IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-01090-SCT



JOHN T. GORE — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

# APPELLANT'S REPLY BRIEF

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
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## TABLE OF AUTHORITIES

**CASES**:



**STATUTES**

none

**OTHER AUTHORITIES**

## REPLY ARGUMENT

ISSUE NO. 1: *404(b)*

The state's reliance on *State v. Driggers,* 554 So. 2d 720 (La. Ct. App. 1989) and *State v. Miller*, 718 So. 2d 960 (La. 1998), should not be persuasive here. Both are distinguishable.

In *Driggers*, "[t]he state's express purpose for introducing evidence of other crimes was, among many others, to show the lustful disposition of the defendant, to show defendant's pattern and mode of operation while molesting young female victims." 554 So. 2d at 722. Unlike Gore, in *Driggers*, the "defendant claimed that the acts were unintentional or accidental." 554 So. 2d at 724. The otherwise objectionable evidence was relevant to the *Driggers* court on the narrow point of lack of accident or mistake. Gore's defense, on the other hand, was not that he accidently or mistakenly committed the criminal acts, rather, that the acts as alleged did not occur.

Incidently, in *State v. Kennedy*, 803 So. 2d 916, 918 (La. 2001), the Louisiana Supreme Court refused to apply *Driggers*, an intermediate appellate court decision. In *Kennedy*, the defendant was charged with capital rape of his eight-year-old step-daughter in 1998. The state introduced unrelated evidence of "the defendant's alleged sexual misconduct involving the rape of a minor child in 1984" sixteen years earlier. *Id.*

The *Kennedy* court said, *Driggers* did not support the prosecution's position that "lustful disposition evidence" be used "to show the defendant's history of unnatural

sexual interest in prepubescent female minors," since intent was the main issue in *Driggers, i. e.,* Driggers made his "general intent" an issue by "claiming the charged act, if it did occur, was accidental; therefore, the other crimes evidence tended to show that the 'charges against the defendant did not occur by accident, but were intended by him.'" *Id.* [citing *Driggers*, 554 So. 2d at 724-25].

The *Kennedy* court continued by stating that, since "motive, intent, and identity" were "not genuinely at issue," and, because the prior act evidence sought to be introduced by the state did "not bear upon an essential element of the offense, ... evidence that the defendant has allegedly raped another female child" was offered only to demonstrate that Kenney had "the propensity to commit such crimes and that the act charged against him probably occurred just as the present victim claims" which is an improper basis under the exception. 803 So. 2d 925.[1]

In *State v. Miller*, 718 So. 2d 960, 961-62 (La. 1998), also cited by the state here in Gore's case, the defendant was charged with molesting two of his nieces in 1994, and the state sought to introduce testimony that in 1996 "the defendant was overheard telling his neighbor's eight-year-old daughter at a barbeque that he had seen her in his bedroom naked." A prior appellate court ruling in *Miller* affirmed the trial court's ruling, finding

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In 2001, following the *State v. Kennedy* decision, the Louisiana legislature enacted Louisiana Code of. Evid. Art. 412.2. to allow evidence of other offense(s) in sexual assault cases or in cases involving sex offenses against minors regardless of whether the charged offense is a general intent or specific intent crime. Mississippi has no similar statute or court rule.

the evidence was relevant to "establish a predisposition to molest young girls" and was admissible "to establish intent, preparation, plan, knowledge, and possibly opportunity and/or absence of mistake or accident." [cite omitted]. The Louisiana Supreme Court concurred stating that a "lustful disposition was relevant in determining whether [Miller] had the specific intent to commit the crimes charged." 718 So. 2d 966.

In *Miller*, times of the two instances were much closer than in Gore's case. Also, in *Miller* there was nothing comparable to the remote nudist evidence.

On the issue of specific intent, as stated in Gore's initial brief, participation in nudist culture established neither a motive or intent to any of the elements of gratification of lust whether the conduct is considered deviant from the norm or not. The *Miller* opinion would support this position.

The state here in Gore's case also suggests that any error in admission of the Miss. R. Evid. 404(b) evidence against Gore was cured by the limiting instruction. However, giving of the limiting jury instruction does not necessarily negate the grievous error here. See, *e. g.*, *Sawyer v. State,* 2 So.3d 655, 660 (¶25) (Miss. Ct. App. 2008), where the court found that a limiting instruction did not cure error of admission of a prior conviction.

ISSUE NO. 2: *Exclusion of defense witness Linda Stanley*

The state argues that Linda Stanley's testimony about the allegations by Katie concerned a collateral issue and was properly excluded, albeit for the wrong reason. If

the issue of the alleged fondling of Katie was collateral, as suggested by the state, then, the issue "is not directly relevant to the central issue of the case." [State's Brief, p. 9, citing *Lee v. State,* 944 So. 2d 35, 42-42 (Miss. 2006)]. If the topic is irrelevant under Miss. R. Evid. 608(b), it is irrelevant under 404(b). By arguing that the allegations of Katie are collateral, and, therefore, irrelevant, the state's positions under Issue No. 1 and Issue No. 2 are fatally inconsistent.

As admitted by the state, "[w]hether Katie slept nude with Gore has absolutely no bearing on whether or not Gore fondled M. G." [State's brief, p. 9]. So, prior allegations of fondling as well as the remote nudist camp evidence were both irrelevant and prejudicial and "not directly relevant," so, both should have been excluded as argued in Issue No. 1, *supra*.

The state likewise admits that 608(b) was misapplied here by the trial court, yet, urges the court to apply the safe harbor of "right result for the wrong reason." The state did not argue that *Pinkney v. State*, 538 So. 2d 329, 348 (Miss. 1988), *Lewis v. State*, 580 So. 2d 1279, 1287 (Miss. 1991), *Pettit v. State*, 569 So. 2d 678, 681 (Miss. 1990) and *Miskelley v. State*, 480 So. 2d 1104, 1109 (Miss.1985) are not controlling. In each of these cases offered by Gore's initial brief, the argument could have been made that the evidence there pertained to collateral matters. However, in none of those cases does the Supreme Court say that.

The state chose to introduce the testimony about alleged fondling of Katie some

nine years prior. Simple fairness, not to mention the state and federal constitutions, requires Gore be allowed to respond, as a fundamental right. It is to exercise this right to respond that Gore respectfully requests in a new trial.

ISSUE NO. 3: *Search and Seizure*

Gore relies on his initial arguments under this issue, particularly the authorities of *Smith v. Ohio,* 494 U. S. 541, 110 S. Ct. 1288 (1990) and *U. S. v. Zvala*, 541 F. 3d 562, 576-77 (5th Cir. 2008), which the state did not address.

ISSUE NO. 4: *Weight*

Gore relies on his initial argument under this issue.

## CONCLUSION

John T. Gore is entitled to have his conviction reversed and rendered or remanded for a new trial.

Respectfully submitted,
JOHN T. GORE

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## CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 16th day of October, 2009, mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. William E. Chapman, III, Circuit Judge, P. O. Box 1626 Canton, MS 39046, and to Hon. Jacque Purnell , Asst. Dist. Atty. , P. O. Box 68, Brandon MS 39043, and to Hon. La Donna C. Holland, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.

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