IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01761-COA

TIMOTHY JORDAN — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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. Timothy Jordan

THIS 6th day of April, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Timothy Jordan

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 Timothy Jordan was convicted of four counts of sexual battery, one count of gratification of lust and one count of child neglect. A jury trial was conducted September 29, 2008 to October 7, 2008, with Honorable Andrew Howorth, Circuit Judge, presiding. Jordan was sentenced four terms of life imprisonment concurrent plus two ten years terms for the gratification and neglect convictions, concurrent with each other, but consecutive to the life terms. Jordan is presently incarcerated with the Mississippi Department of Corrections.

FACTS

In the Fall of 2005, Tim Jordan, age 38, was a logger in Lafayette County. [T. 538, 979-80]. His wife Krystal, age 29, stayed at home and used drugs, "cocaine, methamphetamine, marijuana" and Lortab.[1] [Ex. 1; T. 533, 538-44]. Krystal and Tim had two children, a new-born Sabrina and a four-year old Brianna. [T. 533-35]. There was an older boy of Krystal's, born of a different father, living with them as well. *Id.*

In addition to her drug use, Krystal spent her spare time having sex with a number of men in the community including co-defendants Glenn Grose and Johnny Grose and another man named Tony Rakestraw. [T. 395, 538-44]. At one point Tim Jordan had to go get Krystal from "deer camp" where he found her drunk and riding a four wheeler with another man. [T. 987-88]. Krystal was spending so much time at the Grose brothers', she eventually moved in with them around October 2005 and Tim Jordan followed her. [T. 988].

Krystal was having sexual relations with both Johnny and Glenn and obtaining drugs in trade. [T. 544]. John Grose was crippled by rheumatoid arthritis and spent all his time in a wheelchair. [T. 556].

On October 20, 2005, Rhiannon Shaw, a Department of Human Services "family protection specialist" in Lafayette County received a report about "possible abuse and neglect" at the home of Krystal and Tim Jordan. [T. 393-94]. Ms. Shaw determined that Krystal and Tim were actually staying with the Grose brothers at their trailer. *Id.*

Shaw paid a visit, met the four people staying at the Grose brothers' trailer and observed the two girls. [T. 395-98; Ex. 1]. There was a brief conversation with Brianna. *Id.* Ms. Shaw

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[1] Lortab is a brand name for a combination of hydrocodone and acetaminophen.

perceived possible indicators of neglect and heavy drinking. *Id.* Drug use was a concern also. *Id.*

Five days later on October 25, 2005, Ms. Shaw received a report that Krystal Jordan had been arrested in a "domestic altercation". [T. 400, 499; Ex. 1]. On October 26, 2005, Shaw found Brianna being baby-sat by Tim Jordan's niece. [T. 401; Ex. 1]. Upon her arrival, Brianna was squatting in the yard with her pants down. *Id.*

On October 31, 2005, Shaw found out Krystal Jordan was committed to the state hospital at Whitfield for drug and alcohol rehabilitation and the Jordan children were with Krystal's grandmother Martha Grose. [T. 402, 499-500, 752-53;Ex. 1]. Martha Grose and her daughter Gloria Hollis (Krystal's mom) informed Shaw that Brianna had some "potty training" issues, her bottom was red and Brianna was saying things about people "touching her", specifically Glenn Grose, Johnny Grose, Tim Jordan and Krystal Jordan, and others. [T. 402-04,499-500, 752-53; Ex. 1]. Shaw scheduled a "forensic interview" and medical exam both for November 3, 2005. *Id.*

The forensic interview was conducted by a third person with Shaw observing. *Id.* In the forensic interview, which was video-taped, Brianna allegedly made conflicting accusations, depending on interpretation, that "Tim" and "Kristy" and "Glenn" and "Johnny" all touched her "nunu". [T. 405-10; Exs.2-3]. Brianna also accused her grandmother of touching or hurting her and made further accusation of people hurting her with a knife, though no knife injuries were found. [T. 421-23; 466-67]. Brianna basically accused everyone who got mentioned in the interview of hurting or touching her. [T. 424]. Contrarily, Brianna also said that her father Tim Jordan did not hurt her and touched her "nowhere". [T. 425, 468]. There was a "provisional" transcript of the interview introduced as Ex. 7. [T. 449-50].

The technique of Brianna's November 3, 2005, forensic interview was seriously

criticized by a state expert who found the interview very problematic. [T. 454-57]. Specifically, follow up questions were not properly handled in the interview and there were many many leading questions. [T. 896, 900]. The interviewer also did not always give Brianna opportunity to answer. [T. 455-56].

The interviewer kept introducing people into scenarios, which was simply wrong. [T. 462]. The interviewer also lumped people together in questions which was an inappropriate technique.[T. 464-65]. Little if any effort was made to clear up Brianna's numerous inconsistencies. *Id.*

Oxford pediatrician Tanya King, M. D., examined Brianna after the forensic interview. [T. 712; Ex. 11]. No allegations were made during the exam. [T. 714].

Brianna's medical exam was fine until her genitalia were examined. [T. 718]. Brianna's vaginal area was bruised. [T. 719-20]. The hymen was intact, but bruised. [T. 721]. Brianna's anus was dilated from what Dr. King termed "multiple penetrations" and might have been the "worst she had ever seen." [T. 723, 728]. There were no signs of acute trauma. [T. 735].

Even though Martha Grose and Gloria Hollis said Brianna experienced pain urinating, Dr. King's notes indicate "denies urinary pain or difficulty". [Ex. 11]. Dr. King's notes indicate that Brianna was "well nourished" in "no distress", and contrary to some of the therapist testimony, Dr. King described Brianna's interaction as "appropriate" as were her "mood and affect." [Ex. 11].

A counselor, Robin Smith, started working on Brianna's case in February 2006 and provided, in much detail, Brianna's alleged behavioral aberrations which Smith opined to be consistent with an abused child. [T. 38-41, 803-13]. Brianna had been sent for several periods of

in-house psychiatric treatment complete with medication for her emotional problems. [T. 47-49]. Throughout her therapy, Brianna had made accusations against Glenn and Johnny Grose, Tim and Krystal Jordan, and others. [T. 50-51].

Tim Jordan put on evidence that no one was aware of any possible problems with Brianna before Martha Grose and Gloria Hollis made there report to DHS. A nurse practitioner who had treated Brianna said everything about the child appeared normal. [T. 904]. There were no signs of sexual abuse. *Id.* Tim Jordan's mother said Brianna was a normal girl. [T. 934]. She noticed no problems. [T. 938]. Tim Jordan's niece who babysat Brianna said there were no problems. [T. 948-49]. Tim Jordan's sister who lived next door observed no problems with Brianna , no complaints, no inappropriate or abnormal behavior. [T. 967-71]. Jordan denied all inappropriate contact with Brianna. [T. 1002-1003, 1011]. Dr. Ed Morris a Tupelo psychologist described Brianna as a normal 4 year old at the time of her forensic interview. [T. 893].

Krystal did not let incarceration interfere with her manipulation of and contact with Tim Jordan and the two Grose brothers. She corresponded all three men from jail, espousing their innocence. [T. 576-78, 583 ; Exs. D-2, D-3, D-4, D-5, D-9, D-10, S-15, D-13ID]. Krystal wrote to Tim, "I don't know who did this shit to Brianna" . [Ex. D-2]. In Exhibit S-15, Glenn Grose wrote to Krystal, he calls Tim Jordan a liar and said, "[i]f you know if Tim Jordan did that to Brianna ... you need to tell them because they're saying I did it." followed by "I'll help you if you help me." *Id.* Krystal visited Glenn Grose in jail 3 to 4 times. [T. 1114].

Nevertheless, behind everybody's back, Krystal made a deal to testify, and did, against the three men. [T.662-70]. In exchange for her testimony, testimony that included the admission that she prostituted her four year old daughter for drugs, held her daughter so men, including Tim

Jordan, could have sex with her, drugged her daughter with pain killers, and showed her daughter how to perform oral sex, Krystal was sentenced to twenty years with ten suspended. [T. 546-62,597; Ex. D-6]. Krystal had also been charged with sexual battery against her grandmother, which charge was dropped *quid pro quo* for her testimony at the subject trial. [T. 695].

The state's theory as to the dates alleged in the amended second superceding indictment were estimated because Krystal was pregnant during the episodes and the subsequent child, Sabrina, was born May 23, 2005. [T. 537, 980]. There was testimony that another person named Henry Grose was caught under the covers with Brianna, but Brianna never mentioned this person apparently. [T. 503, 1001].

SUMMARY OF THE ARGUMENT

The trial court allowed Krystal Jordan's lawyer to testify and give unqualified legal opinions, vouch for the veracity of her client and comment on the evidence against the remaining codefendants. Amendments to a second superceding indictment rendered it fatally defective. There should have been a severance of defendants for separate trials. The tender years exception to the hearsay rule was misapplied circumventing Tim Jordan's confrontation rights. The verdict was not supported by the weight of the evidence.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT ALLOWED IMPROPER LEGAL OPINIONS WHICH WERE COMMENTS ON EVIDENCE AND WITNESS VERACITY?

In an unusual move, the state offered the testimony of Krystal Jordan's attorney Hon. Cordelia Fondren who, over objection, went to great lengths describing how Krystal Jordan's decided to plead guilty and testify. [T. 662-83]. The objectionable testimony included Ms. Fondren's assessment of the evidence against all of the defendants. *Id.* Ms. Fondren testimony to the jury included opinions and commentary on the quality and quantity of evidence against all of the defendants and on the veracity of the witnesses. Ms. Fondren was not tendered or qualified, in the evidentiary sense, as an expert.

Tim Jordan's trial counsel objected to hearsay and on the grounds that Ms. Fondren's testimony constituted improper opinions and commentary on witnesses and the weight of the evidence and were acutely prejudicial. *Id.* A motion for mistrial was argued and denied. [T. 697-99].

Ms. Fondren's described how it was her duty to assess the evidence in deciding whether to recommend or approve a plea of guilty. [T. 662-83]. After Krystal initial denied involvement, Ms. Fondren described how Krystal "opened up" and how Ms. Fondren became "comfortable with that", saying, "Krystal and I talked extensively ... I questioned her extensively to try to get an idea if what she was saying to me was credible. I was comfortable after talking to her about that, that she understood and that she was to the best of her knowledge telling me what she recalled." [T. 669].

Later, after reciting the allegations of the criminal information, Ms. Fondren was asked, "and were you satisfied as her counsel that there were grounds for the entry of the plea of guilty?" [T. 672-73]. An objection was overruled, and an affirmative reply was made, "Yes. After I talked with Krystal again about the aspect of aiding and abetting and her part legally, I was comfortable that she understood her liabilities were." *Id.*

After that, Ms. Fondren went count by count through Krystal's criminal information stating how Krystal was "justified" in pleading guilty to helping the other defendants commit sexual battery against Brianna. [T. 673-74]. Ms. Fondren, without being qualified as a legal expert nor as a "professional lie-detector", basically was allowed to tell the jury that Krystal was telling the truth, or at a minimum, that the evidence was there to convict all four defendants.

In *Hart v. State*, 637 So.2d 1329, 1338-40 (Miss.1994), the trial court excluded a psychologist's "opinion that the defendant had acted reasonably" and "justifiably in self-defense." On appeal, the Supreme Court ratified the trial court's exclusion on the basis that the opinion "invaded the province of the jury" and was "an opinion on the ultimate issue" and an invalid opinion and inadmissible "legal conclusion as to the defendant's state of mind." *Id.*

As held in *Hobgood v. State*, 926 So.2d 847, 854 (Miss.2006), it is permissible, under certain circumstances, to "allow testimony as to the *credibility* of a child-abuse victim," but not testimony as to the *veracity* of any witness. *Id.* at 854. See also *Smith v. State*, 925 So. 2d 825, 834-35 (Miss. 2006).

Under Miss. R. Evid Rule 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Yet as stated in *May v. State*, 524 So.2d 957, 964 (Miss.1988), "[e]very expert

opinion embracing the ultimate fact is not *per se* admissible, however". Testimony "which simply allow the witness to tell the jury what result to reach are impermissible, as are questions asking the witness for a legal conclusion." *Id.*

It should be noted that Federal Rule of Evidence 704(b) states:

> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The prejudice to Tim Jordan was that the jury heard an opinion from a lawyer that Krystal's co-defendants were guilty and that Krystal was telling the truth and was, therefore, justified in pleading as a aider and abettor. This prejudicial testimony is clearly prohibited by the rules and case law. Accordingly, Tim Jordan asks respectfully for a new trial.

ISSUE NO. 2: WHETHER JORDAN WAS PREJUDICED BY AMENDMENTS TO THE SECOND SUPERCEDING INDICTMENT?

As initially returned in February 2006, the indictment in this case had four defendants and seven counts. [R. 1-4]. The first superceding indictment, returned in November 2006, had eight counts, three defendants. [R. 14-18]. In March 2008 there was a second superceding indictment with thirty three (33) counts, three defendants; then, during trial, the second superceding indictment was amended *twice* on the state's motions with orders entered. [R. 33-44, 59-69; [T. 919-27].

The first inter-trial amendment changed the occurrence dates of all the counts, while the second inter-trial amendment was to charge Glenn Grose as an habitual offender. [R. 199-201; T.

1161]. Both of these amendments prejudiced Tim Jordan as will be shown below.

The second superceding indictment initially charged Tim Jordan as follows:

Count	Charge	Alleged Occurrence Dates
1	Sexual Battery	March 2005
2	Gratification of Lust	March 2005
3	Sexual Battery	April 2005
4	Gratification of Lust	April 2005
5	Sexual Battery	May 2005
6	Gratification of Lust	May 2005
7	Sexual Battery	June 2005
8	Gratification of Lust	June 2005
9	Sexual Battery	July 2005
10	Gratification of Lust	July 2005
11	Sexual Battery	August 2005
12	Gratification of Lust	August 2005
13	Sexual Battery	September 2005
14	Gratification of Lust	September 2005
15	Sexual Battery	October 2005
16	Gratification of Lust	October 2005
33	Felony child Neglect	March 1 to October 31, 2005 [R. 33-44].

At the close of the state's case, the prosecutor asked the trial court to change the occurrence dates in Counts 1 through 8 to "March through May 2005" and in Counts 9 and 10 to changed the dates to "May through October 2005" and to dismiss counts 11 through 16. [T. 919-27; R. 59-68]. The trial court obliged. *Id.*

The result was that Counts 1, 3, 5, and 7 were all identical, as were Counts 2, 4, 6, and 8. *Id.* The record shows there was never a verdict or dismissal of counts 2, 4, 6, 8. Arguably, the gratification of lust charges would have merged into the sexual battery charges under *Friley v. State,* 879 So.2d 1031, 1034-35 (Miss. 2004), ["[a] plain reading of the statutes shows that sexual battery (penetration) includes molestation (touching). It is impossible to penetrate without touching."].

Tim Jordan respectfully suggests that the amendments to the second superceding indictment changing the dates were ones of substance, not form; because, time was of the essence and Jordan's defense strategy was thwarted, but, perhaps worst, the indictment was extremely vague. Trial courts do not have authority to grant substantive amendments to indictments. See *Baine v. State*, 604 So. 2d 258 (Miss. 1992), *Monk v. State,* 532 So. 2d 592 (Miss. 1988), *State v. Allen*, 505 So. 2d 1024 (Miss. 1987).

"An indictment may not be amended to change the nature of charge, except by action of the grand jury which returned the indictment." *Griffin v. State*, 584 So. 2d 1274, 1275 (Miss. 1991):

> It is well settled in this state ... that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. 584 So. 2d at 1275-76 [cite omitted].

Morever, the objectionable amendments of the dates rendered the indictment here so vague it was impossible to determine the conduct and date of occurrence. The jury was confused by the indictment too , they sent out a note, asking what conduct was associated with what dates. [T. 1417].

In *Jones v. State*, 993 So.2d 386, 394 (¶¶18-20) (Miss. Ct. App. 2008) the defendant filed a motion to quash claiming the indictment "incorrectly stated that the date of [an] alleged robbery [as] March 5, 2005, rather than February 5, 2005."

The *Jones* court reiterated that, claims of defective indictment are questions of law afforded a broad standard of *de novo* review. *Id* [Citing *Nguyen v. State*, 761 So.2d 873, 874(¶

3) (Miss.2000) and *Peterson v. State*, 671 So.2d 647, 652 (Miss.1996) (superceded by statute)].

The purpose of an indictment is to advise a defendant with "some measure of certainty as to the nature of the charges" made to provide "a reasonable opportunity to prepare an effective defense." *Id.* [Citing *Moses v. State*, 795 So.2d 569, 571(¶ 13) (Miss. Ct. App.2001)]. An indictment is required to recite "the essential facts constituting the offenses charged and shall fully notify the defendant of the nature and cause of the accusation." *Id.* [Citing URCCC 7.06].

According to UCCCR Rule 7.06 an incorrect date does not render an indictment insufficient. Under UCCCR Rule 7.09, "[a]ll indictments may be amended as to form but not as to the substance of the offense charged." An amendment cannot be material to the merits of the case and should not prejudice a defendant. *Jones,* 993 So. 2d 394 *(¶20)* [Citing *Eakes v. State*, 665 So.2d 852, 859-60 (Miss.1995). Unless time is of the essence to a charge, an "amendment to change the date on which the offense occurred is one of form only." *Id.* [Citing *Baine v. State*, 604 So.2d 258, 260-61 (Miss.1992).]. See also *Davis v. State*, 866 So.2d 1107, 1110 (¶ 11) (Miss. Ct. App.2003), and *Spears v. State*, 942 So.2d 772, 774 (¶ 6) (Miss.2006).

Whether a change of date is one of form or substance, depends on the facts of the case and the defendant's defense. *Leonard v. State*, 972 So.2d 24, 28 (Miss. Ct. App. 2008). "[A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Id.* [Citations omitted.]. As noted in *Caston v. State*, 949 So.2d 852, 858(¶ 14) (Miss. Ct. App.2007), a "pivotal consideration when considering the validity of an indictment on appeal, 'is whether the defendant was prejudiced in the preparation of his defense.'" [Quoting from *Wilson*

v. State, 815 So.2d 439, 443(¶ 11) (Miss. Ct. App.2002)].

In the case of *Wilson v. State*, 515 So.2d 1181, 1182-83 (Miss.1987), the defendant was charged with rape and claimed that the indictment was vague and "did not give [him] the proper notice to maintain an adequate defense." Even though the supreme court affirmed the conviction in *Wilson*, the court said "[i]n all fairness, notice of a specific date is often essential to the preparation of a defense-especially where an alibi defense is relied on," but, Wilson had not raised a "credible claim of unfair surprise or prejudice..." so the conviction was affirmed. *Id.* at 1183. In the present case, Jordan's defense was, in part, alibi, that he was working.

In *Moses v. State*, 795 So.2d 569, 570-73 (Miss. Ct. App.2001), the Court found "that an indictment regarding twenty-two separate sexual felonies against a child was too vague, as it failed to adequately disclose the nature of and the times of the alleged offenses." What is most applicable to the case at hand is that the *Moses* court said, "[t]o attempt to charge multiple separate felonies by using identical language for each crime, including an identical span of time that the crimes were alleged to have occurred, fails woefully to fulfill the fundamental purpose of an indictment." *Id.* at 573(¶ 17).

The circumstances here are very similar to *Moses*. Moreover, in the present case, the charges changed from monthly occurrences to episodic events spanning three months intervals. Jordan's ability to defend the allegations was weakened substantially by the trebling of the time of the occurrences. Jordan's defense of not being present and not knowing what was going on when he was at work were harder, if not impossible, to present for a three month span of time.

Therefore, the amendments here were of substances, not form, and made the indictment vague, and should have been left to the consideration of a grand jury rather that a motion to the

trial court. Irreparable prejudice resulted and a new trial is requested.

ISSUE NO. 3 DID THE TRIAL COURT ERR IN DENYING JORDAN A SEPARATE TRIAL?

Tim Jordan moved to have a separate trial from the Grose brothers. [R. 7-10; T. 3-18, 184- 85]. Jordan claimed prejudice from the joinder in part because the defenses of all three defendants was diametrically opposed, all sought exculpation at the expense of the others. Tim Jordan's position was that he was not present during the alleged misconduct of the Grose brothers and Krystal Jordan. [T. 3-9, 981-85]. Jordan's position was that he was at work, sometimes out of town, logging for long hours, and was unaware of the mistreatment, if any, of his daughter. *Id.*

Counsel for Jordan explained there was no comity between the co-defendant's and that this was "not a united front." [T. 5]. Each defendant sought to exculpate himself at the expense of the other in the face of the physical evidence that somebody must have hurt the child and "it wasn't me". *Id.* Morever, Tim Jordan was prejudiced by the evidence of extensive drug use and drug distribution of the Grose brothers and by the behind the scenes double crossing, and by the fact that Glenn Gross was an habitual offender. [R. 199-201; T. 1161].

In *Caston v. State* 823 So.2d 473, 487 (¶¶ 33-34) (Miss. 2002), three defendants were charged and convicted of manslaughter. One issue was whether a severance of defendants was in order. The *Caston* court explained that defendants indicted together are not automatically entitled to separate trials and that the granting and denying of severances "is at the discretion of the trial judge" reversible only if resulting from "an abuse of discretion." [Citations omitted]

The *Caston* court acknowledged that first, "[t]he trial judge has the discretion to grant a severance if it is necessary to promote a fair determination of the defendant's guilt or innocence." *Id.* [Citation omitted]. There should be a determination of whether " the testimony of one co-defendant tends to exculpate that defendant at the expense of the other defendant and whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other." *Id.* [Citations omitted].

Contrary to the present facts, the *Caston* court found no "mutually antagonistic defenses" and "no indication that each [defendant] was exculpating himself at the expense of the other" nor were there "conflicts between the brothers" and "no showing that the brothers were prejudiced by the denial of the severance." So, no abuse of discretion. *Id.* See also, *Strahan v. State*, 729 So.2d 800, 803 (Miss.1998), *Carter v. State*, 799 So.2d 40, 44(¶ 13) (Miss.2001).

As was well pointed out in Jordan's motion hearing for the severance, a trial court must consider: (1) whether or not the testimony of one co-defendant tends to exculpate that defendant at the expense of the other defendant, and (2) whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other. *Duckworth v. State*, 477 So.2d 935, 937 (Miss.1985). "The overarching consideration when evaluating these factors is whether the defendants would be prejudiced by a joint trial." *Sanders v. State,* 942 So.2d 156, 159 (¶ 15) (Miss.2006).

In *Tillman v. State,* 606 So.2d 1103, 1105-06 (Miss. 1992) since each defendant's testimony tended to "exculpate themselves at the expense of the other" coupled with the fact that Tillman's co-defendant was an habitual offender, the trial court erred reversibly in not granting Tillman a separate trial. The *Tillman* court recognized that in *Usry v. State*, 378 So.2d 635, 637

(Miss.1979), the court "noted that in cases involving multiple defendants, where one is charged as a habitual offender, a severance would ordinarily be preferred." Usry's motion for severance was untimely however. *Id.*

Here Tim Jordan was forced to go to trial with Glenn Gross an habitual offender. [R. 199-201; T. 1161]. This result violated the ruling from both *Tillman and Usry, supra.*

The court in *Tillman* found that Tillman was prejudiced by the joint trial, Tillman's defenses were in conflict with his co-defendant and "the jury's immediate impression was that [Tillman and his co-defendant] were obviously lying." If Tillman had been granted the severance, the court said, "the jury would have been able to consider Tillman's defense in light of the State's evidence without first comparing it to [the codefendant's] defense to make sure the defenses are consistent. *Tillman*, 606 So.2d 1107.

Tillman's convictions was reversed and remanded for a new trial. *Id.* As in *Tillman*, here, a jury in a separate trial should have been afforded the opportunity to consider Tim Jordan's evidence in isolation rather than by comparison as a result of being lumped into a joint trial with drug dealing habitual offenders. A new trial is respectfully requested.

ISSUE NO.4: WAS THE TENDER YEARS EXCEPTION PROPERLY APPLIED?

Tim Jordan respectfully asks the Court of Appeals to review the trial court's granting of the state's motion to allow hearsay evidence under Rule 803(25) Miss. R. Evid., commonly referred to as the tender years exception. [R. 19-20, 53-58]. Rule 803(25) provides the following:

A statement made by a child of tender years describing any act of sexual contact

> performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provided substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness....

Since this issue involves an evidentiary ruling, the standard of review is one of abuse of discretion. Rule 103(a) of the Mississippi Rules of Evidence. *Withers v. State*, 907 So.2d 342, 345 (¶ 7) (Miss. 2005).

It is Tim Jordan's position here that the prerequisite linchpin of reliability was missing from the facts of the present case. Morever, much of the repeated hearsay was testimonial in nature and its introduction without cross examination of the declarant violated Tim Jordan's confrontation rights under the 6th and 14th Amendments to the U. S. Constitution and Art. 3 §26 of the Mississippi Constitution of 1890.

Unreliability

In *Grimes v. State*, 1 So.3d 951 (Miss. Ct. App. 2009), there was an issue of whether the trial court erroneously admitted hearsay under the "tender years" exception. The *Grimes* court pointed out the established "rebuttable presumption that a child under the age of twelve is of tender years". *Grimes* ¶9. [Citation omitted].

The *Grimes* court also carefully explained that the inquiry does not end at a determination of a child being of tender years; because, a child may be of tender years, but if indicia of reliability are missing, the hearsay exception does not apply. *Grimes* ¶10. The following factors, are to be considered by the trial court in deciding reliability under the tender years exception, they are: (1) whether there is an apparent motive on declarant's part to lie; (2) the

general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. [See *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)]. The 12 factors are not "exhaustive", and are not a "mechanical test", other factor can be considered. *Id.* [Citing *Eakes v. State*, 665 So.2d 852, 865 (Miss.1995)].

The *Grimes* court ran the facts of that case through the 12 part filter of Rule 803(25) and found "substantial indicia of reliability in the victim's hearsay statements", concluding "the trial court did have substantial, credible evidence upon which" to allow the hearsay. *Id.*

Here the following factors suggest that reliability is lacking in the present case: From the interview, Exs. 2-3 and the unofficial transcript, Ex. 7, when asked, "who lives in the house with you" Brianna's answer "nobody"; often a listener cannot tell if Brianna is giving negative or affirmative answers to leading questions. After allegations of wrongful touching, Brianna would also reverse herself, where did so-and-so touch you, "nowhere". [T. 76, 85, 81, 84, 307, 425, 472]. Everyone who get's mentioned gets accused. [T. 424]. Brianna even accused her grandmother of wrongfully touching her.[T. 423]. When asked how many eyes she had, the answer was "10". [T. 76, 81-82, 84].

Gloria Hollis, Brianna's grandmother was very concerned that with Brianna lying so

much, even she or her husband would end up being prosecuted. [T. 110-11, 771, 773]. A state expert qualified Brianna's responses as "strange". T. [454-55].

The state expert who criticized Brianna's forensic interviewer had problems with the interviewers non-standard technique of not asking follow up questions, and by not giving Brianna opportunity to respond, Brianna. [T. 454-457]. The interviewer also wrongfully introduced new people into scenarios and arbitrarily grouped people together. [T.462-64].

It was, therefore, proven through the state's evidence that Brianna's "forensic interviewer" had a flawed non-standard technique. Under the several cases which have found the "forensic interview" approach valid, the linchpin of reliability has always been that the method must conform to accepted professional standards. In *Lattimer v. State*, 952 So.2d 206, 221 (¶39) (Miss. App.,2006), the "[the interviewer]'s opinion was based on sufficient facts and his testimony was the product of reliable principles and methods." The *Lattimer* court found "no indication that [the interviewer] failed to reliably apply the principles and methods of forensic interviewing to the facts of the case."]. *Id.* Here, there was unacceptable deviations rendering Brianna's interview, invalid and grossly unreliable for purposes of a Rule 803 (25) analysis. See also *Smith v. State*, 925 So.2d 825, 834 (Miss. 2006).

In *Bishop v. State*, 982 So.2d 371, 375-77 (¶¶ 21-23) (Miss. 2008), the trial court ruled that a four year old declarant's statements to a counselor were non-testimonial and were admissible under the tender years exception. As would probably be the situation here, the trial court in *Bishop* noted that the declarant was four years old based on expert opinion was incompetent to testify. *Id.* The *Bishop* court noted that the trial court said, "[t]his factor is a negative on the issue of reliability, but not determinative." Yet in *Bishop*, the child's statements

about sexual abuse "were consistent." *Id.* This would be contrary to Brianna in the present case who was all over the place in her accusations and recantations.

The *Bishop* court also reviewed whether "suggestive techniques were used" and whether the allegations of abuse there "were the result of leading and suggestive questioning techniques, [and] repeated interviewing of the child." *Bishop* ¶ 22). The *Bishop* court agreed with the trial court's finding that the 4-year old declarant "gave extensive narratives" to the therapist, thus the child's accusations were "elicited without suggestive techniques and satisfy the requirements of Factor (11)". Moreover, in *Bishop*, the child's allegations "were all consistent". *Bishop* ¶23. This all led the *Bishop* court to conclude that the [the declarant's] "statements bore substantial indicia of reliability [and were] supported by substantial evidence." *Id.*

Comparing *Bishop* to the present facts, Brianna's responses to leading questions were neither narrative nor consistent. They were in affect unreliable and should have been excluded.

On the topic of reliability, some comment should be made about the apparent, but probably unintended, bias of some of the professional witnesses. First, several state witnesses, commented that Brianna never called Tim Jordan anything other than "Tim". [T. 107, 114]. However, the contemporaneous notes of Rhianna Shaw, indicate that when Brianna was asked with whom she lived, the answer was "mommy, daddy and Sabrina". [Ex. 1]. Rhianna Shaw also testified that upon her visit to the Jordan trailer, Brianna appeared to be defecating in the yard, her contemporaneous notes do not indicate anything other than squatting in the yard. [Ex. 1; T. 303, 401]. Shaw otherwise described Brianna as "happy". [T. 417, 850; Ex. 1].

There was evidence that Gloria Hollis wanted to adopt Brianna, which is an indication of bias as well. [T. 109-10, 505, 764]. Nor can it be ignored that Gloria was previously sexually

involved with Glenn Gross and that Martha Grose was with Johnny [T. 118-19].

Unavailability

Also in *Bishop*, *supra*, the court reviewed a finding of "unavailable as a witness under Rule 804(a)(6)" as it affects Rule 803(25). *Bishop* 982 So.2d 37-79. Rule 804(a)(6) provides that a child witness is unavailable if there is a "substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused." Miss. R. Evid. 804(a)(6). *Id.* The trial court in *Bishop* made such a finding based on expert testimony finding that testifying "would traumatize" the child. *Id.*

In *Quimby v. State*, 604 So.2d 741, 746-47 (Miss. 1992), a police detective was allowed to repeat what a forgetful child victim recounted about her alleged abuse. The *Quimby* court said "[o]ur hearsay rule, M.R.E. 802, states in no uncertain terms that '[h]earsay is not admissible except as provided by law. The prohibition is loud and clear. 'Hearsay is incompetent evidence.'"

The *Quimby* court, in assessing the strict requirement of reliability of unavailable witness hearsay exceptions, pointed out that case law on the topic most often speaks to quality of trustworthiness needed. The *Quimby* court concluded that any offered statement must have "equivalent circumstantial guarantees of trustworthiness", in other words, the trustworthiness should be as reliable as the first twenty-three exceptions to Rule 803. The *Quimby* court reversed because the trial court did not make findings of reliability and trustworthiness on the record.

Here, the trial court made a finding of unavailability initially without any testimony to

that issue. [T. 197-201]. The state, in an effort to clean up the record, however, came in after the ruling and put on testimony from a therapist that Brianna would have been traumatized by testifying. [T. 330-31; R. 53-58]. However, by her own admission, therapist was not qualified to render such opinions. [T. 338]. So, not only was the hearsay evidence unreliable and incompetent it is impossible to say that the finding of unavailability of Brianna was valid.

Confrontation

Not only was the repetition of the hearsay evidence unreliable here, its introduction violated Jordan's confrontation rights since the statements were testimonial. The social workers and therapist here were agents of the state sharing information and acting in concert with law enforcement. This make the statements they receive testimonial under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004), the United States Supreme Court ruled that the Confrontation Clause prohibits the admission of testimonial out-of-court statements by an unavailable witness unless the defendant has been given prior opportunity to cross-examine the witness. Applying *Crawford*, the court in *Frazier v. State*, 907 So.2d 985 (Miss. Ct. App.2005) said to be admissible, "testimonial hearsay must be exposed to confrontation by way of cross-examination" while "non-testimonial hearsay does not" *Id.* at (¶ 39). The application of *Crawford* "depends upon a determination of whether the evidence admitted is 'testimonial'"; but, the *Crawford* opinion does not provide a "firm definition of 'testimonial'" it only gives a few examples as guidance. *Id.*

Here, the crux of the issue at this point of the analysis is whether Brianna's statements to

social workers, therapists and forensic interviewers were "testimonial" under *Crawford*?

In *Williams v. State*, 970 So.2d 727, 733-34 (¶¶18-23) (Miss. Ct. App. 2007), the defendant was a stepfather accused of molestation of his step-daughter. He objected to the introduction of a forensic interview on the basis of *Crawford*, as Tim Jordan has. After determining that the video taped forensic interview was hearsay, the *Williams* court had to decide whether it was testimonial. Almost identical to the present facts, the interview in *Williams* resulted from a referral to the a County Department of Human Services, and based on the fact that law enforcement was involved the forensic interview was ruled testimonial in nature, as contemplated by *Crawford. Id.*

The *Williams* court referred to *Snowden v. State*, 156 Md. App. 139, 846 A.2d 36, 47 (Ct. Spec. App. 2004) (statements of children to social worker were "testimonial" since made for purpose of developing trial testimony) and *T.P. v. State*, 911 So.2d 1117, 1123 (Ala. Crim. App.2004) (child's statements resulting from an interview a social worker and investigator intended for use in potential criminal prosecution "testimonial").

In *Williams*, even though the interview and information from the interview was testimonial, no *Crawford* violation resulted because "Williams cross-examined [the declarant] later during the trial and even called [her] during his case-in-chief." *Williams,* 970 So. 2d 734 (¶23).

In the present case, even if law enforcement was not initially involved, they were required to be notified immediately, so by the time the forensic interview was conducted and for sure by

the time Robin Smith was involved, so was law enforcement. MCA § 43-21-353. (Rev. 2007).[2]

Following the lead of the Court in *Williams, supra*, a look towards other jurisdictions on this topic is informative, yet divided. As noted in *State v. Bentley*, 739 N.W.2d 296, 300 fn.3 (Iowa 2007): On the issue of whether "statements made by children during interrogations conducted by forensic interviewers without police participation are testimonial" addressing this question courts have reached "disparate conclusions". Compare *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir.2005) (child sex abuse victim's videotaped statements made to a forensic interviewer were testimonial); *State v. Buda*, 389 N. J. Super. 241, 912 A.2d 735, 745-46 (2006)

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MCA § 43-21-353. (Rev. 2007), in part provides

"Upon receiving a report that a child has been **sexually abused**, or burned, tortured, mutilated or otherwise physically abused in such a manner as to cause serious bodily harm, or upon receiving any report of abuse that would be a felony under state or federal law, **the Department of Human Services shall immediately notify the law enforcement agency** in whose jurisdiction the abuse occurred and shall notify the appropriate prosecutor within forty-eight (48) hours, and the Department of Human Services shall have the duty to provide the law enforcement agency all the names and facts known at the time of the report; this duty shall be of a continuing nature." The law enforcement agency and the Department of Human Services shall investigate the reported abuse immediately and shall file a preliminary report with the appropriate prosecutor's office within twenty-four (24) hours and shall make additional reports as new or additional information or evidence becomes available. The Department of Human Services shall advise the clerk of the youth court and the youth court prosecutor of all cases of abuse reported to the department within seventy-two (72) hours and shall update such report as information becomes available.

(6) In any investigation of a report made under this chapter of the abuse or neglect of a child as defined in Section 43-21-105(m), the Department of Human Services may request the appropriate law enforcement officer with jurisdiction to accompany the department in its investigation, and in such cases the law enforcement officer shall comply with such request. [Emphasis added.].

(7) Anyone who willfully violates any provision of this section shall be, upon being found guilty, punished by a fine not to exceed Five Thousand Dollars ($5,000.00), or by imprisonment in jail not to exceed one (1) year, or both.

(child's statements to government-employed social worker were testimonial); *State v. Hopkins*, 137 Wash. App. 441, 154 P.3d 250, 257-58 (2007) (same), *People v. Geno*, 261 Mich. App. 624, 683 N.W.2d 687, 692 (2004) (statement to director of children's assessment center was nontestimonial because the interrogator was not "a government employee"); *State v. Sheppard*, 164 Ohio App.3d 372, 842 N.E.2d 561, 566-67 (2005) (statement to private clinical counselor in mental health interview was nontestimonial); *Commonwealth v. Allshouse*, 924 A.2d 1215, 1222-24 (Pa. Super. Ct.2007) (child's statements to county youth services caseworker at the child's home were nontestimonial); *Hernandez v. State*, 946 So.2d 1270, 1284-85 (Fla. App. 2007) (a child's out-of-court statements to investigators gathering evidence for possible prosecution are "testimonial" under *Crawford*); *State v. Henderson*, 284 Kan. 267, 160 P.3d 776, 785, 792 (2007) (videotaped interview of child made by social worker was "testimonial" and violated Confrontation Clause because child did not testify at trial); *State v. Siler*, 116 Ohio St.3d 39, 876 N.E.2d 534, 543 (2007) (admission of child's hearsay statements violated *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

As noted before, Mississippi has a statutory mandate to notify law enforcement as soon as child abuse is expected. Here the referral of Brianna to Robin Smith was from Headstart, a government agency. [T. 37] Although Smith is in private practice, she was continuously in contact with and sharing all information with law enforcement and "the DA's office" with the purpose to "determine what had happened" to Brianna. [T. 59-61]. Robin Smith knew gathering information through Brianna and reporting it to law enforcement was to "ascertain information that would be used in a criminal prosecution." *Id.* There was a combined assertive effort, under a statutory scheme, whereby both private and state agencies worked together to not only help the

child, but to build a criminal case against those accused of wrongdoing.

In *Hobgood v. State,* 926 So.2d 847 (Miss.,2006), the court found "unsolicited statements" to treatment professionals with whom there was a previous relationship and "not working in connection with the police" were made "for the sake of his well-being and not for the purpose of furthering the prosecution." The same ruling would occur if there were "no previous relationship" and "the purpose of these statements was to seek medical and psychological treatment." However, here in the present case, as opposed to *Hobgood*, Brianna's accusations were solicited, in the forensic interview and by Robin Smith and were not solely for treatment.

Reading *Williams, supra*, and *Hobgood* together, with guidance from the other authorities above, it appears as though Brianna's forensic interview and the information from Robin Smith were testimonial and introduced into evidence in violation of *Crawford* and its progeny. So, Tim Jordan respectfully requests a new trial.

ISSUE NO. 5: WHETHER THE VERDICT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE?

A Lafayette County jail doctor who treated Krystal Jordan said that Krystal was mildly mentally retarded and suffered from organic brain syndrome. [T. 524]. Her functioning was described as "borderline". [T. 525]. While in jail Krystal abused inhalants. *Id.*

Before that, Krystal abused on crack cocaine, crystal methamphetamine, pain killers, and marijuana. [T.541-42]. She obtained these drugs from Glenn and Johnny Grose and Tony Rakestraw, trading sex for drugs. [T. 542-43].

Krystal was very motivated to fabricate. Part of the sweetheart deal Krystal garnered in

this case, was that she had another sexual battery, reportedly committed against her grandmother, dropped in trade for her testimony. [T. 606, 695].

Evidence of Krystal's fabrication is clear in the record. In Krystal's recitation of sexual acts against her daughter, she repeatedly said that male ejaculate was "wiped off of Brianna's belly", over and over in a machine like replay, regardless of the various and sundry positions described. [T. 547, 550, 556, 561].

Krystal acknowledges in a letter to Tim Jordan stating she "doesn't know who did this shit." [T. 578-583]. Krystal readily admitted her inconsistencies. [T. 562, 575].

In addition, Krystal revealed that she hears voices and was addicted to pain killers. [T. 611-12]. There were reports that Krystal threatened to accuse Tim Jordan of abusing Brianna and then marry Glenn Gross. [Ex. 1. (12-5-05 entry)].

Some matters going to the weight of the evidence were offered in issues addressed above so they will not be repeated but include Brianna conflicting statements, the flawed interviewing techniques, and witness bias. The point being that the conviction of Tim Jordan in this case rests on the absolute poorest caliber of proof imaginable.

In *Ross v. State* 954 So. 2d 968, 1017 (¶135) (Miss. 2007), the Supreme Court said of one witness' testimony, "the fact that Jones' testimony was often inconsistent and implausible weighs against its trustworthiness..." It would not be too great a stretch to make the same suggestion of Krystal's testimony here. See *Cole v. State*, 217 Miss. 779, 786-87, 65 So.2d 262, 264-65 (Miss.1953) (reversal based on the overwhelming weight of the evidence, prosecution main witness unreliable because testimony, made the accusations "exceedingly improbable and unreasonable").

The verdict of guilty was clearly contrary to the evidence entitling Tim Jordan to a reversal and rending of acquittal, or alternatively to a new trial. *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), *Brown v. State*, 829 So. 2d 93, 103 (Miss. 2002).

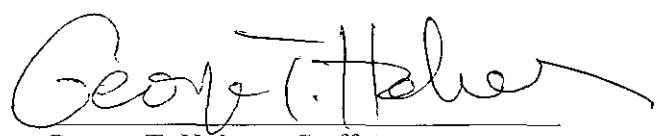
When a jury's verdict is so contrary to the weight of the credible evidence or is not supported by the evidence, a miscarriage of justice results and the reviewing appellate court must reverse and grant a new trial. *Kelly v. State*, 910 So. 2d 535, 539-40 (Miss. 2005).

CONCLUSION

Tim Jordan is entitled to have his convictions reversed with acquittal or with remand for a new trial.

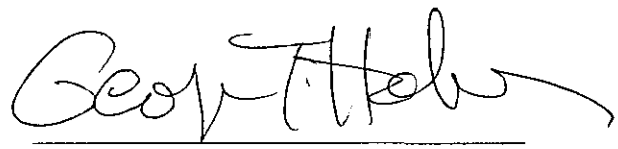
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Tim Jordan, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 6th day of April, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Brief Of Appellant to Hon. Andrew K. Howorth, Circuit Judge, 1 Courthouse Square, 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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