henry's trial counsel, Henry, in his original brief, requested this Court take judicial notice of the bar status of his trial counsel. This Court has previously indicated that it may take judicial notice of the licensure status of a member of the bar. See *Mississippi Real Estate Com'n v. McCaughan*, 900 So.2d 1169, 1188

[1] The moniker of "trial counsel" is used only for identification purposes and not a concession of the issue that "trial counsel" was an attorney licensed to practice law.

fn.4, ¶69 (Miss.App.,2004)("According to the roll of attorneys maintained by The Mississippi Bar, this Court may and should take judicial notice that Root is not a licensed attorney."). See also *Mullins v. Oates*, 2008-AK-R0303.001 fn. 10 (Alaska 2008)(taking judicial notice of status of members of Alaska Bar); *People v. Vigil*, 2008-CA-1215.419 (Ct. App. Cal. 6th Dist.)(2008)(Court took judicial notice of trial counsel's State Bar Records). Therefore, this Court should take judicial notice of the inactive status of Henry's trial counsel.

Alternatively, Toby Henry requests the Court to allow supplementation of the record with certain electronic mail correspondence between Toby Henry's appellate counsel and James R. Clark, Deputy General Counsel for the Mississippi Bar. This electronic mail correspondence which is attached in the Appendix to this Reply Brief provides that Henry's trial counsel voluntarily took inactive status on August 1, 2008. The trial began August 27, 2008. Thus, Henry was not represented by a licensed practitioner.

The State also makes an ancillary argument that the status of Henry's trial counsel is an issue for the Mississippi Bar. However, a " . . .license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial and to aid in the administration of justice as an attorney and as an officer of the Court." *Rules of Discipline of Mississippi Bar*, Part One (1984). Furthermore, the Mississippi Supreme Court has exclusive jurisdiction of matters "pertaining to attorney discipline, reinstatement, and appointment of receivers for suspended and disbarred attorneys." *Id.* Certainly, the Mississippi Bar can initiate disciplinary action regarding inactive status and the continuation of a law practice. However, the Mississippi Bar cannot provide relief for the Appellant Toby Henry who was deprived of competent, licensed counsel. This fundamental right cannot be relegated to bar disciplinary proceedings.

ISSUE NO. 2: APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In the second assignment of error, the State argues that that Appellant Henry was provided effective assistance of counsel. Henry argued in his original Brief that his trial counsel failed to proffer a reasonably believable defense at the inception, failed to give Henry proper legal advice on the maximum sentence, failed to request a mistrial after he orchestrated a "spectacle," failed to prepare for the Peterson hearing, failed to object or request a mistrial to the prosecution's highly inflammatory closing argument comments and was too frail or decrepit to represent Henry. In response, the State addresses some of these arguments, but fails to fully address many of the arguments originally set forth by Appellant Henry.

In the mater of the alibi defense, the State contends that trial counsel was effective because he objected to the amendment of the indictment to change the date of the offense from February 22, 2007, to February 25, 2007. However, the amendment was granted despite the objection, and trial counsel's reason for opposing the amendment was that trial counsel believed Henry was incarcerated on February 22, 2007, as evidenced by his opening statement and his arguments regarding the amendment. Tr. at 71-73, 91. The proof at trial was that Henry was not incarcerated until February 26, 2007. Tr. at 141. Thus, the whole objection and attempted alibi was apparently a mistaken belief on the part of trial counsel, not a reasonably believable defense from the inception. Thus, the credibility of the Henry's defense and his trial counsel was undermined from the beginning of the trial when he put forth this false alibi defense.

The State does not address the issue of the trial counsel advising Toby Henry as to the maximum sentence being twenty (20) years rather than life. Thus, Toby Henry would assume this issue is uncontested and is further supported by the statements of his trial counsel in the

record. Henry's trial counsel, at the inception of voir dire, explicitly stated that he was not "standing here worried about going away for 20 years of my life." Tr. 60.

The State argues that the "spectacle" of bringing a child into the courtroom was not supported by any record evidence that trial counsel encouraged or condoned the incident. Although there is no express statement on the record, common sense and experience would indicate that the trial counsel orchestrated this event. The circumstances were that the court took a break during voir dire. Tr. at 51. Appellant Henry and his trial counsel then left the courtroom and came back in simultaneously. Tr. at 51. When Toby Henry came in with his attorney, he had a small child in his arms with his counsel present. *Id.* The trial judge immediately told the client to get the child out of the courtroom and told trial counsel "you know better." *Id.* Thus, it is obvious from the circumstances that this was an ill-fated ploy that was orchestrated by his trial counsel.

The State attempts to provide credit to Henry's trial counsel by contending that trial counsel was "successful in preventing testimony about other wrongs under M.R.E. 404(b) to be admitted." While the trial court did exclude testimony about other wrongs under M.R.E. 404(b), an examination of the six pages of transcript dealing with this issue show that trial counsel had little to do with the exclusion. Tr. 160-166. The record reflects the District Attorney requested a hearing on the admissibility of a witness whom would purportedly testify as to other uncharged acts. Tr. 160. The trial court judge was the one whom brought up M.R.E. 404(b) as an obstacle for the admission of this evidence. Tr. 162. Even after the trial judge has provided trial counsel for a potential basis for exclusion, trial counsel only interposed an objection related to discovery and how it was contrary to the statements of DHS (which were not in evidence and no attempt was ever made to put into evidence). Tr. 164. In the six pages of

discussion of this issue, trial counsel only made this one statement regarding the discovery issue, and made no mention of M.R.E. 403 or 404(b). The trial court, without any assistance of trial counsel, found it to be inadmissible under M.R.E. 404(b)

As for the issue of trial counsel being unprepared for the *Peterson* hearing, the State argues essentially that it was not prejudicial to the Defendant because he did not testify and the prior conviction was not admitted before the jury. Tr. 167-174. However, Appellant Henry had the knowledge of the trial court's ruling that the prior conviction for accessory after the fact to burglary would be admitted prior to making a decision to testify. Tr. 172-174, 175. Certainly, the trial court's ruling to allow admission of a prior conviction would be a substantial deterrent to a criminal defendant choosing to testify on his behalf and a material factor in the decision making process. Had trial counsel been prepared for the *Peterson* hearing, he likely would have had the conviction excluded and Appellant Henry's choice to testify or not would be substantially different.

The contention that trial counsel failed to object to improper prosecutorial comments did not merit much discussion from the State except that the "prosecution's closing argument about the significance of the photographic evidence was in response to Henry's 'spanking' defense." Tr. 204. The State basically ignores the argument that the following statement is inflammatory:

> And, Ladies and Gentlemen, you're told that there's no evidence of any serious bodily injury. That's outrageous. I don't know what's happened to America. I don't know what's happened to the America I knew. We've lost our sense of outrage. If those pictures don't outrage you, if those pictures don't stick in your throat, there's something fundamentally wrong with you.

This statement goes far beyond a comment on the significance of the photographic evidence and is clearly the "send the message" type which the Mississippi Supreme Court prohibited and condemned in *Payton v. State*, 785 So.2d 267 (Miss.,1999). The Mississippi

Supreme Court aptly explained the problem with the "send a message" argument in their opinion in *Williams v. State*, 522 So.2d 201, 209 (Miss.1988), as follows:

> The jurors are representatives of the community in one sense, but they are not to vote in a representative capacity. Each juror is to apply the law to the evidence and vote accordingly. The issue which each juror must resolve is not whether or not he or she wishes to "send a message" but whether or not he or she believes that the evidence showed the defendant to be guilty of the crime charged. The jury is an arm of the State but it is not an arm of the prosecution. The State includes both the prosecution and the accused. The function of the jury is to weigh the evidence and determine the facts. ***When the prosecution wishes to send a message they should employ Western Union. Mississippi jurors are not messenger boys.***

Williams, 522 So.2d at 209 (emphasis added). Trial counsel made no objection and did not ask for a mistrial in response to the inflammatory statements of the prosecutor. Thus, this provides another example of trial counsel's failure to competently represent his client.

In a vacuum, each individual deficiency identified may not constitute ineffective assistance of counsel by itself, but the cumulative errors and totality of the circumstances clearly dictate a finding of deficient counsel. As set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct 2052,2064-56, 80 L.Ed.2d 674, 693-95 (1984) and adopted by this Court in *Stringer v. State*, 454 So.2d 468, 476-477 (Miss. 1984), Appellant Henry must meet the familiar two prong test that 1) his counsel's performance was deficient, and 2) that this deficient performance prejudiced his defense. The first prong is certainly met with the above litany of deficiencies. Appellant Henry would also submit the second prong is met as well.

In its response, the State argues that Appellant Henry has not met this second prong because the State contends that due to the evidence against Henry, the verdict would not have been different. However, the deficient performance of counsel taints the

entire proceeding, not just the trial verdict. Henry was clearly prejudiced by his trial counsel whom advised him that the maximum sentence was twenty (20) years, rather than life, when he received a twenty (20) year sentence plus five (5) additional years of post release supervision. With the correct information, Toby Henry would have been afforded the opportunity to make an informed choice on going to trial, accepting a plea agreement or pleading guilty and allowing the court to decide.

Henry was also clearly prejudiced by the failure to prepare for the *Peterson* hearing since it became a material factor in his decision not to testify. Thus, the jury had no opportunity to hear any explanation or exculpatory statements from the Defendant. Trial counsel's failure to designate any potential defense witnesses is another prejudicial event. Although trial counsel did not call any witnesses, the failure to provide reciprocal discovery would have likely prevented their testimony. Trial counsel clearly cites that there is information in the discovery from DHS which would be helpful to his client and the district attorney asked the venire regarding DHS employees. However, there were no witnesses called in defense of Henry by his counsel.

Furthermore, only by the providence of the trial judge, Henry was granted a lesser included instruction of misdemeanor child abuse. Trial counsel only submitted one jury instruction on simple assault which was not applicable and was not granted. Trial counsel only argued that his client was not guilty of child abuse, and failed to make any argument about the misdemeanor child abuse instruction or make any attempt to get the jury to consider misdemeanor child abuse. The failure to ask the jury to consider the lesser included offense in closing argument certainly prejudiced the client since it

essentially left the jury with only two choices, felony child abuse or not guilty. Thus, Henry was again prejudiced by the ineffectiveness of his trial counsel.

ISSUE 3: THE CURRENT INTERPRETATION OF THE FELONY CHILD ABUSE STATUTE VIOLATES DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS

The State again submits that this issue was waived because it was not raised at trial. However, the statutory interpretation of the felony portion of the child abuse statute by the Mississippi Supreme Court in *Buffington* causes a material conflict with the remainder of the statute. Such a conflict cuts to the core of a Defendant's fundamental rights to due process and a strict construction of penal statutes which serve to deprive one of their freedom. Thus, this issue would be subject to the plain error analysis and excepted from the rule that the issue has to be presented to the trial court. Although the State opines that the *Buffington* decision "is what Henry's counsel finds so appalling for child discipline enthusiasts," appellate counsel does not find it appalling on child discipline policy grounds, but on constitutional due process grounds and statutory construction grounds. The *Buffington* decision substitutes the more general definition of "physical injury that amounts to child maltreatment[2]" from the National Center on Child Abuse and Neglect for the Court's prior adoption of "serious bodily injury" in determining the legislatively undefined definition of "serious bodily harm" in the felony child abuse statute.

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[2] From *Wolfe v. State*, 743 So.2d 380, 385 ¶23 (Miss. 1999):

> The National Center on Child Abuse and Neglect in its Model Child Protection Act has defined physical injury that amounts to child maltreatment as "death, or permanent or temporary disfigurement, or impairment of any bodily organ or function." Model Child Protection Act § 4f (U.S. National Center on Child Abuse and Neglect 1977). The difference, though subtle, is important. "Impairment of any bodily organ or function" is a lower threshold than the "protracted loss or impairment of the function of any bodily member or organ."

Although the *Buffington* court found the application of the "temporary disfigurement" language not to be violative of the Constitution based on "the evidence and law" in *that* case, that court did not consider the entire clause, which includes ". . . impairment of any bodily organ or function." *Buffington v. State* 824 So.2d 576, 582 (Miss.,2002). Further, the *Buffington* court did not consider the impact it would have upon the misdemeanor child abuse statute which was basically abrogated by this judicial ruling rather than legislative action. This construction also construed the statute in favor of the State and not in favor of the offender as required by fundamentals of due process. See *Duke v. U. of Tex.*, 663 F.2d 522, 526 (5th Cir. 1981).

In defense of their argument on this issue, the State basically concedes the merit of the argument regarding the statutory interpretation. In fact, the State actually states: ". . . while Henry's argument might be a good argument in the abstract, it is not a good argument under the facts of this case." However, Appellant Henry is well aware that deprivation of freedom and felony convictions are not abstract.

In looking at the elements of felony child abuse and misdemeanor child abuse, the elements are exactly the same except for one, whether the injury was a "nonaccidental physical injury" or "serious bodily injury." See Miss. Code Ann. 97-5-39 (West 2009) and *Yates v. State*, 685 So.2d 715, 720-721 (Miss. 1996). By construing the term "serious bodily injury" to include "temporary disfigurement, or impairment of any bodily organ or function," the Mississippi Supreme Court begs the key question: What is the difference between "nonaccidental physical injury" and "temporary disfigurement, or impairment of any bodily organ or function?" Black's Law Dictionary defines ***physical injury*** as "Physical damage to a person's body" and ***impairment*** as "the fact or state of

being damaged, weakened, or diminished." *Black's Law Dictionary* (8th ed. 2004), ***Disfigurement*** is defined as "An impairment or injury to the appearance of a person or thing." *Id.*

Although there are numerous bruises on the child's body in the photographs submitted into evidence, Toby Henry admitted to being responsible for two areas, the bruising on the buttocks/legs and the bitemarks on the inner thigh. Although there was a bruise on the forehead, the physician in this case testified that the forehead is a "common site to be bruised or injured based on the way toddlers get about" and due to their head being bigger than other parts of the body. Tr. 97.

As in *Yates*, there is merely bruising in the instant matter and not severe injuries such as the injuries in *Buffington* which included being covered with bruises from head to toe, hair falling out in patches from malnutrition, and cuts and scratches on her face and body. *Buffington v. State* 824 So.2d 576, 580 -581 (Miss.,2002). Additionally, there was testimony of testimony that the child had been thrown against the wall more than once and hit with belts and dog collars. *Id.* Furthermore, the physician in *Buffington* also testified that the injuries to the child's back, neck and face could have created a substantial risk of death. *Id.*

The *Buffington* court clearly found that a few bruises would not meet the felony criteria. *Id.* As demonstrated by the testimony of the physician in the instant case, a single bruise is an impairment of the skin, the body's largest organ. The testimony in this case illuminates the practical problems with the conflicting definitions of felony and misdemeanor child abuse, as set forth:

Q. Now, Doctor, the injuries that you see that were those injuries in fact result in temporary disfigurement of the organ of the body.

A. Of the skin, yes, sir.

Q. And the skin is an organ, isn't it.

A. Absolutely.

Tr. 103-104.

Thus, mere bruising, even one bruise, would meet the technical definition of felony child abuse as defined in *Buffington* as an "impairment of any bodily organ or function." Therefore, the *Buffington* definition of "serious bodily harm" is in conflict with the Court's own holding and is incapable of practical application by juries and courts, a result warned of by the *Wolfe* dissent. At the very least, this Court should consider adding the modifier of "protracted" to the "impairment of any bodily organ or function." Although there would be concern about the application of this standard in a case like *Buffington*, the injuries in that case would still meet this definition, and this definition would provide a more clear demarcation line between felony and misdemeanor child abuse.

CONCLUSION

Given the evidence presented in the trial below and the foregoing issues, TOBY HENRY is entitled to have his conviction for felony child abuse reversed and rendered to misdemeanor child abuse since the definition of felony child abuse and misdemeanor child abuse are the same for all intensive purposes and the doctrine of lenity. Alternatively, Appellant Toby Henry's case should be remanded for a new trial where he is represented by a licensed, actively practicing attorney.

Respectfully submitted,

TOBY HENRY, Appellant

By: 
William P. Starks, II(MSB#[redacted]

OF COUNSEL:

Studdard Law Firm
325 College Street (street)
Post Office Box 1346 (mailing)
Columbus, Mississippi 39703
T: 662.327.6744
F: 662.327.6799
E: william@studdardlaw.com

CERTIFICATE OF SERVICE

I, William P. Starks, II, do hereby certify that I have this the 19th day of August, 2009, mailed a true and correct copy of the above and foregoing Reply Brief Of Appellant, by United States mail, postage paid, to the following:

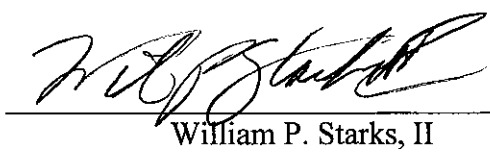
Honorable Lee J. Howard
Circuit Judge
Post Office Box 1387
Columbus, MS 39703

Honorable Forrest Allgood
District Attorney
Post Office Box 1044
Columbus, MS 39703-1044

Honorable Charlie Maris
Special Assistant Attorney General
P. O. Box 220
Jackson MS 39205

Mr. Toby HENRY, MDOC# N3364
Mississippi State Penitentiary
Post Office Box 1057
Parchman, MS 38738

I, William P. Starks, II, do also certify that the original and three (3) copies of the Reply Brief of Appellant, along with an electronic copy on CD-ROM, have been forwarded to the Clerk of the Mississippi Supreme Court via Federal Express, overnight courier.



William P. Starks, II

IN THE COURT OF APPEALS
STATE OF MISSISSIPPI

STATE OF MISSISSIPPI — **APPELLEE**

VERSUS — **CASE NO. 2008-KA-01648-COA**

TOBY HENRY — **APPELLANT**

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF LOWNDES

Personally came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, William P. Starks, II, Attorney at Law, who being by me first duly sworn, makes oath to the following:

The two email documents with the subject of RE: Joseph O. Sams, Jr. in the Appendix to the Reply Brief are true and correct copies of electronic mail correspondence between myself and James R. Clark, Deputy General Counsel for the Mississippi Bar, regarding the inactive status of Mr. Joseph O. Sams, Jr., whom served as trial counsel for Appellant Toby Henry.

Affiant saith not, this the 19th day of August, 2009.

William P. Starks, II

SWORN TO AND SUBSCRIBED BEFORE ME this the 19th day of August, 2009.

NOTARY PUBLIC

(SEAL)

STATE OF MISSISSIPPI ★ DEBORAH R. MOORE ★ NOTARY PUBLIC ID# 14243 My Commission Expires May 19, 2012 LOWNDES COUNTY

My Commission Expires: May 19, 2012

William P. Starks, II

From: Jim Clark [jclark@msbar.org]
Sent: Sunday, May 17, 2009 9:32 PM
To: william@studdardlaw.com
Subject: RE: Joseph O. Sams, Jr.

William: he was inactive from 08 01 08 through now.

Sent from my Windows Mobile® phone.

-----Original Message-----
From: william@studdardlaw.com <william@studdardlaw.com>
Sent: Sunday, May 17, 2009 9:15 PM
To: jclark@msbar.org <jclark@msbar.org>
Subject: Joseph O. Sams, Jr.

Jim,

Can you tell me the date of the inactive status of Mr. Joseph O. Sams, Jr., of Columbus? I am asking because I have a pending appeal of a case he tried in Lowndes County and I need to confirm whether or not he was an active attorney as of the date of the trial.

William Starks
william@studdardlaw.com
662-418-9454 (cell)

William P. Starks, II

From: Jim Clark [jclark@msbar.org]
Sent: Monday, May 18, 2009 7:47 PM
To: William P. Starks, II
Subject: RE: Joseph O. Sams, Jr.

Voluntary.

Sent from my Windows Mobile® phone.

-----Original Message-----
From: William P. Starks, II <william@studdardlaw.com>
Sent: Monday, May 18, 2009 7:14 PM
To: 'Jim Clark' <jclark@msbar.org>
Subject: RE: Joseph O. Sams, Jr.

Jim,

Are you at liberty to tell me why he is inactive?
Failure to complete CLE?
Voluntary Designation?
Other?

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