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

JOHN T. GORE — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. John T. Gore

THIS 25th day of August, 2009.

Respectfully submitted,

JOHN T. GORE

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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STATEMENT OF THE ISSUES

ISSUE NO. 1: **WHETHER THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF PRIOR ALLEGED MISCONDUCT AS AN EXCEPTION TO M. R. E. 404(B)?:**

ISSUE NO. 2: **WHETHER THE TRIAL COURT ERRED BY EXCLUDING DEFENSE EVIDENCE UNDER M. R. E. 608(B)?**

ISSUE NO. 3: **WHETHER THE WARRANTLESS SEIZURE OF EVIDENCE FROM THE DEFENDANT'S HOME WAS ILLEGAL?**

ISSUE NO. 4: **WHETHER THE VERDICT IS CONTRARY TO THE WEIGHT OF EVIDENCE?**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Rankin County, Mississippi where John T. Gore was convicted of gratification of lust under MCA § 97-5-23 (1) (1972) in a jury trial conducted April 28, 2009, with Honorable William E. Chapman, III, Circuit Judge, presiding. Gore was sentenced to fifteen (15) years incarceration, with two (2) years suspended, and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

In 2007, John T. Gore, a former law enforcement officer, was living in Rankin County on Haynes Chapel Road near Pelahatchie. [T. 90-91, 116, 166-67]. Gore's son Daniel Gore lived down the road about a quarter of a mile with his girlfriend, Lindsey Bohn. *Id.* Daniel and Lindsey have a daughter, M.G. born August 3, 2005. [T. 90]. Gore shared meals with Daniel and Lindsey, and often kept M. G. for the young couple. [T. 91, 104-05].

On May 11, 2007, Lindsey went to the Pepsi Pops event put on by the Mississippi Symphony Orchestra at the Ross Barnett Reservoir, where Daniel's employer was contracted to work. [91-92]. She left M. G. with Gore between 10:30 a. m. and noon. *Id.*

When Lindsey arrived to retrieve M. G. later that evening around 10:30 p.m., she let herself into Gore's house, as was their custom. [T. 93]. Lindsey said she looked into Gore's bedroom and saw M. G. "laying on the bed next to Gore, and [M. G. was] completely naked, no diaper, no nothing." *Id.* Lindsey testified that Gore said, "she found my vibrator" followed by, "she put it on herself." *Id.* Lindsay testified Gore said they had just taken a bath and were lying down. *Id.* The "vibrator" referred to was described as a back massager rather than a sexual device. [T. 110].

Lindsey said she left with the baby and returned home. [T. 94]. When Lindsey was getting M. G. ready for bed, she said she saw the baby's anus and "it was the size of a nickel." *Id.* Daniel Gore was still working at the Pepsi Pops event, but their friend Matt,

who was staying with Daniel and Lindsey was there. *Id.* [T. 91, 104]. Lindsey said she grabbed a shotgun, but could not find any shells, so she grabbed a knife, and drove back to Gore's. *Id.* When Lindsey arrived at Gore's she tried to stab Gore with the knife. [T. 95, 263]. Lindsey eventually called law enforcement and drove back home. [T. 95-96]. When a sheriff's deputy and juvenile officer arrived at her house, Lindsey was instructed to take M. G. to a hospital, which Lindsey did, arriving at St. Dominic Hospital in Jackson about midnight. [T. 96, 156-57]. Lindsey said M. G. had not had any previous injuries to her anus nor bowel problems which would have caused her anus to be enlarged. [T. 97]. On of the responding deputies said the child's rectum looked red. [T. 115].

The responding officers went next to Gore's house, read the *Miranda* warnings to him, and they discussed the situation.[1] [T. 116-17, 157-59]. The deputies said Gore appeared to be intoxicated. *Id.* The deputies said that Gore explained that he fell asleep and awoke to find M. G. playing with the vibrator which Gore said he kept under his bed. [T. 117-18, 160, 169]. Gore explained that M. G. was naked because she soiled her clothes. *Id.*

When asked where the vibrator was, Gore allegedly told the officers it was under the bed in a box. [T. 118, 135-37, 139-40]. One of the officers then looked under the bed, retrieved a box, opened it and removed the vibrator. *Id.* The vibrator was admitted into

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[1] *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 6 L. Ed. 2nd 694 (1966).

evidence as Exhibit 1, over objection. [T. 138]. Gore was not under arrest when the vibrator was seized. [T. 135-37, 161].

The examining emergency room physician described M. G.'s rectum to be "a bit dilated or enlarged" without tears and no bleeding. [T. 148]. The doctor did not note any redness nor bruising and was of the opinion that the child was not "penetrated by any particular object" but he suspected abuse nonetheless. [T. 149-153].

Besides offering testimony about the alleged incidents on the date in question, the state introduced testimony in its case-in-chief, from Daniel Gore, that when he was around 13 years old, Gore informed Daniel about being a naturalist or nudist. [T. 180-92, 201-03]. Daniel said Gore wanted him and his sister Katie to participate and be naked too. *Id.* However, there was no alleged misconduct or sexual activity. [T. 210-11, 220-21, 229, 243].

Gore's twenty-one year old daughter Katie Jenkins testified at trial that, nine years earlier, when she was twelve, Gore "touched [her], and he made [her] sit in his lap while he was naked and [she] was naked, and look at pictures on the computer of naked children." [T. 217-18, 222]. Katie also said Gore fondled her while she was in bed with Gore and his girlfriend. [T. 218].

Gore, testifying in his own defense, said Lindsey and the friend Matt had come by on the day in question and asked Gore, who was working, to keep the baby. [T. 257-62, 273-75, 278-81]. Gore denied ever misappropriately touching M. G. and generally denied

the occurrences of the charged offense and the prior allegations of misconduct involving Katie. *Id.*

Gore testified Lindsey had only brought over a few diapers which all became wet because M. G. was swimming, the child was constipated which possibly have caused her anus to be enlarged. [T. 260]. That night after putting M. G. to bed, while he was washing some clothes, Gore said he heard M. G. making noise, he went back to the bedroom and found M. G. playing with the vibrator on the floor, but not in a sexual way. *Id.*

Gore denied being drunk and said he never drank when he kept the baby. [T 261]. Gore said that after Lindsey came over and tried to stab him, he took a prescription tranquilizer and drank some brandy. [T. 263]. Gore said he talked to police under the influence of the sedative he took and brandy, but basically told them the same as his testimony. [T. 266, 284].

Later in the morning of May 12, 2007 before dawn, Gore said Daniel and Matt came to his house, tore things up, beat him up, threatened to kill Gore, pointed a pistol at him, and left him handcuffed which he was later able to remove. [T. 264]. The police came subsequently and arrested Gore with a warrant. [T. 161-62, 266].

SUMMARY OF THE ARGUMENT

The trial court erred in allowing proof of uncharged irrelevant allegations of prior misconduct. The trial court erred by not allowing the defendant to introduce evidence to dispute allegations of prior misconduct. The so-called vibrator was illegally seized and improperly admitted into evidence. The weight of evidence did not support the verdict.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF PRIOR ALLEGED MISCONDUCT AS AN EXCEPTION TO M. R. E. 404(B)?

Gore's position under this issue is that the nudist colony evidence and evidence about the allegations involving Katie were remote, irrelevant and more prejudicial than probative. As will be shown, the trial court misapplied *Derouen v. State*, 994 So. 2d 748 (Miss. 2008).

In *Derouen* the defendant was charged with fondling his step-niece on one occasion. 994 So. 2d 750. The trial court allowed testimony that there had been one prior episode with the same child. The Supreme Court approved of the prior incident evidence and took the opportunity to expand 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) in the process.

The *Derouen* opinion specifically 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.[2] Even with the expanded exception, prior incident evidence, nevertheless, still cannot be offered as proof of probability that a defendant committed the new offense on the implication that he is a bad person with a propensity for this type of conduct or a person of criminal character. Even if relevant, prior bad act evidence must yet 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. M. R. E. 401 and, 403. So, *Derouen* is not absolute authority for introduction of every incident or accusation of sexual misconduct against a defendant.

In *Derouen,* the prior acts evidence involved the same child and were fairly recent and involved the same kind of alleged bad conduct. Here in Gore's case, the prior bad acts allegations included fondling of another child, Katie, which was very remote in time.

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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.

Moreover, the allegations about the nudist colony were also very remote in time and, more importantly, did not involve any claim of sexual misconduct. The *Derouen* decision would require the exclusion of such evidence as more prejudicial than probative.

The nudist camp evidence, besides being also remote, did not involve proof of lack of accident or mistake, intent, or motive for the allegations involving M. G. The nudist camp evidence was simply presented to the jury with the overt suggestion that Gore was a bad person because he allegedly forced his children to participate in nudist activities when they might not have wanted to.

The *Derouen* court relied on the Florida case of *Shapiro v. State*, 696 So. 2d 1321 (Fla. Dist. Ct. App. 1997) . However, a subsequent decision out of Florida shows the limitation of the evidentiary exception adopted in *Derouen*.

In *Foburg v. State*, 744 So. 2d 1175, 1178, (Fla. App. 2 Dist. 1999), the defendant was convicted of, among other crimes, fondling a child under the age of sixteen. The prosecution offered evidence of prior acts involving several children over a period of time some 17 to 20 years in duration. The *Foburg* court reversed citing their rule that, "[t]he charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses," and, must also tend "to prove a material fact issue that is in dispute." [Citations omitted.]. *Id.*

The Florida Appellate Court in *Foburg* refused to extend *Shapiro, supra*, to allow

introduction of bad character evidence consisting of dissimilar patterns of alleged abuse and manipulation of minors over a long period of time, "because there are no other striking similarities shared by the charged offenses," pointing out that "the absence of similar conduct for an extensive period of time might suggest that the conduct is no longer characteristic of the defendant." [Citations omitted]. 744 So. 2d 1178. In reversing the conviction, the *Foburg* court found the bad character evidence "was not uniquely factually characteristic of the charged offenses, and therefore, it was not probative of those offenses," and that "[t]he only purpose served by the State's introduction of the [prior incident] evidence was to imply that because Foburg had committed similar acts seventeen to twenty years ago, he must have committed the acts with which he was now charged. *Id.* Propensity is an improper basis for the admission of [the] evidence." *Id.*

If the Florida court's rationale was a basis for the adoption of the extended exception in *Derouen*, such logic should also serve to establish the temporal and relevancy parameters of the expanded exception. Applying *Foburg* to the facts of the present case leads to the fair conclusion that the remote and unrelated bad character evidence here was both irrelevant and distinctly more prejudicial than probative under M. R. E. 403.

Gratification of lust is a specific intent crime. *Hailey v. State*, 537 So. 2d 411, 416 (Miss.1988), and *Branch v. State*, 998 So. 2d 411, 418 (Miss.2008), fn. 5. The intent

being that the perpetrator intends to satisfy his licentious desires by rubbing or touching, in this case, a minor. *Id.* The 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.

This case should be reversed for allowing introduction of irrelevant allegations of past misconduct under 404(b). *Darby v. State*, 538 So. 2d 1168 (Miss. 1989), *Tobias v. State*, 472 So. 2d 398 (Miss. 1985).

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED BY EXCLUDING DEFENSE EVIDENCE UNDER M. R. E. 608(B)?

In response to the allegations of prior sexual misconduct, the defendant called Linda Stanley, who was Gore's girlfriend at the time, to testify. [T. 237- 51]. The trial court here excluded Ms. Stanley's testimony under M. R. E. 608(b).[3]

Ms. Stanley's proferred testimony was that when Katie was 12, which would have been around 2000, Katie would come in the bedroom where Gore and Linda were asleep with clothes on and get in the bed with them often and that everyone remained clothed.

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M. R. E. Rule 608. Evidence of Character and Conduct of Witness.
(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified

[T. 241- 248]. Linda said she observed no sexual misconduct concerning Katie, and Gore loved Katie very much. *Id.* Linda also testified that Gore never asked the children to take their clothes off. *Id.* In general, Linda said that Gore was never known to act inappropriately around children. *Id.*

As stated in the prior issue, the trial court here ruled under *Derouen, supra,* that the prior allegation of sexual misconduct against Gore with his daughter and that allegations that he insisted his daughter and son attend a nudist colony were both relevant. That being so, the trial court, and this court, cannot now say that inquiry into the prior bad acts was relevant for the state's case in chief, but not relevant for the defense's case in chief. To do so is a patent denial of due process under the 6th and 14th Amendments to the U. S. Constitution and Article 3 §26 of the Mississippi Constitution of 1890.

Rule 608(b) was misapplied here by the learned trial court in an abuse of discretion. Primarily, as is apparent, Rule 608 is a rule to exclude proof of the character of a witness by way of extrinsic specific instances of conduct. So says the comments to the rule, "Rule 608 is concerned with character evidence of witnesses ... [s]ubsection (b) flatly prohibits impeaching a *witness's character for truthfulness* via extrinsic proof of specific acts of the witness's conduct, except criminal convictions pursuant to Rule 609." [Emphasis added.].

The excluded testimony from Linda Stanley did not pertain to Katie's character for truthfulness. It pertained to Gore's conduct, and specifically whether certain alleged

events occurred or did not occur.

The case of *Pinkney v. State*, 538 So. 2d 329, 348 (Miss. 1988), supports the introduction of Linda Stanley's testimony in this case. *Pinkney* was a capital murder case where the defendant claimed "that a deputy extracted a confession" by holding a gun to Pinkney's head. The state presented the testimony "of another officer that he had never seen the deputy carry a gun." Pinkney argued that this rebuttal testimony should have been excluded as extrinsic. The *Pinkney* court held that this testimony was properly admitted because it concerned a statement of fact not reputation or character evidence.

In *Lewis v. State*, 580 So. 2d 1279, 1287 (Miss. 1991), the defendant was convicted of aggravated assault, one issue was whether the court erred in allowing the state to call a rebuttal witness to prove specific instances of Lewis' conduct by extrinsic evidence to attack his credibility. Lewis had testified that the victim had a knife and a gun and attacked him first, and that the victim's injuries were the result of his defending himself. Specifically Lewis denied having a gun on the night of the incident and also denied having a weapon several days prior. The State called the victim's aunt in rebuttal, who testified that three days prior to the incident, Lewis had came to her house looking for the victim. The aunt testified that Lewis showed her a gun in his pocket.

On appeal, Lewis argued unsuccessfully that the aunt's testimony was substantive evidence of other crimes rather than as impeachment of his credibility. *Id.* The *Lewis* court found that the aunt's testimony "was not introduced as a specific instance of

conduct to impeach Lewis' credibility, and thus, 608(b) is not applicable. Nor was impeachment, in this instance, on a collateral issue. Who had a gun and who was the aggressor was central factual issue." *Id.* at 1287-88. The aunt's testimony in *Lewis* "was not reputation or character evidence but a statement of fact relevant to the merits. Consequently, the testimony was admissible." *Id.*

A fair reading and application of *Pinkney* and *Lewis* to the facts of the present leads to the conclusion that Linda Stanley's testimony should have been admitted. Moreover, under the same authority, it follows that, since the trial court's ruling here that the evidence about the prior acts was relevant, evidence about the incidents, including Linda Stanley's factual testimony, was not extrinsic and thus admissible under 608(b).

Additionally, the misapplication of rule 608 here resulted in the defendant not being allowed to answer the charges against him as would be his fundamental right. The trial court should have exercised its discretion in favor of allowing the defendant to present evidence instead of allowing the state to hide behind the rule.

In *Pettit v. State*, 569 So. 2d 678, 681 (Miss. 1990), a sale of narcotics case, the trial court excluded defense testimony about an undercover agent who denied using drugs with the defendant a topic which was covered in cross-examination. *Id.* Pettit sought to call a surrebuttal witness to testify that he had seen the agent participate in drug use on a specific date. The State objected under 608(b) arguing that such impeachment "should not be allowed on a collateral matter" and the trial court sustained the state's objection. The

Pettit court ruled that the exclusion was error, though harmless and not reversible. *Id.*

In *Miskelley v. State*, 480 So. 2d 1104, 1109 (Miss.1985), the defendant allegedly confessed to his girlfriend about a murder, and the girlfriend testified to this at trial. The State's theory was that Miskelly resented the fact that the girlfriend who testified broke up with Miskelly and was going to start dating the victim again. Miskelly's position, which made impeachment evidence relevant, was that the girlfriend's testimony about Miskelly's alleged confession "was a result of coaxing, over-persuasion and threats to deny appellant sexual favors, and that there was no truth" to her account. *Id.* at 1109. Miskelly wanted to cross-examine the girlfriend about whether the confession was coaxed but the trial court excluded the evidence on the conclusion that it was extrinsic character evidence of a witness. The *Miskelly* court, acknowledging "the principle and rule that a witness may not be impeached upon a collateral matter" ruled, nevertheless, that exclusion of the impeachment evidence on the grounds that it concerned extrinsic, and otherwise irrelevant, allegations of misconduct, denied Miskelly his right to confront state witnesses under the 6th Amendment and reversed based on an abuse of the discretion of the trial court. *Id.* at 1111-12. The same result is called for here.

There is no difference between the points at issue here in Gore's case and those in *Pettit* and *Miskelly*, *supra*. Both require reversal even assuming *arguendo* that Rule 608(b) did apply. See also *Darby v. State*, 538 So. 2d 1168, 1174 (Miss. 1989), and *Harley v. State*, 345 So. 2d 1048, 1050 (Miss. 1977) for the proposition that the

Compulsory Process clause of the 6th Amendment prohibits exclusion of relevant defense theory evidence through the 14th Amendment.

ISSUE NO. 3: WHETHER THE WARRANTLESS SEIZURE OF EVIDENCE FROM THE DEFENDANT'S HOME WAS ILLEGAL?

The sheriff's deputies did not initially arrest Gore when they interviewed him May 11, 2007, Gore was simply questioned and he told the officers about finding the child with the vibrator or massager. [T. 118, 130-37, 139-40, 160-61]. In their discussions, Gore was asked about the location of vibrator and Gore told them it was under the bed in a box. *Id.* Once again, Gore was not under arrest at this time. *Id.*

Once Gore told the deputy where the vibrator was, the officer reached under the bed, retrieved the box and opened it. *Id.* It is Gore's position that this warrantless seizure violated the 4th and 14th Amendments to the U. S. Constitution and Article 3 §23 of the Mississippi Constitution of 1890. John Gore did not unequivocally consent to the search. See, e. g., *Bumper v. North Carolina,* 391 U. S. 543, 549, 88 S. Ct. 1788 (1968). ["When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Citations omitted.]. See also, *Schneckloth v. Bustamonte,* 412 U. S. 218, 227, 93 S. Ct. 2041, 2047 (1973). The officers merely asked Gore where the vibrator was and Gore told them it was under the bed. [T. 118, 130-37, 139-40].

Since Gore was not under arrest at the time, the seizure of the vibrator was not incident to arrest. In *Smith v. Ohio,* 494 U. S. 541, 110 S. Ct. 1288 (1990), Smith was stopped while walking in a parking lot while carrying a paper sack. When police called for him, he put the sack on the hood of a car. Smith was not under arrest, and the policeman asked him what was in the sack Not getting a response from Smith, the officer seized the sack, looked inside, and found drug paraphernalia. The *Smith* court held that the warrantless search of a paper sack was not a valid search incident to a lawful arrest and was thus illegal and could not, therefore, be the basis of the resulting arrest. *Id.* at 542, 110 S. Ct. at 1289. The *Smith* court relied upon its earlier announced principle that "an incident search may not precede an arrest and serve as part of its justification." *Id.* at 543, 110 S. Ct. at 1290 (quoting *Sibron v. New York*, 392 U. S. 40, 63, 88 S. Ct. 1889, 1902 (1968)).

In *U. S. v. Zvala*, 541 F. 3d 562, 576-77 (5th Cir. 2008), the U. S. Court of Appeals for the Fifth Circuit reversed a drug conviction because of a search of a defendant's cell phone, not incident to arrest, conducted prior to the defendant's arrest and made without probable cause to arrest and without consent. Zvala's vehicle had been stopped based on suspicion of drug trafficking. The officer seized Zvala's cell phone and retrieved information from it connecting Zvala to alleged drug transactions. The *Zavala* court noted that, without a warrant or consent, *Terry v. Ohio*, 392 U. S. 1, 88 S. Ct. 1868 (1968), permits only a limited pat-down search to determine whether a suspect is carrying

a weapon. The *Zvala* court followed the rule that, "[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." [Citing *Minnesota v. Dickerson*, 508 U. S. 366, 373, 113 S. Ct. 2130 (1993).]. The holding in *Zvala* was that the arresting officers could not search Zavala's vehicle based on this suspicion without consent or probable cause, nor could a search of Zavala's cell phone be conducted without consent or probable cause. 541 F. 3d at 576-77.

It follows, therefore, under the authority *supra*, that since the seizure of the vibrator in the present case was made neither incident to arrest and without consent, and without probable cause, it should have been suppressed. A new trial is respectfully requested.

ISSUE NO. 4: WHETHER THE VERDICT IS CONTRARY TO THE WEIGHT OF EVIDENCE?

To determine whether trial evidence is sufficient to sustain a conviction "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.'" *Bush v. State*, 895 So. 2d 836, 843(¶ 16) (Miss. 2005) (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss.1968)). The deciding factor is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Id.* If the minimum conclusion is reached that, "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence is sufficient. *Id.*

In *Pittman v. State,* 836 So. 2d 779, 785 (Miss. Ct. App. 2002), a father was convicted in part of statutory rape of his daughter. There was no proof of penetration nor attempted penetration. The *Pittman* Court upon review said that a crime was being committed but it was not statutory rape, and reversed.

In the present case, the evidence was all circumstantial, even the state's physician could not state within a reasonable degree of medical certainty what had occurred with the child. As in *Pittman*, there may have been arguable proof of possible child neglect in this case, or lack of supervision, but, the evidence was so inadequate here on the issue of gratification of lust, that the trial court should have granted a new trial or reversed and rendered an acquittal of the indicted charges.

CONCLUSION

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

Respectfully submitted,

JOHN T. GORE

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 25th day of August, 2009, mailed a true and correct copy of the above and foregoing 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. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

George T. Holmes

George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200