IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RAPHAEL FLOWERS — APPELLANT

V. — NO. 2009-KA-0387-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Benjamin A. Suber, MS Bar No. [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Raphael Flowers

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RAPHAEL FLOWERS **APPELLANT**

V. **NO. 2009-KA-0387-SCT**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Raphael Flowers, Appellant
3. Honorable Dewayne Richardson, District Attorney
4. Honorable Jannie M. Lewis, Circuit Court Judge

This the 6 day of October, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Benjamin A. Suber
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RAPHAEL FLOWERS — APPELLANT

V. — NO. 2009-KA-00387-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1

UNDER DOUBLE JEOPARDY THE STATE WAS BARRED FROM PROSECUTING FLOWERS AGAIN BECAUSE THE FIRST CASE RESULTED IN A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT.

ISSUE NO. 2

RAPHAEL FLOWERS WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF PRIOR BAD ACTS OR OTHER UNRELATED CRIMES NOT CHARGED IN THE INDICTMENT WERE WAS ADMITTED OVER FLOWERS' OBJECTION.

ISSUE NO. 3

THE TRIAL COURT ERRED IN DENYING FLOWERS' MOTION FOR A NEW TRIAL AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY FAILING TO DISCLOSE

MEDICAL RECORDS AND THAT A WITNESS WAS RECEIVING THERAPY.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Leflore County, Mississippi, and a judgment of conviction for the crime of Count I - Statutory Rape. Flowers was sentenced to thirty (30) years with the Mississippi Department of Corrections. A mistrial was granted for Count II - Statutory Rape, Count III - Sexual Battery, and Count IV - Sexual Battery. Flowers is currently in the custody of the Department of Corrections following a jury trial on November 6, 2007, and November 8, 2007, Honorable Jannie M. Lewis, presiding.

Flowers was previously tried June 19-20, 2007, Honorable Betty M. Sanders presiding. The Court granted a mistrial due to the cumulative misconduct of the assistant district attorney.

FACTS

On April 23, 2006, four young boys, Jacorius Banks, Jaquez Hill, Jacolby Hill, and Henry Stevenson, allege that Raphael Flowers had sexual relations with the boys. Jacorius testified during the second trial that he Flowers wanted him to go walking. Tr. 321. They left Gloria's new house and went to Gloria's[1] old house. Tr. 321-22. Jacorius claimed that Jacolby, Jaquez, and Henry[2] were all together at Gloria's old house. Tr. 322.

---

[1]Gloria is Raphael Flowers mother. She recently had moved to a new house. The alleged incident took place in Gloria's old house, which appeared to be abandoned.

[2]Henry's nickname is Biggie

According to Jacorius all four boys lined up against the wall. *Id.* Jacorius alleged that Flowers told him to pull down his pants, then Flowers pulled down his boxers. *Id.* Flowers then put his penis in Jacorius's mouth and then put his penis in Jacorius's butt. *Id.* Jacorius continued his testimony by stating that Flowers was moving "back and forth." Tr. 323.

However, Jacorius's statement to police was drastically different than his testimony. In Jacorius's statement he stated that only he and Flowers went to Gloria's old house. Exhibit S-3 for ID, R.E. 45. Furthermore, Jacorius declared that Flowers took Jacorius's hand and placed it on his privates. *Id.* Flowers allegedly told Jacorius he wanted him to "beat his meat." *Id.* Then Flowers told him to put his head "down there." *Id.* Jacorius complied with that request and Flowers told him to suck his penis. *Id.* Jacorius did what Flowers had asked and then Flowers tried to put his penis into the Jacorius's butt. *Id.*

Jaquez Hill testified that Flowers called all of the boys over to Gloria's house. Tr. 375. Jaquez stated the Flowers lined all the boys up against the wall in Gloria's room. *Id.* Jaquez stated that he was the third boy to go with Flowers. Tr. 376. Jaquez claimed that Flowers told him to pull down his pants. *Id.* Then Flowers pulled down his pants. *Id.* Jaquez contended that Flowers then "pumped [him] in his butt." with his penis. *Id.* However, in Jaquez's statement to police, he stated that only Jacolby and Henry were with him at Gloria's old house with Flowers. Exhibit S-6 for ID, R.E. 46.

Jacolby testified that Flowers took Jacolby, Jacorius, Jaquez, and Henry to Gloria's old house. Tr. 391. Jacolby then claims that Flowers had them all line up against the wall. *Id.* Jacolby stated that Flowers would then call them one by one. *Id.* Flowers told Jacolby to come lay on the bed. *Id.* Jacolby alleged that Flowers had him lay on his stomach and Flowers told him to pull down his pants. Tr. 392. Jacolby then contends that Flowers stuck his penis into his butt. *Id.*

Jacolby further testified that he had heard many thing from Jacorius[3]. Tr. 398. Jacolby on cross-examination admitted that he did not tell the police that Flowers made the boys line-up against the wall. *Id.* Jacolby heard that from Jacorius. *Id.* Furthermore, Jacolby stated that many things he testified too, he was told about by Jacorius. *Id.*

Henry tesified that the boys were lined-up against the wall and Flowers called them in one by one. Tr. 403. Henry stated on the stand that Flowers would give him fifteen cents ($0.15) to suck his penis. *Id.* Henry never received any money from Flowers. *Id.*

On cross-examination, Henry admitted that he never saw Flowers do anything to any of the other boys that were there at Gloria's old house. Tr. 405. He also admitted that he never read his statement from the sheriff's office. Tr. 407.

Flowers through testimony, stated that he did not admit to anyone at the police department that he assaulted any of the children. Tr. 456. Flowers stated that the police told him he had to sign some papers in order to get a bond to get out of jail. Tr. 455.

---

[3]Jacorius's also is called J.J.

Flowers further testified that he never saw a waiver of right form. Tr. 460. Flowers also stated that he only sign the statement to police because they said they were going to get him some help and bond. Tr. 455-56.

Nevertheless, Flowers testified that he was playing basketball on the alleged day in question. Tr. 457. Flowers remember arriving at the basketball court around 12:30 pm and leaving somewhere around 6:30 pm that afternoon. Flowers had several defense witnesses that verified Flowers alibi of playing basketball on April 23, 3006.

Tomario Williams expressed that he arrived at the basketball court arounf 12:00-12:30 pm on April 23, 2006. Tr. 474. Williams never saw Flowers leave the area. Tr 475.

Tony Bennett also verified that Flowers was playing basketball on April 23, 2006. Bennett stated the Flowers never left the basketball court and that he and Flowers were playing on the same team. Tr. 477.

Derrius Spratt was also playing basketball on April 23, 2006. Tr 485. Spratt testified that Flowers was in fact playing basketball. Tr. 486. However, he was not sure if Flowers was there the whole time. *Id.*

SUMMARY OF THE ARGUMENT

The Appellant, Raphael Flowers, constitutional protections guaranteed by the Fifth Amendment and the Double Jeopardy Clause of both the United States Constitution and of the Mississippi State Constitution were violated. The State had an operative bar against bringing of another prosecution when the first case resulted in a mistrial wholly

based upon an act by the same state. A defendant who moves for a mistrial is barred from later complaining of double jeopardy. To overcome this bar, (Defendant) must show that error occurred and that it was committed by the prosecution purposefully to force (Defendant) to move for a mistrial. Prosecutorial misconduct was clearly evident in the record as stated by the trial court. Tr. 144.

The trial court improperly admitted into evidence of alleged bad acts of Flowers. The evidence of a crime other than that charged in the indictment is not admissible evidence against the accused. The trial court allowed the State to introduce evidence through Flowers alleged statement about other acts that occurred that was not presented in the indictment. The probative value of the evidence did not substantially outweigh the prejudicial effect of the prior alleged crimes as required by M.R.E 403. This evidence was unduly prejudicial.

The State violated the discovery rules by not disclosing disclose medical reports and one (1) year of treatment by Jacorius. This was a reversible error he court in denying Sanders his right to a fair trial. This Court should reverse the trial court and remand the case for a new trial.

ARGUMENT

ISSUE NO. 1

UNDER DOUBLE JEOPARDY THE STATE WAS BARRED FROM PROSECUTING FLOWERS AGAIN BECAUSE THE FIRST CASE RESULTED IN A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT.

Flowers made several motions for a mistrial during the first trial that occurred on June 19 -20, 2007. Tr. 3, 143. The trial court granted a mistrial based on the actions of the prosecution. Tr. 2, 142-44. The prosecution, during opening statements made a comment clearly to inflame the jury. Tr. 2. The prosecution stated that "this is one of the saddest and sickening cases I've ever tried." *Id.* Flowers immediately objected and moved for a mistrial. *Id.* The court ruled that the comment was improper, but did not rise to the level of a mistrial and told the jury to completely disregard the statement made by the assistant district attorney. Tr. 3-4.

Later during cross-examination, the prosecution asked the witness, "why are you just waiting until today to come in and make this statement that you were with him the whole time." Tr. 143. Flowers immediately objected to the form of the question and moved for a mistrial. *Id.* After argument from both sides, the trial court ruled that "the cumulative affect of what has occurred requires the Court to grant this mistrial. It's not just this incident. It's the opening statement. It's the questions, the way they were asked to the children, and some things that were said by way almost arising to testimony from the district attorney to get information before the jury that did not properly come from the witness, ths Court is going to grant the motion." Tr. 144.

"The double jeopardy prohibition does not mean that every time a trial abort or does not end with a final judgment the defendant must be set free." ***Schawarzauer v. State***, 339 So.2d 980, 982 (Mis. 1976). "However, if a mistrial is granted upon the court's own motion, or upon the state's motion, a second trial is barred because of double

jeopardy unless there was a manifest necessity for the mistrial, taking into consideration all the circumstances." ***Watts v. State***, 492 So.2d 1281, 1284 (Miss. 1986); ***Jones v. State***, 398 So.2d 1312 (Miss. 1981). "Some examples of manifest necessity are: failure of a jury to agree on a verdict, . . . ; biased jurors; . . . ; an otherwise tainted jury; . . .; improper separation of jury; . . . when jurors otherwise 'demonstrate their willingness to abide by the instructions of the court,'" ***Watts***, 492 So.2d at 1284. *See* ***Jones***, 398 So.2d at 1315, 1318; ***Schwarzauer***, 339 So.2d at 982.

"Even if the state does not move for a mistrial, the involvement of the state is relevant in determining whether a second trial is time barred." ***Watts***, 492 So.2d at 1284. *See* ***Carter v. State***, 402 So.2d 817, 821-22 (Miss. 1981); ***Jones***, 398 So.2d at 1318.

"Generally, a defendant who moves for a mistrial is barred from later complaining of double jeopardy." ***Jenkins v. State***, 759 So.2d 1229, 1234 (Miss. 2000). *See* ***McClendon v. State***, 387 So.2d 112, 114 (Miss. 1980). "To overcome this bar, (Defendant) must show that error occurred and that it was committed by the prosecution purposefully to force (Defendant) to move for a mistrial." ***Jenkins***, 759 So.2d at 1234; ***Carter***, 402 So.2d at 821. *See also* ***Divans v. California***, 434 U.S. 1303, 1303, 98 S.Ct. 1, 1, 54 L.Ed.2d 14, 15 (1977). "Without proof of judicial error prejudicing the defendant, or 'bad faith prosecutorial misconduct,' double jeopardy does not arise." ***Jenkins***, 759 So.2d at 1234; ***United States v. Jorn***, 400 U.S. 470, 482, 91 Sct. 547, 557, 27 L.Ed.2d 543, 555 (1970)(plurality).

Flowers asked the trial court to grant a mistrial. Tr. 3, 143. The trial court declared a mistrial and told the assistant district attorney that it was due to his conduct during the course of the trial. Tr. 144.

In ***McDowell***, the court declared a mistrial after a witness stated that he had shown a photo line-up to the undercover police officer in the presence of the jury. ***McDowell v. State***, 807 So.2d 413, 422 (Miss. 2001). At that point there was confusion as to whteth the statement had actually been made a whether the officer had previously identified McDowell from the video prior to looking at the photo line-up. *Id.* After the court was unsure how to cure the error, McDowell moved for a mistrial and the court granted the motion. *Id.* The trial court made it clear that there was no sign of prosecutorial misconduct in the testimony that lead to a mistrial. *Id.* Therefore double jeopardy did not apply.

McDowell can be distinguished from the case at hand. The court clearly took offense to the conduct of the prosecution. The court stated that it was not just the current incident, it was the opening statement, the way he was asking questions to the children, and by the way he was trying to get information before the jury that did not properly come from the witness. Tr. 144. Double jeopardy arises due to the "bad faith prosecutorial misconduct" of the assistant district attorney. ***Jenkins***, 759 So.2d at 1234.

Flowers asked this court to reverse and render his case under double jeopardy because the State was barred from prosecuting Flowers again because the first case resulted in a mistrial based on prosecutorial misconduct.

ISSUE NO. 2

RAPHAEL FLOWERS WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN CHARACTER EVIDENCE OF PRIOR BAD ACTS OR OTHER UNRELATED CRIMES NOT CHARGED IN THE INDICTMENT WERE WAS ADMITTED OVER FLOWERS' OBJECTION.

Flowers objected to the contents of the alleged statement made by Flowers to police after he was arrested. Tr. 333. Flowers objected to the fact that certain portions of the statement not charged in the indictment should not be read to the jury. *Id.* The were allegations of fondling in the statement, however, it was not charged in the indictment and should not have been presented to the jury. The court overruled the objection. Tr. 334.

"Generally, evidence of a crime other than that charged in the indictment is not admissible evidence against the accused." ***Duplantis v. State***, 644 So.2d 1235, 1246 (Miss. 1994); ***Ladner v. State***, 584 So.2d 743, 758 (Miss. 1991). "However, where another crime or act is 'so interrelated [to the charged crime] as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences,' proof of the other crime or act is admissible." ***Duplantis***, 644 So.2d at 1246 (*quoting* ***Wheeler v. State***, 536 So.2d 1347, 1352 (Miss. 1988)); ***Neal v. State***, 451 So.2d 743, 759 (Miss. 1984). "Proof of another crime or act is also admissible where necessary to identify the defendant, to prove motive . . . ." *Id.*

The statements about Flowers' alleged prior bad acts fall within the area of bad acts as contemplated by M.R.E. 404(b). Mississippi Rule of Evidence 404(b) provides:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

Mississippi Rules of Evidence 404(b).

A two-part analysis is conducted in order to determine whether to admit evidence under Rule 404(b). "The evidence offered must (1) be relevant to prove a material issue other than the defendants's character; and (2) the probative value of the evidence must outweigh the prejudicial effect." ***Crawford v. State***, 754 So.2d 1211, 1220 (Miss. 2000).

This Court stated that in order to pass muster under Rule 404(b), evidence must "be such that it satisfies some other evidentiary purpose beyond simply showing that [the defendant] is the sort of fellow likely to commit the crime charged." ***Watts v. State***, 635 So.2d 1364, 1368 (Miss. 1994) (quoting ***Jenkins v. State***, 507 So.2d 89, 91 (Miss. 1987)). Even if the evidence does pass muster under Rule 404(b), it must still pass the test of Rule 403. ***Watts***, 635 So.2d at 1368. The Court in ***Jenkins*** also stated:

> To be sure, evidence admissible under Rule 404(b) is also subject to the prejudice test of Rule 403; that is, even though the Circuit Court considered the evidence at issue under Rule 404(b), it was still required by Rule 403 to consider whether its probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass. ***Watts***, 635 So.2d at 1368 (Miss. 1994) (quoting ***Jenkins***, 507 So.2d at 93 (Miss. 1987)).

In the present case, the trial court did not address either prong. Looking at the first prong, this Court has stated that the "[a]dmission of evidence of unrelated crimes for

the purpose of showing the defendant acted in conformity therewith has repeated been found reversible error." ***Duplantis***, 644 So.2d at 1247; ***Rose v. State***, 556 So.2d 728, 731 (Miss. 1990). Flowers was charged with Statutory Rape in the indictment. Clerk's Paper 1, R.E. 24. However, in the alleged statement, Jacorius grabbed Flowers' penis. Exhibit S-2, R.E. 44. Jacorius further sucked on Flowers' penis. *Id.* The evidence should not have been admitted pursuant to one of the exceptions enumerated in M.R.E. 404(b). These facts should not have been presented to the jury because they were not listed in the indictment. These facts were clearly presented to inflame the jury.

Furthermore, the probative value of the evidence did not substantially outweigh the prejudicial effect of the prior alleged crimes as required by M.R.E. 403. As previously indicated, the prior alleged bad acts did not have any probative value regarding the exceptions set forth in M.R.E. 404(b), so there is no possible way it could have substantially outweighed the prejudicial effect of the evidence.

M.R.E. 403 is "the ultimate filter through which all otherwise admissible evidence must pass." ***Brooks v. State***, 903 So.2d 691, 699 (Miss. 2005). When an objection is offered, and the objection is overruled, the objection shall be deemed an invocation of the right to M.R.E. 403 balancing analysis by the trial court. ***Smith v. State***, 656 So.2d 95, 100 (Miss. 1995), *overruled on other grounds*, ***Brown v. State***, 890 So.2d 901, 912 (Miss. 2004). "We say for the future, however, that wherever 404(b) evidence is offered and there is an objection which is overruled, the objection shall be deemed an invocation of the right to the M.R.E 403 balancing analysis. . . ." ***Easter v. State***, 878 So.2d 10, 21

(Miss. 2004). "If prior bad acts evidence falls within a 404(b) exception, its prejudicial effect must still be weighed against its probative value to determine admissibility under Mississippi Rule of Evidence 403." ***Underwood v. State***, 708 So.2d 18, 32 (Miss. 1998). *See also* ***Edlin v. State***, 533 So.2d 403 (Miss. 1998); ***Swington v. State***, 742 So.2d 1106, 1112 (Miss. 1999).

Even if evidence is relevant, M.R.E. 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, ..." ***Watts***, 635 So.2d at 1368 (Miss. 1994). "Candor requires acknowledgment that, though technically relevant in the sense just mentioned, evidence of the character of that at issue here is not of great probative value." *Id.* However, "[i]f presented to the jury, it has great prejudicial effect and it would arguably inject collateral issues into the case. *Id. See* ***Michelson v. United States***, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-19, 93 L.Ed. 168, 173-74 (1948); *McCormick, The Law of Evidence,* Section 190. The evidence in the case at hand was given directly to the jury from the testimony of Officer Spencer. Tr. 334.

It was reversal error for evidence of a prior bad act to have been presented to the jury. Reversal of the trial court judgment, and a remand for a new trial is the appropriate remedy in this instance. Therefore, the Appellant respectfully submits that the Court should reverse this case and remand to the Leflore County Circuit Court for a new trial with the exclusion of the evidence of the other bad acts.

ISSUE NO. 3

THE TRIAL COURT ERRED IN DENYING FLOWERS' MOTION FOR A NEW TRIAL AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY FAILING TO DISCLOSE MEDICAL RECORDS AND THAT A WITNESS WAS RECEIVING THERAPY.

During the sentencing phase of the trial, a witness for the prosecution began talking about Jacorius going to counseling and taking medications. Tr. 547. Flowers contends that the State failed to disclose medical reports and one (1) year of treatment by Jacorius.

Flowers submits that the matter at bar was a failure of the State to even present this to the court under the express provisions **of Uniform Circuit and County Court Rules, Rule 9.04G** for an evidentiary determination or in the least review of the medical report, its content, its value, the manner and means of care to the victim and what exculpatory value was denied to Flowers.

Flowers submits that without even knowing of the existence of the potentially valuable medical record and treatment that was intensely administered to Jacorius, such information must have been deemed a violation of Flowers' due process and rises to the threshold of a constitutional deprivation in this matter such the State had knowledge of this ongoing medical treatment for one year.

The State violated the discovery requirements by failing to disclose the information prior to the trial. ***Box v. State***, 437 So.2d 19 (Miss. 1983) first set forth the procedure that trial courts should follow in settling discovery violations, however that

procedure is now set forth in **Rule 9.04 of the Uniform Circuit and County Court Rules**. ***McCullough v. State***, 750 So.2d 1212, 1217 (Miss. 1999), ***Duplantis v. State***, 644 So.2d 1235 (Miss. 1994).

The Mississippi Supreme Court has held that "the essential purpose of Rule 9.04 is the elimination of trial by ambush and surprise." ***Robinson v. State***, 508 So.2d 1067, 1070 (Miss. 1987). See also **Rule 9.04** of the Uniform Circuit and County Court Rules. **Rule 9.04** states the following:

> [T]he prosecution must disclose to each defendant or to defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order the following which is in the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecution:
> 1. Names address of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statements written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by any such witness; . . .
> 4. Any reports, statements, or opinions of experts, written, recorded or otherwise preserved, made in connection with the particular case and the substance of any oral statement made by such expert; . . .
> 6. Any exculpatory material concerning the defendant.

U.R.C.C.C. § 9.04 (1997).

"Disclosure is the hallmark of fairness and the quest for justice that should be the goal of the criminal justice system." ***Wooten v. State***, 811 So.2d 355, 365 (Miss. Ct. App. 2001); ***Robinson***, 508 So.2d at 1070. When the state violates the rules of discovery, the trial court should abide by the rules set out in ***Box***, which is now reflected in **Rule 9.04.** ***McCullough***, 750 So.2d at 1217; ***Box***, 437 So.2d at 23-24; ***Powell v. State***, 925 So.2d

878, 881 (Miss. Ct. App. 2005). **See also U.R.C.C.P. § 9.04 (1997).** The following procedure is set out in **Rule 9.04**:

> 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 or time reasonable 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.

U.R.C.C.C. 9.04 I. The Mississippi Supreme Court held in ***McCullough***, that failure to follow the ***Box*** guidelines[4] is prejudicial error, requiring reversal and remand. ***McCullough***, 750 So.2d at 1217; ***Snelson v. State***, 704 So.2d 452, 458 (Miss. 1997); ***Duplantis***, 644 So.2d at 1250; ***Darghty v. State***, 530 So.2d 27, 33 (Miss. 1998).

Rule 9.04 states that the defense should have a reasonable time to examine the newly produced information, but Flowers had absolutely no time to review and prepare for the new information about counseling for Jacorius. A new trial would have allowed counsel for Flowers to prepare and adjust his strategy for the newly discovered

---

[4]***Box*** guidelines are now reflected in Rule 9.04 of the Uniform Circuit and County Court Rules. ***McCullough v. State***, 750 So.2d 1212, 1217 (Miss. 1999); ***Duplantis v. State***, 644 So.2d 1235 (Miss. 1994).

information. The Mississippi Supreme Court stated that there is no hard and fast rule determining how much time is a reasonable time for the defense to review the newly acquired evidence. ***Inman v. State***, 515 So.2d 1150, 1153 (Miss. 1987); ***Wooten***, 811 So.2d at 365.

The facts in the ***McCullough*** case address the issue of newly acquired evidence. In ***McCullough***, the prosecution informed McCullough that it intended to impeach his testimony using newly acquired evidence. The evidence was not provided to McCullough until the morning of trial. McCullough made an objection to the evidence and requested a continuance. The Mississippi Supreme Court held that "[s]ince the defense was not presented with the evidence until the morning of the trial, and McCullough requested a continuance which was denied, this Court finds prejudicial error." ***McCullough***, 750 So.2d at 1217. The Court in ***McCullough*** reversed and remanded the case. These facts are related to the facts in the case involving Flowers. However, in case at hand, Flowers did not know about the counseling until the sentencing phase of the trial, whereas in ***McCullough*** they found out on the morning of trial.

The Mississippi Court of Appeals held in ***Powell*** that a violation of the discovery rules by the prosecution does not always result in a reversal of the conviction. ***Powell***, 925 So.2d at 882. However, that case can be distinguished. In ***Powell***, this court said that it was error for the State to use an impeaching document that was not disclosed to the defendant. *Id.* However, this court did not reverse because the defendant failed to bring the matter to the trial court's attention. *Id.* Powell filed a motion for a new trial after he

was convicted stating that the court erred in allowing the State to impeach him because he was not given a copy of the impeaching document. *Id.* The Mississippi Court of Appeals continued to say that if Powell would have brought this information up to the trial court during the trial, then the trial court would have been compelled to proceed in accordance with **Rule 9.04 I**. *Id.* The Court in ***Inman*** stated that "[w]here that State is tardy in furnishing discovery which it was obligated to disclose and after an initial objection is made by the defense, the defendant is entitled upon a request to a continuance postponement of the proceeds reasonable under the circumstances." *Id.* Flowers in his Motion for Judgment Notwithstanding the Verdict and Motion for New Trial asks for a new trial because a violation of Flowers' constitutional rights.

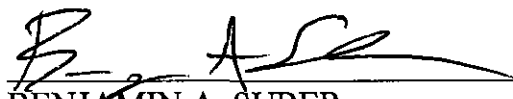
In ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court of the United States held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Uniform Circuit and County Court Rule 9.04(A)(1) main purpose is to prevent trial by ambush. ***Dotson v. State***, 593 So.2d 7, 12 (Miss. 1991).

CONCLUSION

Raphael Flowers respectfully requests that his conviction for statutory rape be reversed and rendered, or in the alternative reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Raphael Flowers, Appellant

BY: 

BENJAMIN A. SUBER
MISSISSIPPI BAR NO. [redacted]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200
Facsimile: 601-576-4205

CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Raphael Flowers, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Jannie M. Lewis
Circuit Court Judge
P.o. Bxo 2166
Lexington, MS 39095

Honorable Dewayne Richardson
District Attorney, District 4
P.O. Box 426
Greenville, MS 38702

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 6 day of October, 2009.

Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200