IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-KA-02129-SCT

NICKEY WILLIAMS — 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. Nickey Williams

THIS 20th day of April, 2009.

Respectfully submitted,

NICKEY WILLIAMS

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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STATEMENT OF THE CASE

Nickey Williams was convicted of two counts of sexual battery in a jury trial August 4-6, 2008, in Lee County, with Honorable James S. Pounds, Circuit Judge presiding. Williams was sentenced to thirty years in the first count and twenty years, with ten suspended, in the remaining count, consecutive. Williams is presently incarcerated with the Mississippi Department of Corrections.

FACTS

In 2005, Nickey Williams and his wife Kimberly lived in the Lee County community of Mooreville. [T. 338, 376]. Nickey and Kimberly have three children, two of which are pertinent to this appeal, Ravyn born May 22, 2001 and Hanna, born April 20, 2005. [T. 375-76].

Prior to Hanna's birth, Ravyn had been removed from the Williams' home in September 2004 by the Mississippi Department of Human Services for neglect. [T. 330, 377]. The record is not specific. Ravyn was placed in therapeutic foster care with a goal of reunification with her parents. [T. 27, 254, 333, 377].

The initial placement of Ravyn in a foster home was with relatives, but that did not work out. [T. 331, 363]. So, another arrangement was made with Kay Smith and her husband who had been trained to be and had been foster parents to children from troubled homes before. [T. 25-26, 332].

During the initial months of Ravyn's foster arrangement, Nickey and Kimberly were afforded supervised visitation, but, no over-night. [T. 27-29, 255-58]. That changed in November 2005. *Id.*

Arrangements were made for Ravyn to spend the weekend with Nickey and Kimberly November 11-12, 2005. *Id.* Kimberly retrieved Ravyn from Kay Smith's Friday afternoon November 11th. *Id.* Ravyn was returned to Kay Smith's Sunday afternoon November 13 around 2:00 p. m. *Id.*

Later that Sunday night, Kay Smith said she was talking on the phone and observed Ravyn laying on a doll simulating what appeared to be sexual behavior. [T. 29-30, 258-60]. Ms. Smith asked the child why she was doing that, and the child burst into tears and said "Daddy

hurt me." *Id.* Ravyn accused Nickey Williams of inserting a finger into her vagina while bathing. *Id.*

The requisite reports were made and, with what is now routine protocol, a forensic interview and medical exam were scheduled and conducted. [T. 300-01, 351]. The details of the forensic interview were not offered into evidence, but were reported to William Marcy, M. D., the physician who performed the examination. [T. 3761-74, 449]. Dr. Marcy was also told about the incident at Kay Smith's and Ravyn's accusation. *Id.*

Dr. Marcy had previously examined Ravyn upon her initial intake into DHS custody in September 2004. [T. 414-19]. At his second examination conducted November 15, 2005, the doctor noted inflammation and an increased hymenal diameter . [T. 421-29]. The child's hymenal opening previously was 3.5 mm, but subsequently measured at 7.5 mm. *Id.*

Hanna was also examined by Dr. Marcy three months later on February 15, 2006, when she was ten (10) months old. [T. 359, 431]. Dr. Marcy found Hanna's anus enlarged with some tearing. [T. 434-39]. Hanna had remained with her parents until February 13, 2006, when she was placed with Kay Smith. [T. 355].

Kimberly Williams testified that after Hanna was born, and she went back to work, the only people who kept Hanna were Kimberly's mother, grandmother, and Nickey Williams. [T. 388-89]. Kimberly described that if by chance Nickey would pick up Hanna from her mother or grandmother, he would come by her work place and hang around or go to relatives or friends. *Id.* Kimberly also stated that Hanna had been around a person who had allegedly molested Kimberly when Kimberly was young. [T. 395-96]

In a hearing to determine admissibility of hearsay under M. R. E. 803(25), Ravyn testified

she did not remember any mistreatment and denied making other allegations. [T. 71-84]. However, during trial testimony, Ravyn restated the accusations that her father put a finder into her vagina. [T. 466-70]. The trial court allowed some state witnesses to repeat what Ravyn told them under the tender years hearsay exception, others were denied. [T. 233-37].

Nickey was charged initially with five various counts of sexual battery and gratification of lust against his daughters Ravyn and Hanna. [R. 5-7]. However, Counts II, III and V were dispensed by *nolle prosequi* and Nickey stood trial on Count I, sexual battery by digital insertion against Ravyn 11-12-05, and Count IV, sexual battery against Hanna by anal insertion between April 2005 and February 2006. [R. 5-7, 116; T . 153]. Count IV was referred to as Count II in the jury instructions to avoid prejudice to Williams. [R. 113]. In this brief, the references are to the original count numbers.

SUMMARY OF THE ARGUMENT

The two counts under which Williams went to trial should have been severed. The trial court erroneously excluded crucial defense evidence without justification. Williams was irreparably prejudiced by incompetent hearsay. The weight of the evidence on count I was contrary to the verdict, while the sufficiency and weight under count IV were non-existent as to Williams' culpability. The jury was tainted by a juror who did not disclose a business relationship and friendship with a key state witness. The trial court should have granted an instruction on child testimony.

ARGUMENT

ISSUE NO. 1: WHETHER COUNTS I AND IV SHOULD HAVE BEEN SEVERED FOR TRIAL?

The standard of review for this issue requires a determination of whether there was an "abuse of discretion" on the part of the trial court in denying a requested severance. *Rushing v. State*, 911 So.2d 526, 532(¶ 12) (Miss.2005). There are three matters to be addressed in a motion to sever criminal counts for trial: "[1] the time period between the offenses, [2] whether the evidence proving each offense would be admissible to prove the other counts, and [3] whether the offenses are interwoven." *Id.* at 534(¶ 15). There is no automatic severance required when "some element of the necessary proof as to one [count] would be inadmissible on the other [count] were it being tried separately." *Wright v. State*, 797 So.2d 1028, 1030(¶ 7) (Miss. Ct. App.2001). Rather, if there is "evidence that is admissible for one purpose and inadmissible for another, the jury should be "instructed as to the limited purpose for which the information is admitted" rather than exclude evidence. *Id.* at (¶ 8).

The Mississippi Supreme Court set out the procedure for trial courts to follow in addressing severance motions in *Corley v. State*, 584 So.2d 769, 772 (Miss.1991). *Corley* requires a hearing where the state has the burden to prove *prima facie* that the charges in the indictment fall within the parameters of MCA § 99-7-2 (Rev.2007)[1]. If the state proves so, the

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MCA § 99-7-2 (Rev. 2007):
(1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

(2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such

moving defendant may offer rebuttal that the charges sought to be severed arose from "separate and distinct acts or transactions." *Id.* Then, the trial court must decide "whether the time period between the occurrences is insignificant, whether the evidence proving each count would be admissible to prove each of the other counts, and whether the crimes are interwoven." *Corley*, 584 So.2d at 772.

In the present case, *Corley* was not strictly followed. [T. 156-57]. The motion was made by defense counsel who expressed the need for severance to avoid prejudice of the jury finding guilt under one count and mistakenly presuming guilt on the other. Defense counsel stressed that for a significant portion of the time frames alleged, the children did not live in the same house with the appellant and his wife; and, this fact established that the alleged abuse against each child was separate and distinct from the other. *Id.* The state argued that some of the dates overlapped and the alleged events occurred "at the same place" and that the motion for severance was too late. *Id.*

The trial court found Williams' severance motion untimely, but nevertheless without merit. *Id.* There was no finding that the alleged "offenses [were] based on the same act or transaction; [nor that] the offenses [were] based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan."

Williams' motion to sever was unquestionably timely under the rules. The learned trial court's ruling in this regard appears arbitrary. Uniform Circuit Court Rule 9.03 states:

> The court may, on motion of the state or defendant, grant a severance of offenses **whenever**:
> 1. If **before trial,** it is deemed appropriate to promote a fair determination

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charges may be tried in a single proceeding.

> of the defendant's guilt or innocence of each offense; or
> 2. If **during trial**, upon the consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. [emphasis added]

In *Sawyer v. State*, 2 So.3d 655, 657-58 (Miss. Ct. App. 2008) the defendant was charged with and convicted of armed robbery and being a felon in possession of a firearm under state law. On appeal, Sawyer argued that the two counts should have been severed "because the jury would automatically infer that he was guilty of Count I, armed robbery, when the jury heard the evidence of his previous convictions for armed robbery, which were necessary to establish the elements of Count II, possession of a firearm as a convicted felon."

In *Sawyer* both crimes occurred simultaneously satisfying the first prong of the *Corley* analysis. Next the *Sawyer* court determined, under *Corley,* that the "evidence to prove the armed robbery count" also proved "the felon in possession of a firearm count, [since] ... both crimes require[d] that the State prove that Sawyer had possession of a firearm, and both crimes happened at exactly the same time." *Sawyer*, 2 So.3d at 657-58. So, they were interwoven under the third prong of Corley and was no abuse of discretion in the trial court's denying Sawyer's motion for severance. *Id.*

Accordingly, M. R. E. 404(b) issues have "no bearing on whether the trial court should allow a multi-count indictment."*Sawyer*, 2 So.3d at 657-58. [citing *Corley*, 584 So.2d at 772 n. 1.]. Nevertheless, the Supreme Court urged a separate 404(b) analysis upon retrial of Sawyer due to reversal on other grounds as "the trial court may reconsider whether severance is appropriate at the retrial of this case.

Applying the *Corley* factors to the present facts: [1] the time period between the offenses:

Count I - November 11-12, 2005, Count IV - between April 20, 2005 and February 14, 2006. The overlap is 2 days out of 300, which would be minuscule to say the least. [2] Whether the evidence proving each offense would be admissible to prove the other counts, definitely not. [3] Whether the offenses are interwoven. No.

So, the facts of this case do not even come close to satisfying the *Corley* test. If the trial court had applied the test, it would have had to reach the same conclusion.

The *Corley* court said trial courts should be very careful in addressing severance of counts because the Supreme Court remains "unwilling to allow separate and distinct offenses to be tried in the same criminal proceeding....to avoid potential problems of a jury finding a defendant guilty on one unproven count due to proof of guilt on another, or convicting a defendant based upon the weight of the charged offenses, or upon the cumulative effect of the evidence." *Corley*, 584 So.2d 772. [Cites omitted]. The *Corley* court added that, if a severance motion is denied or if a severance motion is not made, it is "recommend that the trial court caution the jury that although the case before the jury involves charges of more than one offense, proof of guilt on one count is not proof of guilt on the other(s)." *Corley*, 584 So.2d 772, fn 2. This was not done in Williams' case which only exacerbates the miscarriage of justice here. A new trial is respectfully requested.

ISSUE NO. 2 WHETHER THE TRIAL COURT EXCLUDED CRUCIAL ADMISSIBLE DEFENSE EVIDENCE?

The defense had listed several family members and friends as character witnesses in discovery. [R- 77; T. 520-22, 535-36, 540-41, 551-57]. On direct the witnesses were asked to describe first hand information about Nickey being a good father. *Id.* The trial court here

excluded most of this defense evidence, primarily, on the basis of alleged untimely discovery disclosure, and secondly on the basis of relevance. *Id.* The standard of review regarding the admission or exclusion of evidence is abuse of discretion. *Burton v. State*, 875 So.2d 1120(¶ 6) (Miss. Ct. App.2004).

The defendant made a proffer that the observations sought from the witnesses included a time frame of six (6) months before the incidents. [T. 551-57]. Otherwise the defense position is that discovery was fully and timely provided. So, the testimony was pertinent.

Assuming *arguendo* that the witness information was not disclosed by the defense, which is not admitted, the state never claimed surprise nor prejudice, and never requested a continuance nor mistrial. The trial court did not provide the state the opportunity to interview the witnesses as required by *Box v. State*, 437 So.2d 19 (Miss.1983). Instead, the trial court took the extreme measure of excluding defense evidence which Williams suggests was unconstitutional under the 5th and 14th Amendments to the United States Constitution and Article 3 §26 of the Mississippi Constitution (1890).

In *Ross v. State*, 954 So.2d 968, 999-1001 [¶¶65-68] (Miss. 2007), the Mississippi Supreme Court reversed because the trial court excluded conflicting statement evidence of a state witness offered by the defense for impeachment purposes on the grounds that the statement was not disclosed in discovery. Ross argued that even if there was a discovery violation, exclusion of the evidence was improper and prejudicial. The court agreed, stating that the trial court should have allowed "the State to review the statement and request a continuance, if necessary" and

otherwise follow the procedures set out in *Box v. State*, 437 So.2d 19 (Miss.1983). [2] Evidence offered by a defendant even in violation of discovery rules should not be excluded out of hand. *Ross,* 954 So. 2d 1000. [Citing *Carraway v. State*, 562 So.2d 1199, 1203 (Miss.1990)]. Rather, the State shall "be given the opportunity to meet the evidence" and move for a continuance or mistrial if necessary. The radical sanction of excluding defense evidence "is only appropriate where the defendant's discovery violation [is] 'willful and motivated by a desire to obtain a tactical advantage.'" *Id.* [Citing *Darghty v. State*, 530 So.2d 27, 32 (Miss.1988) (citing *Taylor v. Illinois*, 484 U.S. 400, 415, 108 S.Ct. 646, 655, 98 L.Ed.2d 798, 814 (1988)). See also *Houston v. State*, 531 So.2d 598, 611-12 (Miss.1988), [Exclusion "ought be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage."

The *Ross* court reiterated that prejudice can result from failure to follow the *Box* procedures or arbitrarily "excluding testimony that tended to support a defendant's account of events. *Ross*, 954 So. 2d 1001. [Citing *Darghty v. State*, 530 So.2d 27, 33 (Miss.1988) ["Even-handed application of the Rule requires the same procedure to be followed when the

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The *Box* procedure was written into U.R.C.C.P. 9.04(I),
If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:
1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

State objects to testimony because of a defendant's violation as when the defendant objects for the same reason."]]. Even though Ross was allowed to impeach the state witness with her prior inconsistent statement on cross-examination, the exclusion of the actual statement from evidence "did prejudice his case" and constituted reversible error. *Ross*, 954 So. 2d 1001

The same situation occurred with reversal in *Sandefer v. State* 952 So.2d 281, 293 (Miss. Ct. App. 2007) where the court recognized that homage must always be paid to "the compulsory process clause of the Sixth Amendment" in ruling on discovery violations of a defendant under UCCCR Rule 9.04, because, even if the procedures under the rules are followed, the trial court cannot exclude defense evidence unless the "court determine[s] that the 'defendant's discovery violation [was] 'willful and motivated by a desire to obtain a tactical advantage.' *Id.*

To affirm the trial court's exclusion of the evidence here in Williams' case violates the sound rule that a defendant always has a right to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967), *Wilson v. State*, 390 So.2d 575, 581 (Miss.1980). *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

Williams respectfully requests a new trial.

ISSUE NO. 3: WHETHER WILLIAMS WAS PREJUDICED BY INCOMPETENT HEARSAY?

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).

A. Tender Years Exception

A hearing was conducted after the state gave notice of intent to utilize the tender years hearsay exception of rule 803 (25). [R. 25-138].[3] At the hearing the foster mother, social workers, Ravyn and investigators all testified. *Id.*

When asked about her accusations of sexual abuse, Ravyn basically said she did not remember. [T. 68-82]. The trial court made its ruling allowing the foster mother Kay Smith and social worker/counselor Tina Ballard to testify but disallowed others. [T. 233-37].

Williams' position is that, with Ravyn admitting that she did not recall the incidents involving her accusations against her father, her reports became unreliable under 803(25). In further support of this position, it was revealed through the Clinical Supervisor of the foster care program, that Ravyn was an "aggressive" and disruptive child whose emotions were like a "roller coaster." [T. 92-93, 96, 119-20, 121]. Ravyn was described by the supervisor as having some "character issues" and she would not follow rules. *Id.* She was "very defiant with teachers" and "developmentally delayed.". [T. 120-21].

Reliability and trustworthiness are the ultimate factors in deciding admissibility of tender year exception evidence. In *Grimes v. State*, 1 So.3d 951 (Miss. Ct. App. 2009), the court carefully explained that a tender years exception inquiry does not end at a determination of a child being of tender years since, a child may be of tender years, but if indicia of reliability are

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[3]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....

missing, the hearsay exception does not apply. *Grimes* ¶10.

The *Grimes* court explained how the following factors, are to be considered by the trial court in deciding reliability under the tender years exception: (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. *Id.* [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 factors can be considered. *Id.* [Citing *Eakes v. State*, 665 So.2d 852, 865 (Miss.1995)].

Williams suggests that the trial court erred reversibly by improperly weighing the effects of Ravyn's character problems and recantation of abuse allegations. Specifically, it is suggested that under factors (2) and (10) of the tender years test, "general character of the declarant" and "age and maturity of the declarant," should have been weighed conclusively against reliability, trustworthiness and admissibility.

B. Double Hearsay

Williams sought by motion to exclude information about Ravyn's forensic interview, which was conducted, but the details of which were never introduced at trial nor tendered to the

court for a finding of reliability and trustworthiness. [T. 371-74]. Dr. Marcy, the medical doctor who examined Ravyn and Hanna, testified to the jury he used second hand information from the forensic interview in making his determination of expected sexual abuse. [T. 430, 449]. Williams respectfully suggests that the disclosure of the content of the forensic interview constituted hearsay within hearsay under M.R.E. 805 and there was no showing of trustworthiness as required by Rule 803(4) for admission.[1]

In has been held that, "statements made by one other than the patient" can be admissible under the medical treatment hearsay exception. *Valmain v. State*, No. 2007-KA-01062-SCT. (April 2, 2009). The situation here is different, however, the issue before the court now is hearsay within hearsay or double hearsay. Somebody told Dr. Marcy what was said, or not said, in Ravyn's forensic interview. [T. 430, 449]. Dr. Marcy then, came to court and repeated what was told to him for the jury. *Id.* It is Williams' position here that reliability of the forensic interview and second-hand information were not established and were not admissible.

In *Jones v. State* 763 So.2d 210, 215-16 (Miss. Ct. App. 2000), the court addressed a "double hearsay" issue under M.R.E. Rule 805, stating " if each leg of the hearsay upon hearsay conforms with an exception to the hearsay rule, the double hearsay is admissible." In *Jones*, the developments were that there was a witness who heard a nurse claim to have heard the dying

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803 (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, **if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trust worthiness.** For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health. [Emphasis added.].

victim identify Jones as the shooter. However, the witness who "denied ever actually hearing the deceased declarant state that "Rodney" was the person who shot him", was nevertheless "allowed to testify and have two separate relays of hearsay testimony admitted through her testimony." *Id.* The *Jones* court reversed, holding "that the admission of the statements by the nurse to [the witness] was error and reversible error in this case, given the obvious impact the statements would naturally have on a jury." *Id.*

Here in Williams' case, the second layer of double hearsay has not been shown to fit any exception to the hearsay rule. The opinion in *Lattimer v. State*, 952 So.2d 206, 221 (¶39) (Miss. App. 2006), stands for the proposition that, for the content of a forensic interview to be admissible as a hearsay exception, the interview must be shown to have been conducted with, and was the product of, "reliable principles and methods." Here, in Williams' case, the trial court did not determine whether there were any unacceptable deviations from "reliable principles and methods" in Ravyn's interview for purposes of a Rule 803 (25) analysis. See also *Smith v. State*, 925 So.2d 825, 834 (Miss. 2006).

In *Brooks v. State*, 903 So.2d 691, 696-98 (Miss. 2005), the state was allowed to introduce hearsay which included a second hand confession allegedly attributed to the defendant. A witness testified "she was told by Brooks's mother ... that Brooks had admitted committing the crime." *Id.*

The *Brooks* court reversed finding the double hearsay was erroneously allowed. *Id.* The Supreme Court urged the trial court, upon remand, to conduct a hearing to receive more evidence to determine reliability of the double hearsay declarant which was lacking.

The point being for purposes of Williams' appeal here is that, it is the trial court's

responsibility to determine the reliability of each portion of a double hearsay when offered, which was not done here. The question of whether the forensic interview was reliable hearsay evidence remains unanswered and it was the trial court's responsibility to determine this reliability, under *Brooks*.

Conclusion of hearsay arguments

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 admissible under the tender years exception. One matter *Bishop* court emphasized was that the child's statements about sexual abuse "were consistent." *Id.* This would be contrary to Ravyn Williams who in the present case recanted her allegations with "I can't remember" at the motion hearing, yet testified exactly opposite at trial. [T. 71-84, 466-70].

Contrary to the present facts, in *Bishop* the trial court reviewed whether "suggestive techniques were used" in a forensic interview and whether the allegations of abuse there "were the result of leading [or] suggestive questioning techniques." *Bishop* ¶ 22). The *Bishop* court agreed with the trial court's finding that the 4-year old declarant "gave extensive narratives" to the therapist, and that the child's accusations were "elicited without suggestive techniques". Here, it is not known if Ravyn was led in the forensic interview nor whether she gave narrative responses. In *Bishop*, the child's allegations "were all consistent". *Bishop* ¶23. We know, here in Williams case, that Ravyn was not consistent. The *Bishop* court concluded that the [the declarant's] "statements bore substantial indicia of reliability [and were] supported by substantial evidence." *Id.* The record in the present case does not support the same conclusion.

Comparing *Bishop* to the present facts, there was no analysis of the forensic interview here.

Even now, on appeal this Court does not have enough information about the forensic interview to gauge its reliability or trustworthiness under either 803(25) or 803(4). Until proven reliable, the double hearsay evidence concerning the forensic interview in this case remains unreliable and inadmissible.

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 and reliability 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. The same result is respectfully requested here.

ISSUE NO. 4: WHETHER THE JURY WAS TAINTED BY MISCONDUCT?

Juror misconduct was pled in Williams' motion for new trial. [R. 124-26]. Juror Melvyn Blackmon did not respond to *voir dire* questions about knowing state witness Wanda Jones . [T. 621-47].

The first indication of possible impropriety was when Ms. Blackmon returned for Williams' sentencing hearing and sat with, and spoke with, state witness Wanda Jones who worked at the Lee County Family Children's Services, and other "social workers from the office [and] the victim's advocate." [T. 623, 625]. Wanda Jones testified that Ms. Blackmon had sold Avon products to the ladies in her office. [T. 624]. It was further disclosed that Ms. Blackmon even spoke to Wanda Jones during the trial. [T. 626].

Ms. Blackmon testified that she did not remember the court reading the witness list and she emphatically denied being asked if any of the jurors knew Wanda Jones. [T. 633]. On redirect, though, Ms. Blackmon contradicted herself stating, "[w]ell when they said Wanda Jones, the only Wanda Jones that I could think of, I have a neighbor that has a daughter named Wanda Jones. And I thought that was the Wanda Jones. I did not even know her." [T. 638-39].

Ms. Blackmon was clear that she knew Wanda Jones and referred to her as one of her Avon customers. [T. 633-34]. Ms. Blackmon acknowledge that she spoke with Wanda Jones during the trial, stating, "I asked her was she a friend of Brenda and that was it, and she nodded and walked on. That was it." [T. 635, 639]. Blackmon also agreed that she sat with Wanda Jones during the sentencing, because, Jones was the only person she knew. [T. 636].

Wanda Jones denied having any contact with Ms. Blackmon subsequent to the trial whatsoever. [T. 625, 627]. To the contrary, when asked if she had spoken to Wanda Jones after the

trial, Blackmon said, "[w]e talked, I think, when I got home one day to call to let me know that someone had told her that we was going to be doing this because of what he said that we were friends". [T. 640].

During *voir dire,* the inquiry to the venire about knowing witnesses came when the court read the state's potential witness list, which included Wanda Jones' name, and asked the general question to the pool, "[a]ny of you consider yourself close, personal friends with any of the witnesses I just named?" [T. 165-66]. Several persons responded, but not Melvyn Blackmon. *Id.* After others responded, but before moving along to the next topic, the trial court asked again, "anybody else know any of the witnesses". [T. 171]. No response. *Id.*

It should be noted, so the context will be complete, that defense counsel asked wether any of the venire had family working for the Department of Human Services. [T. 211]. So, it would have been apparent that the trial court and defense counsel were, unambiguously, seeking responses from persons with family, friendship and business relations with witnesses.

In *Odom v. State*, 355 So.2d 1381, 1382-83 (Miss.1978), a burglary conviction was reversed when it was learned that an investing detective's brother sat on the defendant's jury and the trial court denied a new trial. The *Odom* court said, "the failure of a juror to respond to a relevant, direct, and unambiguous question leaves the examining attorney uninformed and unable to ask any follow-up questions to elicit the necessary facts to intelligently reach a decision to exercise a peremptory challenge or to challenge a juror for cause." *Id.*

Under *Odom*, the following factors are to be addressed when deciding whether a new trial is required when a prospective juror does not respond to a *voir dire* question when the juror has "knowledge of the information sought to be elicited": The court should determine whether the

question was: "(1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited." *Id.* If so, "the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond." *Id.* If prejudice can reasonablely be inferred, a new trial is required as a matter of law. *Id.*

In *Eley v. State* --- So.3d ----, 2007-KA-02220-COA (March 31, 2009)¶ 17, it was alleged that a juror "failed to respond truthfully to relevant, direct, and unambiguous questions during voir dire," particularly, the juror failed to respond truthfully about knowing a detective and other matters.

The *Eley* court noted, in applying the *Odom* three part test, *supra*, that during voir dire, the venire was asked by the trial court whether anyone knew the particular detective and the juror in question did not respond. After he testified, the detective recognized the jury as a "victim of an armed robbery that he had previously investigated." *Id.* So, under *Odom*, the question was was "relevant to the voir dire examination and unambiguous." *Id.*

In affirming, the *Eley* court noted that the contact between the detective and juror was a "one time encounter" over a year and half prior to the trial. *Id.* Even though the detective recognized the juror, there was no showing that the juror recognized the detective, so the court concluded that Eley's claim of misconduct was "mere speculation." *Id.*

The present case is different, Jones and Blackmon had multiple contacts. [T. 623-39]. There's was a business relation. *Id.* Plus, both persons recognized each other, and spoke during the trial. *Id.* To show they were close, they sat together and talked at Williams' sentencing. *Id.* Ms. Blackmon would no doubt have been stricken if she had answered truthfully, and Williams' right to a fair and impartial jury was tainted thus establishing an inference of prejudice under *Odom,*

supra. Williams respectfully requests a new trial. See also, *Myers v. State*, 565 So.2d 554, 558 (Miss.1990). ["[W]here a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause, the trial court must grant a new trial].

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

As for the alleged crime again Ravyn Williams, the verdict is contrary to the weight of evidence. The complaining witness was unstable, she recanted, she was aggressive, and did not follow rules. [T. 68-82, 92-93, 96, 119-20, 121]. Plus, not knowing whether she was tainted in the forensic interview makes all of the evidence which might arguably support of the verdict unreliable and tainted.

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, the prosecution's main witness unreliable because testimony, made the accusations "exceedingly improbable and unreasonable"). Williams, accordingly, respectfully requests a new trial.

ISSUE NO. 6: WHETHER THE SUFFICIENCY AND WEIGHT OF EVIDENCE ARE CONTRARY TO THE VERDICT IN COUNT IV?

After Hanna was born, Kimberly Williams testified she went back to work, and the only people who kept Hanna were Kimberly's mother, grandmother, and Nickey Williams. [T. 388-89]. Kimberly described that if, by chance, Nickey would pick up Hanna from her mother or grandmother, he would come by her work place and hang around or go to relatives or friends. *Id.*

Kimberly also stated that Hanna had been around a person who had allegedly molested Kimberly when Kimberly was young. [T. 395-96]

Take out the evidence under Count I, the case concerning Ravyn, and what remains in this record as to Count IV, is this: there was a little girl named Hanna who was injured and too young to speak. Hanna had been kept by mainly four people, the mother, a grandmother, and the father. She was exposed to other people, one of whom, allegedly molested Hanna's mother years ago.

Yet, Hanna's father, Nickey Williams got convicted for injuring Hanna. It is obvious that the jury was prejudiced by the Count I evidence. The evidence does not establish who harmed the Hanna.

The verdict of guilty under Count IV was clearly contrary to the evidence entitling Nickey Williams to a reversal and rending of acquittal, or alternatively to a new trial, which is hereby respectfully requested. *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).

The court in *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985), said

> If the facts and inferences so considered point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting [a motion for directed verdict] is required.

See also *Carr v. State*, 208 So. 2d 889, 889 (Miss. 1968), *Foster v. State*, 919 So. 2d 12, 15 (Miss. 2005).

ISSUE NO. 7: WHETHER WILLIAMS WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON CHILD TESTIMONY

Williams offered the following instruction:

> The Court instructs the jury that Raven Williams, a 7 year old child, has testified in this case about alleged events that occurred when she was 4 years old. The Court instructs you as a jury that you are to view the testimony of this child in light of the child's age and understanding and you are to give it such weight and credit as you deem it is entitled. [R. 93; T. 560-61].

The trial court refused the instruction citing *Goodnight v. State*, 799 So. 2d 64, 67-68, (Miss 2001). The instruction is *Goodnight* is not even close to being comparable to the above.[4]

However, under *Burbank v. State,* 800 So. 2d 540, 545 (Miss. Ct. App. 2001) and *Jones v. State,* 606 So. 2d 1051, 1059-60 (Miss. 1992) the instruction offered by Williams here appears to be proper. In both *Jones* and *Burbank* the court basically said, "[i]f the jury is to be instructed at all with respect to the testimony of the child, it should be told to view the testimony in the light of the child's age and understanding, not his veracity." *Id.*, both *Burbank* and *Jones.* [Citing *Bandy v. State*, 495 So.2d 486, 493 (Miss.1986).] So, it appears that the learned trial court's refusal of the proper instruction was an abuse of discretion. Williams respectfully requests a new trial.

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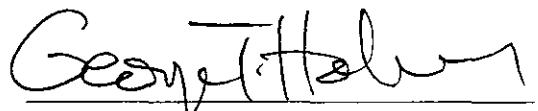
[The refused instructions from *Goodnight*: D9: "The Court instructs the Jury that uncorroborated testimony of a child or children of tender years should be viewed with caution." and D11 "The Court instructs the Jury that the uncorroborated testimony of a victim should be examined closely and scrutinized with caution." 799 So. 2d at 67.

CONCLUSION

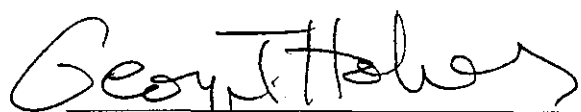
Nickey Williams respectfully suggests that the evidentiary and procedural errors outlined above resulted in irreparable prejudice to him and for which he respectfully requests a new trial under count I, while a lack of evidence justifies his request for a reversal and acquittal under count IV.

Respectfully submitted,
NICKEY WILLIAMS

By: 
George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 20th day of April, 2009, mailed Circuit Judge, P. O. Box 316, Booneville MS 38829, and to Hon. Paul C. Gault, Asst. Dist. Atty., P. O. Box 7237, Tupelo MS 38802, 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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