IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-01052-SCT

CURTIS LERNARD SEA — APPELLANT

V.

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. Curtis Lernard Sea

THIS 10th day of November, 2009.

Respectfully submitted,

CURTIS LERNARD SEA

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the Second Judicial District of Yalobusha County, Mississippi, where Curtis Lernard Sea was convicted of five (5) counts of sexual battery. A jury trial was conducted March 2-3, 2009, with Honorable Andrew C. Baker, Circuit Judge, presiding. Sea was sentenced to twenty-five (25) years in each count, all concurrent, and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Curtis Sea was originally indicted in a nine count indictment for statutory rape and sexual battery involving four girls, all daughters of Lashawn Joyner from three different fathers. Sea was convicted of five of the sexual battery counts associated with only three of the girls. Sea was acquitted of all statutory rape counts. Sea was acquitted of the all allegations concerning one of the girls. For completeness, however, the facts will be

recited so as to include the evidence presented on all four girls who are referred to herein as follows: D. D. (born October 28, 2003), B. J. (born March 21, 2002), T. J., (born November 23, 2000) and A. W. (born November 8, 1998). [T. 58].

In 2006 and 2007, Lashawn Joyner, the mother of the four girls, lived in Water Valley and then in Oxford. [T. 59-60]. Leshawn's aunt, Ollie May Joyner, who lived in Water Valley, would keep the girls when Lashawn was at work or school. [T. 59-60]. At some point during 2005 or 2006, the appellant, Curtis Sea, moved in with Ollie May Joyner. *Id.*

According to the trial testimony, on January 21, 2007, Lashawn was at home with her daughters and found them in a room "kind of on top of each other." [T. 61, 68]. When asked what they were doing, Lashawn said the girls' response was, "[w]e are doing nasty stuff." *Id.*

Concerned, Lashawn took the children to Baptist Memorial Hospital in Oxford. [T. 62, 68, 107]. Physicians found "no tearing, or any signs of abuse" according to Lashawn. [T. 63]. Nevertheless, a social worker was called as well as the police. *Id.* A "forensic interview" was arranged and conducted with each of the children by the Oxford Family Crisis Services on February 1, 2007. [T. 62, 108-10].

These interviews were video-taped. [Exs. 1-4]. The tapes were introduced into evidence at trial over the objection of Curtis Sea. [T. 110-116]. The tapes included allegations against Sea. All four girls testified at Sea's trial.

At the time of the alleged incidents with the girls, Lashawn's boyfriend David Delaney, a/k/a Darrell Delaney, made and sold pornographic movies, which the girls were aware of and some even watched. [T. 63-64, 82-83, 91, 96, 102-03, 211].

Prior to the allegations involving the children, there was some friction between Lashawn and Curtis Sea. [T. 65-66]. B. J. said that her mother did not like Curtis. [T. 90].

D. D., age five at the time of trial, testified that, when she was staying with her Aunt Ollie Mae, the appellant tried "to put his private in [her] private." [T. 81]. D. D. denied ever telling her mother about this, and denied that her mother caught her in the room with the other girls, and denied that her mother took her to the hospital. *Id.*

In D. D.'s forensic interview, Exhibit 3, the interviewing social worker is shown drawing a face, to break the ice with the young girl, and asking D. D. what was missing from the drawing of the face. D. D.'s reply was "a pencil" and "a corn pop." D. D. also said the face should have three (3) eyes and three (3) ears. The interviewer showed D. D. representational pictures of a boy and a girl. D. D. described both as "boy" pictures and indicated that neither looked like her. D. D. was non-responsive to the interviewer when asked to name genitalia and buttocks. [Ex. 3].

D. D. did indicate on the video that Curtis had "touched her" or "hurt her" and pointed at a picture, which could not be seen on the video, and called whatever she pointed at a "sucker". D. D. made indications that Curtis hurt her between her legs with

his sucker and it "felt ugly." D. D. said that she saw Curtis' sucker, and that he put his sucker in her booty and that it "felt ugly." This allegedly occurred in Aunt Ollie Mae's kitchen. *Id.*

D. D. also indicated to the interviewer that her mother told her what to say, but was not specific. When the interviewer present anatomically correct dolls to D. D., she did not demonstrate anything. *Id.*

On cross-examination, D. D. stated that Curtis Sea always kept his clothes on. [T. 84]. When asked if Curtis ever touched her, she said he did "last night", the night before the trial. [T. 84-85]. On redirect, D. D. denied ever telling anyone that Curtis did anything "bad" to her. [T. 85]. The jury acquitted Sea on all charges under counts 4 and 5 associated with D. D. [R. 9, 187].

B. J., age six at trial, testified that the appellant tried "to put his privates in [her] privates" and moved "up and down." [T. 86]. When asked on cross how any inappropriate touching occurred, B. J. said, "I don't know." [T. 92].

In B. J.'s taped interview, she stated, that while at Aunt Ollie Mae's house, Curtis stuck "his private" in her "private." [Ex. 4]. B. J. said her sisters were present, but no grown ups. B. J. alleged that Curtis tried to get her to suck his "private", but she ran away. These events allegedly occurred in the Ollie Mae's living room. B. J. contradicted herself saying that her Aunt Ollie Mae was at home in her room when the incident occurred.. B. J. also said Curtis touched her private area over her clothes, but indicated

that the Curtis hand allegedly went in her private. There was no clarification.

When B. J. was shown anatomically correct dolls in her interview, she put a male doll on top of the female doll, with genital areas together. It was not abundantly clear whether B. J. was demonstrating something that happened to her or whether she was copying activities observed on pornographic movies she indicated she had been shown. *Id.*

When T. J., eight years old at trial, testified, she merely said, that Curtis tried to "do something with his finger to [her] privates." [T. 95]. During her interview when asked what her favorite subject in school was, T. J. answered "yellow." [Ex. 1].

In T. J.'s forensic interview, the social worker asked her if anyone had ever inappropriately touch her, to which the answer was "no." Then the child indicates that she told her mother Curtis touched her privates with his finger one time when she was six at Aunt Ollie Mae's house in Aunt Ollie Mae's bed while Ollie Mae was there in bed with them. T. J. said Curtis only touched her clothes, not her skin. T. J. said her Jeans remained on. *Id.*

After stating that she had never seen Curtis' penis, T. J. said Curtis touched A. W. and D. D., pulled their clothes off and the two girls got on top of him and that T. J. saw Curtis' penis. Curtis was convicted of sexual battery against T. J. [R. 8-9, 187].

A. W. was age ten at trial and said, when she was at her aunt Ollie Mae's house, Curtis touched her "middle parts" and moved "up and down" with his privates, and put

his privates "inside" her. [T. 99]. A. W. also said Curtis put his finger in her privates and "move[d] it around." [T. 100].

In A. W.'s interview, she says Curtis stuck his finger "up in her stuff" when she was asleep. [Ex. 2]. She said Curtis put his mouth on "her stuff" on another occasion.

A. W. said one time Curtis' "stuff" touched her "stuff." This was first described as happening in Aunt Ollie Mae's room with Ollie Mae present, it was then described as in another room on the couch. *Id.* A. W. said Curtis got on top of her, but said they remained clothed and his "stuff" was outside of her "stuff." There was a vague reference that Curtis put his stuff in her booty. A. W. said Curtis apparently masturbated too. No ejaculation is described. *Id.* Curtis was convicted under counts 7, 8 and 9 of sexual battery against A. W. by way of anal and vaginal penetration, and cunnilingus. [R. 9-10, 187].[1]

There was testimony that the girls, at one point, got into trouble playing with their male cousin Marcus without their clothes on. [T. 96, 101-02]. Marcus was "trying to do something" to B. J. [T. 97].

Curtis Sea presented two witnesses who testified that Curtis was very helpful to

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[1] According to *Alexander v. State,* 811 So. 2d 272 (Miss. Ct. App. 2001), two acts of sexual battery are distinct and therefore the same transaction rule does not apply. It is appropriate to charge a defendant separate counts of sexual battery for each separate incident of penetration during the same encounter. *Id.* Also relevant, in *Johnson v. State*, 626 So. 2d 631 (Miss. 1993), *cunnilingus* implies penetration under Mississippi's statutory definition of sexual battery.

Ollie Mae, cooking meals for her and helping around the house. [T. 134-41]. Both defense witnesses said that Curtis was also very good with the girls, and neither ever expected, or observed, any inappropriate behavior. *Id.*

Curtis testified that he never accosted any of the girls. [T. 152-54]. Curtis suggested that they were familiar with sexual matters from Leshawn, and Darrell Delaney's video tapes and incidents with the male cousin Marcus. [T. 149, 161-63]. Curtis also intimated that the girls would have been encouraged to fabricate the allegations due to ongoing animosity from Leshawn and Darrell towards him. [T. 151-52].

SUMMARY OF THE ARGUMENT

Sea was irreparably prejudiced by incompetent hearsay and ineffective counsel. The weight of evidence does not support the verdicts.

ARGUMENT

ISSUE NO. 1: WHETHER THE TENDER YEARS EXCEPTION TO THE HEARSAY RULE WAS PROPERLY APPLIED?

The appellant respectfully suggests that the trial court erred reversibly by allowing the introduction of the video-taped interviews of the four girls in this case on the basis of hearsay. [T. 111-12]. It was also error to allow the state to bolster the video evidence with an investigator's rendition of what the tapes contained in addition to the investigator

repeating what the girls told him. [T. 107-08, 112-16].

The standard of review regarding admissibility of evidence is abuse of discretion, and an appellate court may only reverse for an abuse of this discretion. *Brown v. State*, 965 So. 2d 1023, 1026 (Miss. 2007). Errors of this class require reversal only if an abuse of discretion results in harm to the defendant. *Id.*

Hearsay is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Miss. R Evid. 801. Hearsay is inadmissible, except under certain exceptions, and when improperly admitted constitutes reversible error. *Murphy v. State*, 453 So. 2d 1290, 1294 (Miss. 1984) Miss. R. Evid. Rules 802, 803 and 804. See also *Quimby v. State*, 604 So. 2d 741, 746-47 (Miss. 1992).

The Video Tapes and the Tender Years Exception

The basis for the admission of the four video tapes in this case was the tender years exception to the hearsay rule.[2] However, the trial court did not review the tapes prior to admission and did not conduct an 803(25) hearing. Prior to their introduction,

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M. R. E. 803 (25) Tender Years Exception. 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 provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

defense counsel was not afforded the opportunity to cross-examine the four girls as to the elements under 803(25).

During Sea's trial, the court had *in camera* conferences with each of the four girls to make a determination that the girls understood the taking of an oath and the obligation of truthful testimony. [T. 69-78]. Neither the state nor the defense were afforded the opportunity to ask questions during the *in camera* conference. *Id.* After the *in camera* conferences, the trial court made no mention of 803(25) or any factors of the exception. *Id.*

It was not until after the trial was over, that the court made findings on the specific matters addressed in Rule 803(25) which were purportedly based on the *in camera* discussions and the girls trial testimony. [T. 131-33]. In his post trial ruling from the bench, the trial judge repeatedly said that he could not hear the tapes as they were played during the trial. [T. 127, 131]. Not only was there no hearing on the issue, Sea would also strongly suggest that the prerequisite linchpin of reliability was missing.

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

The *Quimby* court, in assessing the strict requirement of reliability of unavailable

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

It is suggested that this case falls within the ruling of *Quimby*, in that the trial court did not make adequate inquiry into the reliability factors required by 803(25) and did not make any findings on those factors until the trial was over, almost as an afterthought. Sea was not given the opportunity in a hearing prior to the admission of the tapes to cross-examine the declarants.

The fact that the girls may have been of tender years is not controlling. In *Grimes v. State*, 1 So. 3d 951, 954-56 (Miss. Ct. App. 2009), there was an issue of whether the trial court erroneously admitted hearsay under the "tender years" exception. The *Grimes* court pointed out the established "rebuttable presumption that a child under the age of twelve is of tender years". *Grimes* ¶9. [Citation omitted].

The *Grimes* court also explained that the inquiry does not end at a determination of a child being of tender years; because, a child may be of tender years, but if indicia of reliability are missing, the hearsay exception does not apply. *Grimes* ¶10. The following factors, are to be considered by the trial court in deciding reliability under the tender years

exception, they are: (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. [See *Idaho v. Wright*, 497 U. S. 805, 822, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990)]. The 12 factors are not "exhaustive", and are not a "mechanical test", other factor can be considered. *Id.* [Citing *Eakes v. State*, 665 So. 2d 852, 865 (Miss. 1995)].

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

Here the following factors suggest that reliability is lacking in the present case: There was a motive on the girls part to lie, Leshawn did not like Curtis and there was ongoing animosity and the girls knew it. D. D. says in her video interview that her mother told her what to say. [Ex. 3]. The initial accusations against Curtis Sea were not

spontaneous.

There were also multiple discrepancies in the girls' interviews and trial testimony both show a high probability of "faulty recollection." The ages and lack of maturity on the part of the girls weighs against the reliability of their accusations as well. It also is apparent that the forensic interviewers used highly suggestive techniques, mainly leading questions, in eliciting the accusations. The likelihood of fabrication is increased by the fact that the girls had been exposed to Darrell's pornography and possibly had sexual activity with their cousin Marcus.

The forensic interviewers' use of leading questions is particularly significant in the reliability analysis. Under the several cases from the Mississippi Supreme Court and Court of Appeals which have found the "forensic interview" approach valid, the linchpin of reliability has always been that the method must conform to accepted professional standards.

In *Lattimer v. State*, 952 So. 2d 206, 221 (¶39) (Miss. Ct. App. 2006) [cert. den. 951 So.2d 563 (Miss. 2007)], the "[the interviewer]'s opinion was based on sufficient facts and his testimony was the product of reliable principles and methods." The *Lattimer* court found "no indication that [the interviewer] failed to reliably apply the principles and methods of forensic interviewing to the facts of the case."]. *Id.* To the contrary in the present case, many answers from the girls are the product of the interviewers' leading questions. This, once again, weighs heavily against admission of the tapes into evidence.

The incongruities and contradictions of the girls' renditions also shows that the video taped interviews were unreliable. 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. In *Bishop*, the child's statements about sexual abuse were found to be "consistent." *Id.*

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

Comparing *Bishop* to the present facts, none of the girls' responses were narrative nor consistent. The girls contradicted each other and themselves. All of the tapes were in affect unreliable and should have been excluded.

Repetition of the Allegations by Police

Water Valley Police Investigator Hernandez was allowed, over objection, to state that the girls told him they had been "molested.". [T. 107-08]. The officer also testified

that the children told him these alleged incidents happened at Aunt Ollie May's house. [T. 111-12]. After the video tapes were played and officer Hernandez was allowed to state his interpretation of the allegations. [T. 112]. Not only was this testimony hearsay, it also constituted inappropriate bolstering.

In *Ratcliff v. State*, 308 So. 2d 225, 226-27 (Miss. 1975), a police officer was allowed to testify what an informant had told him during the officer's investigation. The court said, "[i]nvestigators cannot be permitted to relate to a jury hearsay which is incriminating in its effect as to a defendant on trial for a crime . . . [w]hat an informant told [the investigating officers] was hearsay and inadmissible to the jury." *Id.*

As here in Sea's case, the victim in *Ratcliff* had testified identifying the defendant. Nevertheless, the *Ratcliff* court reversed and remanded the armed robbery conviction based, in part, on the circumvention of the defendant's cross-examination rights which resulted from the admission of the incompetent hearsay. *Id.*

In *Anderson v. State*, 156 So. 645, 646-47 (Miss. 1934), it was pointed out that:

> [t]his court has consistently condemned the practice of undertaking to bolster up the testimony of a witness on the stand, and to strengthen his credibility by proof of his declarations to the same effect as sworn to by him out of court.

In *Anderson*, investigating officers were allowed to testify that they took the defendant to the victim who was in bed recouping from being shot and that the victim identified the defendant. The *Anderson* court reversed the conviction stating, "[t]he testimony of [the officers] under the circumstances should not have been admitted." *Id.*

If the testimony was inadmissible and reversible error in *Ratcliff* and *Anderson*, it is likewise inadmissible and reversible error here. See also *Bridgeforth v. State*, 498 So. 2d 796, 800 (Miss. 1986).

Reversals for the erroneous admission of hearsay are not uncommon and are a mainstay of Mississippi law. In *Murphy v. State*, 453 So. 2d 1290, 1294 (Miss. 1984), the appellant argued that the trial court erred in allowing investigating officers to testify as to what they were told by a witness. The *Murphy* court reversed and remanded the case for a new trial. The *Murphy* court stated that the trial court's allowance of hearsay evidence in that case, similarly to the present facts, "violated Murphy's right to a fair trial and is reversible error." *Id.*

The present case does not involve the kind of investigatory information to explain an investigating officers action as in *Jackson v. State*, 935 So. 2d 1108, 1114 (Miss. Ct. App. 2006). In *Jackson* hearsay testimony was offered to "to show why an officer acted as he did and where he was at a particular place at a particular time . . . [and] not introduced for the purpose of proving the truth of the assertion."

The girls in this case testified for the jury. It was not necessary to the state's case to show the video taped interview, nor to have Officer Hernandez bolster their testimony by repeating the girls allegations and giving his opinion as to what the video-tapes contained.

In *Turner v. State,* 573 So. 2d 1335, 1338 (Miss., 1990), the court addressed the

common situation that a statement is not hearsay if "made to explain the reason for a later action"; because, the questionable evidence is not offered for the truth of the matter asserted.

What is important for the present case is that the *Turner* court pointed out that a trial court should carefully apply "an objective test ... of how a reasonable objective observer would under the circumstances be likely to perceive" the questionable testimony. *Id.* That is, whether a reasonable person would consider the evidence offered as proof of what was asserted or for some other reason. *Id.*

The *Turner* court said that attention should be turned to "[w]hat the contested statement is supposed to 'explain.'" The *Turner,* the court recognized the pretext that "[a]ny reasonably intelligent, objective observer, e.g., a juror," hearing a police officer repeating the witness' accusations against the defendant in that case would assume only that the testimony was offered for the purpose of proving the elements of the charges.

Curtis Sea asks the Court now to apply the *Turner* test and recognize that, in applying the reasonable person standard, the purpose of allowing Hernandez to repeat the hearsay accusations against Sea were for no other reason that to bolster the state's case with hearsay offered as substantive evidence.

The introduction of the video tapes in this case and which was bolstered by Officer Hernandez' testimony prejudiced Sea as a diminution of his rights of cross-examination and fair trial under the Fifth, Sixth and Fourteenth Amendments to the Constitution of

the United States and Article 3 § 26 of the Mississippi Constitution of 1890. Curtis Sea respectfully requests a new trial.

ISSUE NO. 2: WHETHER THE VERDICT WAS CONTRARY TO THE WEIGHT OF EVIDENCE?

The testimony supporting the conviction in this case was often contradictory as pointed out in the facts. Additionally, it is implausible that Curtis Sea would have or could have conducted himself with the young girls with their aunt Ollie Mae present.

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

The guilty verdicts were all clearly contrary to the evidence entitling Curtis Sea to a reversal and rendering of acquittal, or alternatively to a new trial. *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), *Brown v. State*, 829 So. 2d 93, 103 (Miss. 2002).

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

2005).

ISSUE NO. 3: WHETHER SEA'S TRIAL COUNSEL WAS INEFFECTIVE?

Curtis Sea would respectfully show unto the Court that he was denied effective counsel due to improper introduction of his prior convictions by his trial counsel and failure to seek a lesser included offense instruction for gratification of lust for each of the sexual battery counts. [T. 144-45, 188].

The Mississippi Supreme Court has recognized that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Ransom v. State*, 919 So. 2d 887, 889 (Miss. 2005) (Citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Under the two-pronged test of *Strickland,* adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So. 2d 468, 476 (Miss. 1984), a defendant "must prove under the totality of the circumstances, that (1) his attorney's performance was defective and (2) such deficiency deprived the defendant of a fair trial." 919 So. 2d 889-90 . There is a "strong, but rebuttable presumption that the attorney's conduct fell within the wide range of reasonable professional assistance." *Id.* [See also, *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990)].

The defendant must also establish "that there is a reasonable probability that but

for his attorney's errors, he would have received a different result in the trial court." *Id.* The actions which fall within "trial strategy" include "failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections" and do not necessarily render counsel's actions ineffective. *Id.* Trial counsel's "performance as a whole [must fall] below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial." *Id.*

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Wilcher v. State*, 863 So. 2d 776, 825 (¶ 171) (Miss. 2003).

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

I. Introduction of Sea's Prior Convictions.

A. Relevance

Trial counsel might have thought that Sea's prior convictions were admissible under *Derouen v. State*, 994 So. 2d 748 (Miss. 2008), where the court approved prior incident evidence and expanded the exception to M. R. E. 404(b) for such evidence in child sexual assault cases overruling *Mitchell v. State*, 539 So. 2d 1366 (Miss. 1989).

The *Derouen* case merely provides that admission of allegations of sexual misconduct against the same child, and other children, is not *per se* reversible error, if such evidence is otherwise relevant under M. R. E. 403 and 404(b) to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" and is not more prejudicial than probative.[3] 994 So. 2d 752-56.

Prior incident evidence, nevertheless, still cannot be offered as proof of probability that a defendant committed a new offense on the implication that he is a bad person with a propensity for criminal conduct. Under *Derouen*, even if relevant, prior bad act evidence must be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay or waste of time. 994 So. 2d 752-56.

Her the fact that Sea had two prior convictions involving sex with minors, the prior convictions were so old they were irrelevant and more prejudicial than probative, and would, therefore, not be admissible.

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Rule 403. Although relevant, 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, fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
(b) 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.

Admission of character evidence not in line with an appropriate exception, constitutes reversible error. *Darby v. State*, 538 So. 2d 1168, 1173 (Miss. 1989). In *Darby*, the Supreme Court reversed an aggravated assault conviction because the trial Court allowed introduction of evidence about the Defendant's criminal history.

In *Gallion v. State*, 469 So. 2d 1247, 1249-50 (Miss. 1985), the Court responded to the State's argument that any error resulting from the improper bad-character evidence was harmless, the Court reminded the State that "evidence which is incompetent and inflammatory in character carries with it a presumption of prejudice." *Id.* Citing *Tutor v. State*, 299 So. 2d 682 (Miss. 1974). The *Gallion* court reversed and remanded.

Here, since the evidence against Sea was so questionable, reference to Sea's prior convictions so damaging it could not have been mitigated by the limiting instruction given to the jury.

Recently, the Mississippi Supreme Court concluded that a even limiting instruction could not cure the error in admitting a defendant's prior-felony. *Sawyer v. State*, 2 So. 3d 655, 660 (Miss. Ct. App. 2008)

In *Sawyer*, the defendant was charged with armed robbery and with being a felon in possession of a firearm. *Id.* Sawyer offered to stipulate to the prior conviction, but the state and trial court declined the stipulation and the jury received the evidence about Sawyer's prior conviction. The *Sawyer* Court concluded that any probative value of the defendant's prior convictions was substantially outweighed by the danger of unfair

prejudice under Mississippi Rule of Evidence 403. *Id.* As here, in *Sawyer* a limiting instruction did not cure the error. *Id.* [R. 162].

B. Prior Convictions as Impeachment Evidence

Regarding the prior convictions being used as impeachment evidence by the state, Curtis Sea's trial counsel should have first determined if the state intended on using Sea's prior convictions and then should have obtained a ruling from the trial court under *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987). The holding in *Peterson* is that a trial court must weigh the following factors in deciding whether to admit a prior felony for impeachment of a non-party witness or party witness under M. R. E. 609 (a) and (b):

(1) The impeachment value of the prior crime, (2) The point in time of the conviction and the witness' subsequent history, (3) The similarity between the past crime and the charged crime, (4) The importance of the defendant's testimony, (5) The centrality of the credibility issue. See, *Robert v. State,* 821 So. 2d 812, 816 (Miss. 2002).

In *Triplett v. State*, 881 So. 2d 303 (Miss. Ct. App. 2004), the trial court allowed the state to use Triplett's prior burglary and receiving stolen goods convictions as impeachment. In reviewing the factors under *Peterson v. State*, *supra*, the *Triplett* court found the trial court abused its discretion in the admission of the prior convictions even though the trial court went through the appropriate steps under *Peterson*. 881 So. 2d 307.

The *Triplet* court saw "little, if any, impeachment value in Triplett's prior burglary convictions and his receiving stolen property conviction" since "burglary is not

necessarily a crime affecting veracity." [Citing *Townsend v. State*, 605 So. 2d 767, 769 (Miss. 1992)]. Triplett's receiving conviction was "close" to ten (10) years old and had "little probative value." 881 So. 2nd at 307. Triplett's prior convictions for burglary and receiving were too "similar to the crime for which Triplett was being tried, business burglary," making "the prejudicial effect of admitting the convictions is very high." *Id.*

Applying the five *Peterson* factors to the present case, it is clear that, as in *Triplett*, both of Sea's prior convictions were more than ten years old, he would have been released from the sentence before the ten year mark, rendering the prior convictions, like Triplett's, of little or no probative value. Any admission of a prior conviction is prejudicial to a criminal defendant. Likewise, the prior convictions were similar to the accusations in the present case augmenting the prejudicial effect. Therefore, the admission of Sea's prior convictions by his own counsel was more prejudicial than probative which is forbidden by 609 (1)(b).(See also, M. R. E. 403). The result was an infringement on Sea's fundamental constitutional fair trial and due process rights.

There was no trial strategy here in the admission of the two prior felony convictions, and the prejudice to German is abundant. The fair result would be a new trial. *Havard v. State*, 928 So. 2d 771, 789-90 (Miss. 2006).

II. Failure to request a lesser included offense instruction

Even though appropriate, instructions must be requested by the defense. *Poole v. State*, 231 Miss. 1, 94 So. 2d 239, 240 (1957). It is not a trial court's duty to prepare

instructions for either party. *Samuels v. State*, 371 So. 2d 394, 396 (Miss. 1979), and *Ballenger v. State*, 667 So. 2d 1242, 1252 (Miss. 1995).

This issue should probably be reviewed on a plain error standard which requires an error that results in "a manifest miscarriage of justice" or an adversely affected fundamental or substantive right. *Grubb v. State*, 584 So. 2d 786, 789 (Miss. 1991).

Failure to seek proper jury instructions deprives a criminal defendant of the fundamental constitutional right to a fair trial; because, a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss. 2004).

There was questionable evidence of any penetration for the any of the girls in this case. Under the facts of this case, the appellant was irreparably prejudiced by not having a lesser included instruction. At trial, defense counsel should have offered lesser included offense instructions for gratification of lust under Miss. Code Ann§ 97-5-23 (Rev. 2006)[4],

Gratification of lust is a lesser included offense of sexual battery. In *Friley v. State,* 879 So. 2d 1031, 1034-35 (Miss. 2004) the Court considered whether gratification of lust is a lesser included offense of sexual battery. The *Friley* Court reversed the

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[4] Miss. Code Ann§ 97-5-23 (Rev. 2006) defines gratification of lust as:
(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. . .

Court of Appeals finding gratification of lust "may be a lesser-included offense to some types of sexual battery." *Id.*

Friley was indicted for sexual battery, which required penetration; but, Friley was convicted of gratification of lust, which required only touching without penetration. The court said, "[a] plain reading of the statutes shows that sexual battery (penetration) includes molestation (touching). It is impossible to penetrate without touching." *Id.*

By inference, the court concluded that "Friley's actions were done with the purpose of gratifying his lust, and [the victim] was under the age of 14 at the time of the incident." The *Friley* court pointed out that:

> molestation ...requires a showing of intent in that the State must prove that a defendant's actions were done "with ... purpose." The sexual battery statute requires no such showing of intent-the State must show only that the act was committed. We find, however, that, by his very acts of grabbing Christy, touching her genital area, and touching himself, he was gratifying his lust. 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' actions. See, e.g., *Moody v. State*, 841 So. 2d 1067, 1092-93 (Miss. 2003).
>
> Accordingly, we find that, under these particular circumstances, molestation is a lesser-included offense of sexual battery... *Id.*

Following the rationale of *Friley* in the present case leads to the logical and legally sound conclusion that Sea was entitled to a lesser included offense instruction to the sexual battery counts of the indictment if offered. Sea was entitled to a lesser included instruction, and was prejudiced and missed an opportunity at shorter sentences if convicted. See also *Hester v. State*, 602 So. 2d 869 (Miss. 1992).

Failure to seek proper jury instructions is a fundamental right effecting a defendant's constitutional right to a fair trial, as a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss. 2004).

The prejudice to Short under the *Strickland* test was that the jury was simply not given the opportunity to consider the lesser offense of molestation. As clearly stated by counsel, the objection to the beneficial jury instruction was not trial strategy. The fair result would be a new trial. *Havard v. State*, 928 So. 2d 771, 789-90 (Miss. 2006).

C. Conclusion, Counsel was Ineffective

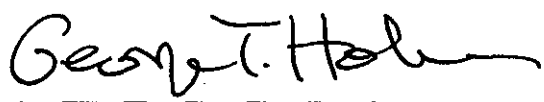
It follows, therefore, that Sea's trial counsel was ineffective, the ineffectiveness was outcome determinative, and Sea is entitled to a new trial.

CONCLUSION

Curtis Sea is entitled to have his convictions reversed with remand for a new trial.

Respectfully submitted,

CURTIS LERNARD SEA

By: 

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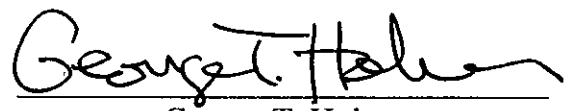
CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 10th day of November, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Andrew C. Baker, Circuit Judge, P. O. Box 368, Charleston, MS 38921-0368, and to Hon. John Champion, Asst. Dist. Atty. , 100-A Public Square, Batesville MS 38606, 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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