IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RANDY LAMAR TAPPER **APPELLANT**

V. **NO. 2009-KA-0544-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. Randy Lamar Tapper, Appellant
3. Honorable Anthony Lawrence, III, District Attorney
4. Honorable Robert P. Krebs, Circuit Court Judge

This the 17th day of August, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RANDY LAMAR TAPPER — APPELLANT

V. — NO. 2009-KA-0544-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT VIOLATED THE APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL JURY BY FAILING TO EXCUSE JURORS FOR CAUSE

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO QUASH THE INDICTMENT FOR NOT ADEQUATELY INFORMING THE APPELLANT OF THE NATURE OF THE CHARGES AGAINST HIM.

ISSUE THREE:

WHETHER THE APPELLANT'S CONVICTION FOR TOUCHING MERGES WITH HIS CONVICTION FOR SEXUAL BATTERY AND THEREFORE, VIOLATES HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

STATEMENT OF INCARCERATION

Randy Tapper, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jackson County, Mississippi, and a judgment of conviction on two (2) counts of sexual battery and five (5) counts of unlawful touching against Randy Tapper, following a trial on January 26-30, 2009, the honorable Robert P. Krebs, Circuit Judge, presiding. Tapper was subsequently sentenced to two life sentences, and five fifteen year sentences, all to run consecutively, in the custody of the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, in the summer of 2006, Janice Crawford gave two of her children, L.P. and C.C[1]., permission to play at the house of Randy Tapper, the Appellant. (T. 268). Specifically, the two girls went to Tapper's house on August 18th, 2006. (T. 272). Tapper picked the girls up in his car. (T. 273). The girls came home on the 20th. (T. 273).

Crawford testified that she did not notice anything odd at first. (T. 274). When Crawford gave the girls a bath, however, she noticed redness on their vaginas. (T. 275). The girls also told Crawford "they were burning." (T. 275). Concerned, Crawford took the children to the emergency

1. To protect the identity of the girls, their names will not be used. At the time of the events in question, C.C. was six years old and L.P. was eight years old. (T. 266-67)

room. (T. 275).

Toby Nix, an emergency room nurse at Singing River Hospital testified to treating C.C. on August 20, 2006. (T. 359). Nurse Nix found erythema, another term for redness, in the girl's vaginal area. (T. 364-65). Specifically, Nurse Nix found redness in her labial folds and on her hymen. (T. 365). Nurse Nix also found a single pinworm in the hymenal area itself. (T. 366). Catherine Shaver, a registered nurse at Singing River Hospital testified to performing an examination on L.P. on August 20, 2006. (T. 387). During the course of the examination, Nurse Shaver noticed erythema in L.P.'s vagina. (T. 395).

Nicole Tapper, Randy Tapper's wife, testified that during the summer of 2006, L.P. and C.C. visited her home and would stay the night. (T. 309). When the two stayed the night, they would sleep with Randy Tapper. (T. 309). Nicole testified that on the night in question, when she would go into the room, Randy would be sleeping in between the two girls. (T. 311). At all times, the girls and Randy Tapper were clothed and the lights were on. (T. 317-318). Nicole testified that Randy Tapper had told her that one of the girls had fallen off the bed. (T. 311). Nicole testified that in 2004, S.F., another young girl, would stay the night. (T. 313). Nicole testified that during that time Randy Tapper did not sleep in the same room as the child. (T. 313). L.P. testified that when she would spent the night, they would slept in Randy Tapper's daughter's room. (T. 330). Only one time did the children sleep in Nicole Tapper's room. (T. 330).

L.P. testified that when she spent the night at Tapper's house, she was touched in what she called the "wrong spot," which she identified as being her vagina. (T. 332-33). L.P. indicated that Tapper touched her with both his hand and his penis. (T. 333-35). L.P. testified that Tapper also touched her leg. (T. 335). L.P. testified that when Tapper attempted to put his penis into her vagina, she screamed, which caused Nicole Tapper to come into the room. (T. 337). L.P. testified that

Randy Tapper told Nicole that she had fallen of the bed. (T. 337). L.P. testified that that was not the truth. (T. 337). When Randy Tapper left to go to the bathroom, L.P. went to the corner and cried. (T. 338).

L.P. further testified that over the course of the summer Tapper touched her "about five times" (T. 341). On those "about five" times, Tapper allegedly used his penis and touched her vaginal area. (T. 341).

C.C. testified that Tapper touched her with his penis. (T. 348). The majority of her testimony, however, indicated that she could not remember any of the relevant facts surrounding the incident. (T. 350-53).

Laura Greer, the former program coordinator for South Mississippi Child Advocacy Center, performed a forensic interview on L.P. and C.C. (T. 418). The jury was played a copy of the interview. (T. 432). Laura Greer offered no expert opinion on the veracity of the allegations of the girls.

The State then called S.F., over the objection of defense counsel. The State intended to call S.F. to testify as to a prior allegation of sexual abuse pursuant with this Court's recent holding in ***Derouen v. State***, 994 So.2d 748 (Miss. 2008). S.F.'s testimony was objected to under Mississippi Rules of Evidence 401, 402, 403, and 404. (T. 435). The State argued that S.F.'s testimony was to go to plan, opportunity, motive, intent and preparation. (T. 435). Ultimately, the trial court allowed S.F. to testify. (T. 436).

S.F. testified that she and her sister would go to Randy Tapper's house when she was nine years old. (T. 440). S.F. testified that she spend the night at Tapper's and sleep in the bed with her sister, Tapper, and Tapper's daughter. (T. 441). S.F. testified that Tapper "always tried to take his private and put it in mine." (T. 441). S.F. further testified that Tapper told her that if she told

anyone, he would kill her. (T. 445).

Tapper took the stand in his own defense. (T. 455). Tapper testified that he was allowing the children to stay at his house because their family had been displaced by Hurricane Katrina. (T. 456-57). Tapper admitted to sleeping in the same room with the children twice, but only did so because the girls were scared. (T. 459).

Tapper denied sexual contact with the girls on the night in question as well as any contact with L.P. throughout the duration of the summer. (T. 460). Tapper testified that the reason the children were making allegations against him is because he "knew inappropriate things going on inside [their mother's] home" and that their mother was afraid that he would turn her in to the authorities. (T. 461). On cross-examination, Tapper testified that the girls' family was selling drugs out of their FEMA trailer. (T. 485-86). After Tapper's testimony, the defense rested.

The jury found Tapper guilty on all counts presented to them. (C.P. 275, R.E. 15). On March 6, 2009, Tapper filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial. (C.P. 280-84, R.E. 17-21). On March 26, 2009, the motion was denied. (C.P. 288 R.E. 25). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, Woods filed a notice of appeal. (C.P. 289, R.E. 25).

SUMMARY OF THE ARGUMENT

The trial court violated Tapper's fundamental right to a fair trial when it made improper rulings concerning the use of for cause strikes during voir dire. The State was granted a motion to strike juror number 23 for cause because he might possibly have been prejudiced against the State, even though that juror expressed that he could ultimately be fair. On the other hand, Tapper was not allowed to strike for cause three jurors who displayed a complete disregard for fundamental rights.

Whether intentional or not, this result substantially and unfairly favored the State. The process by which this jury was selected was fundamentally unfair, prejudiced the appellant, and violated his Constitutional right to a trial by a fair and impartial jury.

Secondly, the trial Court erred in not quashing the indictment. Count IV, V, VI, and VII all contained identical language that provide no notice to Tapper of what the allegations against him were. Moreover, the date range in the counts spanned nearly three months. Exacerbating the problem, the State presented no evidence at trial to deduce when in this three month span the alleged events took place. The indictment rendered Tapper incapable of presenting defenses other than denial, and therefore prejudiced him and warrants reversal.

Thirdly, under Mississippi Law, touching is a lesser included offense of sexual battery with penetration. Tapper was convicted of both touching[2] and sexual battery with digital penetration of the anus. This Court has held that it is impossible to commit sexual battery with penetration without committing touching; therefore, these two crimes merge for the purposes of Double Jeopardy clause of the United States Constitution. Because Tapper's rights under the Double Jeopardy clause have been violated, his conviction for touching should be reversed.

ARGUMENT

ISSUE ONE: WHETHER THE TRIAL COURT VIOLATED THE APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL JURY BY FAILING TO EXCUSE JURORS FOR CAUSE

i. Standard of Review

The Mississippi Constitution guarantees every person the right to trial by an impartial jury.

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2. The terms "touching," "fondling," and "molestation" are all used as a reference for a violation of **Mississippi Code Annotated 97-5-23.** For the purpose of consistence, unless quoting, the Appellant will solely refer to the act as "touching."

Miss. Const. Art. 3, § 26. Generally a juror who may be removed on a challenge for cause is one against whom a cause for challenge exists that would likely effect his competency or his impartiality at trial. ***Billot v. State***, 454 So. 2d 445, 457 (Miss. 1984). The determination of whether a juror is fair or impartial is a judicial question, and it will not be set aside except where there is a finding that the determination clearly appears to be wrong. ***West v. State***, 820 So. 2d 668, 671 (Miss. 2001) (citing ***Carr v. State***, 555 So. 2d 59, 60 (Miss. 1989)).

ii. The trial court erred in refusing to strike juror's 6, 9 and 31.

No one can dispute the fact that everyone is entitled to a trial by a fair and impartial jury. This right is unequivocally protected by the Mississippi Constitution. The right to trial by a fair and impartial jury implicitly includes the right to a fundamentally fair selection process. It is that right which was violated in the case sub judice, when the trial court brushed aside potential jurors unmistakably incorrect views on fundamental rights. These views, clearly expressed, precluded these prospective jurors from being fair and impartial. Thus, these jurors should have been excused for cause and it was error for the trial court to refuse to do so.

During voir dire, several jurors declared that the appellant should have to prove his innocence in clear contradiction to the appellants fundamental right not to testify. Specifically, juror number 6 said the appellant should be, "required to prove his innocence." (T. 231). Juror number 9 stated, "I think everybody is – they should – I mean, if they was charged with something, they should try to prove that they are innocent." *Id.* Juror number 31 stated;

> "A. He would need to present his evidence. It wouldn't be fair just left all on the state. He would need evidence from him as well.
>
> Q. Okay. I'm sorry. Just to be clear, what you're saying is that you think Mr. Tapper would have to present evidence in order to be found not guilty of these offenses?
>
> A. Right."

(T. 236-237).

These three jurors believed that the burden should lie on the appellant rather than the State, even going so far as to say it would not be fair to require the State to shoulder the burden. These inherently incorrect views cannot be ignored as they are completely inapposite to our justice system. In spite of these views, the trial court refused to strike them for cause because they were expressing "opinions" and because they said they would follow the law. (T. 245-246). Statements by a prospective juror that he or she will be fair and follow the law are entitled to considerable deference. ***Scott v. Ball***, 595 So. 2d 848, 850 (Miss. 1992) (see also ***Lester v. State***, 692 So. 2d 755 (Miss. 1997) (overruled on other grounds by, ***Weatherspoon v. State***, 732 So. 2d 158 (Miss. 1998)). Even so, considerable deference does not command absolute adherence, especially where the prospective juror explicitly states beliefs so substantially unfair and prejudicial to the appellant.

The trial court's ruling seems to imply that a prospective juror who either does not believe in or accept the fundamental rights afforded defendants by the Constitution is not foreclosed from being fair and impartial, so long as they say they are. Under such reasoning, irrespective of the fact that a person harbors the opinion that the Constitution does not apply, that person can listen to the evidence and come to a fair and impartial decision. This is a non sequitur. You cannot be fair and impartial if you believe or hold the "opinion" that a person must testify or prove his innocence. To hold otherwise, is the equivalent of saying a prospective juror who openly states he has already formed an opinion as to the defendant's guilt can somehow listen to the evidence and remain fair and impartial.

The law is crystal clear. A defendant has the right not to testify and shall not be required to prove his innocence. When a juror emphatically disregards the law and fundamental rights of the defendant, how can he be fair and impartial? The answer is simple, he cannot.

In the case at bar, defense counsel moved to strike these jurors for cause based on their stated belief that the appellant should have to prove his innocence. These views would likely have effected their competence and impartiality at trial, regardless of whether they said they could be fair. The trial court clearly appears to have been wrong in its determination that these jurors could be fair and impartial. Therefore, the trial court erred in refusing to strike them for cause.

The appellant was then forced to exhaust his peremptory challenges in order to remove them from the panel. The appellant understands that a prerequisite for establishing a claim of a denial of constitutional rights due to denial of a challenge for cause is not only a showing that the defendant had exhausted all of his peremptory challenges, but, also that the incompetent juror was forced to sit on the jury. ***Chisholm v. State***, 529 So. 2d 635, 639 (Miss. 1988). However, the Appellant respectfully submits that damage is done regardless of whether the incompetent jurors end up sitting on the jury. The Appellant was forced to use peremptory challenges on those who lawfully should have been struck for cause. A rule which is not enforced is no rule at all. ***Box v. State***, 437 So. 2d 19, 21 (Miss. 1983). Therefore, the Appellant respectfully submits that this Court enforce the rule and find the trial court's failure to strike three incompetent jurors for cause error.

ii. The trial court erred in striking juror number 23 for cause.

The State moved to strike juror number 23 for cause because his brother had been prosecuted by the same office and tried by the same judge. (T. 242). Defense counsel objected to the strike for cause because juror number 23 responded "yes" to the question of whether he could be fair and impartial regardless of his brother's prior conviction. The State reacted by saying, "[w]hen he came back the second time, Your Honor, it was still eating him." *Id.* The trial court, in clear contradistinction to how it treated defense counsel's motions to strike, summarily ordered he be struck for cause. *Id.* It is unclear as to why juror number 23 was struck for cause after he stated he

could be fair and impartial, while juror numbers 6, 9, and 31 were not after the same response to the same question.

The disparate treatment by the trial court of defense counsel's motions as compared to the State's motion cannot be reconciled. Juror number 23 merely stated he thought his brother was innocent and his trial unfair, but despite that, he could be fair and impartial in this case after listening to the facts and law. (T. 188). Nevertheless, the trial court granted the strike for cause. When defense counsel moved to strike jurors whose stated beliefs would hold the appellant to an *unconstitutional burden*, the trial court found them to be fair and impartial because those beliefs were opinions. Juror number 23's opinion that his brother's trial was unfair somehow precluded him from being fair and impartial, whereas juror numbers 6, 9, and 31's opinion that the appellant should have to prove his innocence had no bearing on their impartiality. Such disparate treatment suggests the stage was set for conviction before the trial even began.

The Appellant submits that such inherently unfair and disparate treatment should not go unnoticed and that such treatment constitutes egregious error.

iii. Conclusion

The State was granted a motion to strike juror number 23 for cause because he might possibly have been prejudiced against the State. On the other hand, the appellant was not allowed to strike for cause three jurors who displayed an absolute disregard for his fundamental rights. Whether intentional or not, this result substantially and unfairly favored the State. The process by which this jury was selected was fundamentally unfair, prejudiced the appellant, and violated his Constitutional right to a trial by a fair and impartial jury. The appellant respectfully submits that this constitutes error.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO

QUASH THE INDICTMENT FOR NOT ADEQUATELY INFORMING THE APPELLANT OF THE NATURE OF THE CHARGES AGAINST HIM.

i. Standard of Review

Claims of defective indictment are questions of law afforded a broad standard of *de novo* review. ***Jones v. State***, 993 So. 2d 386, 394 (Miss. 2008)(citing ***Nguyen v. State***, 761 So. 2d 873, 874 (Miss. 2000) and ***Peterson v. State***, 671 So. 2d 647, 652 (Miss. 1996)(superceded by statute)).

ii. The indictment in the instant case was void.

From the onset of the proceedings, defense counsel argued that Counts IV, V, VI, and VII did not adequately inform Tapper of the allegations against him. Prior to trial, Tapper filed a Demurrer/Motion to Quash alleging the indictment to be defective. (C.P. 166-167, R.E. 22-24). Tapper also argued this motion in pre-trial hearings. (R.E. 118). The motion was denied by the trial court. (T. 124, 126-127). All four counts alleged the following:

> in Jackson County, Mississippi, on or between June 1, 2006 and August 19, 2006, being at the time in question over the age of eighteen (18) years, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires, did unlawfully, willfully and feloniously handle, touch, or rub with his hand, or any part of his body, or any member thereof, the vagina of [L.P.], a child who was at the time in question under the age of sixteen (16) years, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

(C.P. 9, R.E. 13).

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." ***Jones v. State***, 993 So. 2d at 394 (citing ***Moses v. State***, 795 So. 2d 569, 571 (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**).

The indictment in the case *sub judice*, as it relates to counts IV, V, VI, and VII, wholly fails to adequately notify Randy Tapper of the nature and cause of the accusation. "To 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. It is also clear that this basic failure in the form of the charging document could not be, and was not, cured by proof received during the trial." ***Moses v. State***, 795 So. 2d 569, 572 (Miss. Ct. App. 2001)(citing ***Copeland v. State***, 423 So. 2d 1333, 1336 (Miss. 1982).

Tapper was totally uninformed by the indictment as to the totality of the crime alleged. Moreover, no evidence was presented at trial that could support a defense. The testimony at trial was that Tapper touched L.P. "about five" times. (T. 341).

While the Appellant concedes that certain leeway is given to child witnesses, the indictment and the testimony presented at trial provided no real grounds for which Tapper could defend himself other than by denying his involvement. The dates were never developed as to when Tapper allegedly touched L.P. All that existed was an allegation that it had happened. A "pivotal consideration when considering the validity of an indictment on appeal, 'is whether the defendant was prejudiced in the preparation of his defense'" ***Caston v. State***, 949 So. 2d 852, 858 (Miss. Ct. App. 2007)(quoting ***Wilson v. State***, 815 So. 2d 439, 443 (Miss. Ct. App. 2002)).

Had the indictment specifically contained information which could inform Tapper of the charges against him, he could have mounted a more specific defense to the allegations. In essence, a broad, non-specific indictment, in the instant case denied Tapper his ability to present any other defense than denial. For instance, in general, if no specific date is alleged anywhere in the indictment or the evidence presented at trial it would be next to impossible to present an adequate alibi defense. "I don't know when this was alleged to happen, but I wasn't there." is unlikely to sway

the minds of this state's jurors.

This Court has held: "In all fairness, notice of a specific date is often essential to the preparation of a defense-especially where an alibi defense is relied on." ***Wilson v. State***, 515 So., 2d 1181, 1182 (Miss. 1987). In the instant case, there is no way to determine what defense could have been presented, because there was never any narrowing of the dates in the indictment by the evidence submitted at trial.

iii. Conclusion.

Tapper was not adequately informed of the charges against him in his indictment. The vague language of the indictment did not allow for Tapper to even be aware of any possible defense he might have for the allegations against him. Therefore, irreparable prejudice resulted and a new trial is requested.

ISSUE THREE: WHETHER THE APPELLANT'S CONVICTION FOR TOUCHING MERGES WITH HIS CONVICTION FOR SEXUAL BATTERY AND THEREFORE, VIOLATES HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

i. Standard of Review.

Mississippi Appellate Courts apply a *de novo* standard of review to claims of double jeopardy. ***Brown v. State***, 731 So. 2d 595, 598 (Miss. 1999).

ii. Touching is a lesser included offense of sexual battery with penetration, and the Appellant's conviction of both is in violation of his Double Jeopardy rights.

The Double Jeopardy clause exists for three separate purposes. It protects criminal defendants from:

> (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction and (3) multiple punishments for the same offense. These protections stem from the premise that an accused should not be *tried or punished twice* for the same offense.

Brawner v. State, 947 So. 2d 254, 266 (Miss. 2006)(internal citations omitted)(emphasis added).

The United States Supreme Court has consistently interpreted the Double Jeopardy Clause "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." ***Burks v. United States***, 437 U.S. 1, 11 (1978)(internal citations omitted).

In ***Whalen v. United States***, the United States Supreme Court addressed whether cumulative punishments for the offenses of rape and of the killing of the same victim in the perpetration of the crime of rape was contrary to constitutional law. ***Whalen v. United States***, 445 U.S. 684 (1980). The ***Whalen*** Court relied on ***Blockburger v. United States***, 284 U.S. 229 (1932) holding that the two statutes in controversy proscribed the same offense.

The ***Blockburger*** Rule states:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304.

The ***Whalen*** Court noted, however, that ***Blockburger*** established a rule of statutory construction:

> The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

Whalen, 445 U.S. at 691-92.

In the instant case, there is nothing to indicate that the Mississippi Legislature authorized the touching and sexual battery to be punished cumulatively for the same act. Under Mississippi Law,

touching is a lesser-included offense of sexual battery with penetration. ***Friley v. State***, 879 So. 2d 1031, 1035 (Miss. 2004).

With respect to Mississippi Courts, in double-jeopardy claims, Mississippi applies the "same elements" test set forth in ***Blockburger***. See, e.g., ***Thomas v. State***, 711 So. 2d 867, 870 (Miss. 1998). Even though a defendant may be charged with violation of two separate statutes, we look to see whether "each [statutory] provision requires proof of a fact which the other does not." ***Blockburger***, 284 U.S. 299 at 304.

A conviction can withstand double-jeopardy analysis only if each offense contains an element not contained in the other. ***Powell v. State***, 806 So.2d 1069, 1074 (Miss. 2001). If they do not, the two offenses are, for double-jeopardy purposes, considered the same offense, barring prosecution and punishment for both. ***Id.***

> Mississippi Code Annotated § 97-3-95 provides, in pertinent part;
>
> (1) A person is guilty of sexual battery if he or she engages in sexual penetration with:
>
> > (d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) more months older than the child.

Miss. Code Ann § 97-3-95.

> Mississippi Code Annotated § 97-5-23 defines the crime of touching occurs when:
>
> (1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of sixteen (16) years, with or without the child's consent. . . ."

Miss. Code Ann. § 97-5-23.

In Mississippi courts, it is long-standing precedent that two independent crimes merge into one when the greater crime necessarily includes all of the elements of the lesser crime as a lesser

included offense. ***Newburn v. State***, 205 So. 2d 260, 264 (Miss. 1967).

In ***Friley v. State***, this Court, in an opinion written by then Presiding Justice Waller, concluded that molestation (touching) is a lesser included offense of sexual battery. ***Friley v. State***, 879 So. 2d 1031, 1035 (Miss. 2004).[3]

There, the Appellant was indicted under **97-3-95** for sexual battery, but ultimately convicted under **97-5-23** after the trial court, over objection, allowed the State's lesser-included offense instruction for touching. ***Id.*** at 1036. On Appeal. This Court ultimately found that the jury instruction was proper because touching was a lesser included offense of sexual battery with penetration. The Court held:

> Friley was indicted for sexual battery, which requires penetration. He was convicted of molestation, which requires touching. A plain reading of the statutes shows that sexual battery (penetration) includes molestation (touching). **It is impossible to penetrate without touching.**

Id. at 1035 (emphasis added).

To this end, the ***Friley*** Court explained the intent to touch for lustful purposes is necessarily inferred from the very acts of touching or grabbing the victim's genital area; "There is absolutely no other reason why Friley would have performed these acts. It is well settled that intent can be inferred from a defendant's actions." ***Id.*** (Internal citations omitted).

The *Friley* court concluded that: "Where penetration has been achieved by touching a child under the age of 14, molestation is a lesser-included offense of sexual battery." ***Id.***

Accordingly, the Tapper's conviction for touching in Count Two is not supported by law and this Court should reverse Tapper's conviction for touching

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2. In fact, in the instant case, the trial court gave a lesser-included offense instruction for Count 1. (T. 504).

iii. Conclusion.

Therefore, the two offenses merge for the purposes of ***Blockburger*** and demand that the Appellant's conviction for touching be reversed and rendered as violative of the Double Jeopardy Clause of the United States Constitution.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of a proper indictment with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T Cook
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Randy Lamar Tapper, 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:

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District Attorney, District 19
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This the 17th day of August, 2009.

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