

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-01389-COA

PERCY BRIDGEMAN

APPELLANT

V.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF 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.

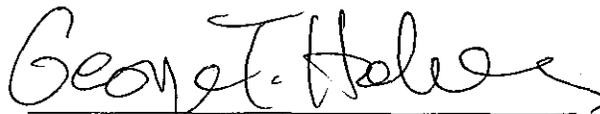
1. State of Mississippi
2. Percy Bridgeman

THIS 10th day of December, 2009.

Respectfully submitted,

PERCY BRIDGEMAN

By:



George T. Holmes,
Mississippi Office of Indigent Appeals

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	I
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
ISSUE # 1	4
ISSUE # 2	7
ISSUE # 3	8
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

CASES:

<i>Brown v. State</i> , 829 So. 2d 93 (Miss. 2002)	7
<i>Carr v. State</i> , 208 So. 2d 889 (Miss. 1968)	8
<i>Eakes v. State</i> , 665 So. 2d 852 (Miss.1995)	6
<i>Edwards v. State</i> , 469 So. 2d 68 (Miss.1985)	7
<i>Foster v. State</i> , 919 So. 2d 12 (Miss. 2005)	8
<i>Grimes v. State</i> , 1 So. 3d 951 (Miss. Ct. App. 2009)	5, 6
<i>Hall v. State</i> , 644 So. 2d 1223 (Miss. 1994)	7
<i>Idaho v. Wright</i> , 497 U. S. 805, 110 S.Ct. 3139 (1990)	6
<i>Kelly v. State</i> , 910 So. 2d 535 (Miss. 2005)	7
<i>Ormond v. State</i> , 599 So. 2d 951 (Miss. 1992)	8
<i>Smith v. State</i> , 492 So. 2d 260 (Miss. 1986)	8
<i>Williams v. State</i> , 754 So. 2d 591 (Miss. Ct. App. 2000)	8

STATUTES

none

OTHER AUTHORITIES

Miss. R. Evid. 803(25)	4
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STATEMENT OF THE ISSUES

- ISSUE NO. 1: WHETHER THE COURT ERRED BY ADMITTING
HEARSAY EVIDENCE UNDER MISS. R. EVID. 803(25)?
- ISSUE NO. 2: WHETHER THE WEIGHT OF EVIDENCE SUPPORTS
THE VERDICT?
- ISSUE NO. 3: WHETHER NEWLY DISCOVERED EVIDENCE
JUSTIFIES A NEW TRIAL?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Madison County, Mississippi where Percy Bridgeman was convicted of two counts of statutory rape in jury trial held May 14-15, 2008, Honorable Samac S. Richardson, Circuit Judge, presiding. Bridgeman was sentenced to twenty-five (25) years in each count, concurrent, and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony, the Madison County Department of Human Services received an anonymous telephone call January 31, 2006, reporting that L. H., a seven year old elementary school student in Canton, told one of her schoolmates that her mother's boyfriend touched her inappropriately [T. 79-89, 104]. Department of Human Services worker Benae Jackson contacted the elementary school principal and went to the school to speak with L. H. [T. 70-71].

L. H. was reluctant to talk to Ms. Jackson. [T. 123]. So, Ms. Jackson left, but was called back to the school later that same day. [*Id.*, T. 117-19]. This time, according to Ms. Jackson, L. H. said that her mother's boyfriend, Percy Bridgeman, had been molesting her, but L. H. did not give any details. [T. 123-35].

After this discussion with L. H. at the school, Ms. Jackson set up a forensic interview with the Child Advocacy Center (CAC) February 6, 2006. [T. 127-28, 216]. At the forensic interview, L. H. denied that anyone had touched her inappropriately. [T. 217-18, 231-34; Ex. D-2]. When the interviewer left the room, L. H. fell asleep. *Id.*

After that, Bena Jackson set up another interview with L. H. held February 22, 2006. [T. 130-31]. This time the CAC was not involved, and the interview was conducted at the DHS office in Canton with Canton Police Investigation Shelby Burnside present . [T. 63, 71, 130, 151].

In this third interview, L. H. is said to have accused Percy Bridgeman of molesting her. [T. 130-32]. The first occurrences were at L. H.'s grandparent's house, where she lived with her mother, and two siblings. [T. 130-32].

It was learned that, since both of them were living with their parents, L. H.'s mother and Bridgeman would spend weekends in motel rooms in Canton, with L. H. and two other children. [T. 70, 71, 124, 150-55, 243]. L. H. alleged in the February 22, 2006 interview that Bridgeman molested her once in a motel room when the other family were sleeping, and once when the mother took the other two children to the doctor. *Id.* The

misconduct described by L. H. consisted of digital and penile penetration of her vagina. *Id.*

L. H. was examined by pediatrician Janice Bacon, M. D., who said that L. H. described being only digitally fondled by Bridgeman. [T. 177, 182-83]. L. H. never told Dr. Bacon of any penile penetration. *Id.* Dr. Bacon found no vaginal tears or other physical injury; the hymen was intact. [T. 178-79, 185-88]. L. H.'s blood tested positive for Chlamydia, a sexually transmitted bacteria. [T. 127, 137, 180, 189-90]. No culture specimens were taken, however. [T. 137-38]. There was no vaginal discharge noted either. [T. 185, 188].

The state put on evidence that Bridgeman was suspected of having Chlamydia back in 2005, but the diagnosis was not made with laboratory results, it was based on Bridgeman having testicle pain. [T. 161, 163-64, 196-202, 207]. Bridgeman testified that he was unaware of any Chlamydia diagnosis. [T. 250, 253].

L. H. testified at trial and told the jury that Percy Bridgeman placed his penis inside her vagina on two occasions, once at her grandmother's house where she was living, and once in a hotel room in Canton where she and her mom and two siblings had come to visit. [T. 97- 105]. L. H. said the alleged rape in the motel occurred when L. H.'s mom had taken the other to children to the doctors' office. *Id.*

Bridgeman denied all charges and allegations of L. H. [T. 242, 245-47]. After the trial, it was learned, unbeknownst to everyone else, that state witness Benae Jackson had a

prior conviction for embezzlement, but it was under the wrong last name, "Johnson." [T. 315-26]. Bridgeman asked for a new trial on the basis of newly discovered evidence which the trial court denied. [R. 97-98].

SUMMARY OF THE ARGUMENT

The trial court should not have admitted hearsay under Miss. R. Evid. 803(25). A new trial should have been granted upon the discovery of new evidence. The verdict is not supported by the weight of evidence.

ARGUMENT

**ISSUE NO. 1: WHETHER THE COURT ERRED BY ADMITTING
HEARSAY EVIDENCE UNDER MISS. R. EVID.
803(25)?**

A hearing was conducted upon the state giving notice of intent to use the tender years hearsay exception of rule 803 (25). [T. 62-88].¹ At the hearing, Benae Jackson, the school principal, and Shelby Burnside of the Canton Police Department testified. *Id.*

It was learned that L. H. was interviewed twice at school on January 31, 2006. Ms.

¹Rule 803(25) provides the following:

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 provided substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness....

Jackson testified that L. H.'s accusations were spontaneous and with detail, but the facts are contrary. [T. 72-73, 123]. L. H. did not speak much at all to Ms. Jackson at first. [T. 123]. When Ms. Jackson returned to the school and interviewed L. H. the girl gave no details. [T. 124] L. H. was interviewed repeatedly that same day, twice by Ms. Jackson and once or twice by the school principal. [T. 80-81].

When interviewed by someone actually trained in proper techniques, L. H. denied ever being molested. . [T. 217-18, 231-34; Ex. D-2]. In addition to being reluctant and recanting, L. H. was inconsistent in details of the allegations. She never told Dr. Bacon of any penile penetration. [T. 177, 182-83].

Bridgeman's position is that, with L. H. being reluctant and giving inconsistent stories, her reports are unreliable under 803(25). There is an overall lack of spontaneity, there is recantation and abundant inconsistency.

Reliability and trustworthiness are the ultimate factors in deciding admissibility of tender year exception evidence. In *Grimes v. State*, 1 So. 3d 951 (Miss. Ct. App. 2009), the court carefully explained that a tender years exception inquiry does not end at a determination of a child being of tender years since, a child may be of tender years, but if indicia of reliability are missing, the hearsay exception does not apply. *Grimes* ¶10.

The *Grimes* court explained how the following factors, are to be considered by the trial court in deciding reliability under the tender years exception: (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. *Id.* [See *Idaho v. Wright*, 497 U. S. 805, 822, 110 S.Ct. 3139 (1990)]. The 12 factors are not "exhaustive", and are not a "mechanical test", other factors can be considered. *Id.* [Citing *Eakes v. State*, 665 So. 2d 852, 865 (Miss.1995)].

Bridgeman suggests that the trial court erred reversibly by improperly weighing the applicable factors. Specifically, it is suggested that under factors (4) and (10) of the tender years test, lack of spontaneity and "age and maturity of the declarant," should have been weighed conclusively against reliability, trustworthiness and admissibility.

Bridgeman was prejudiced because the admission of the hearsay testimony served to bolster the unreliable testimony of L. H. A new trial is respectfully requested.

ISSUE NO. 2:

**WHETHER THE WEIGHT OF EVIDENCE SUPPORTS
THE VERDICT?**

L. H.'s clothes were never tested. [T. 164]. The jury sent out several questions during their deliberation. [R. 49A ; T. 306]. The jury wanted laboratory reports which were not provided and more details about the appellant's medical condition in 2005. *Id.*

The jury, like L. H.'s mother, probably found it unlikely that Percy Bridgeman could have molested L. H. in a motel or hotel room with all five of the people inside. [T. 135]. With L. H. denying any wrongdoing at the CAC interview, it is just as likely nothing ever occurred which means the state simply did not produce enough credible evidence to convict Percy Bridgeman. L. H. never reported rape to Dr. Bacon, only fondling, and there were no physical injuries to L. H. [T. 177, 182-83].

The verdict of guilty was contrary to the evidence entitling Percy Bridgeman to a reversal and rendering of acquittal, or alternatively to a new trial, which is hereby respectfully requested. *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).

The court in *Edwards v. State*, 469 So. 2d 68, 70 (Miss.1985), said

If the facts and inferences so considered point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, granting [a motion for directed verdict] is required.

See also *Carr v. State*, 208 So. 2d 889, 889 (Miss. 1968), *Foster v. State*, 919 So. 2d 12, 15 (Miss. 2005).

ISSUE NO. 3: WHETHER NEWLY DISCOVERED EVIDENCE JUSTIFIES A NEW TRIAL?

It was learned after the trial that state witness Benae Jackson had a prior felony conviction for embezzlement. [T. 315-26]. The conviction, however, was under the name “Benae Johnson.” *Id.* The state was not aware of the conviction before trial, and the defense only learned of it by chance. *Id.*

As stated in *Ormond v. State*, 599 So. 2d 951, 962 (Miss. 1992), “newly discovered evidence warrants a new trial if the evidence will probably produce a different result or verdict; further, the proponent must show that the evidence “has been discovered since the trial, that it could not have been discovered before the trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative, or impeaching.” [Citing *Smith v. State*, 492 So.2d 260, 263 (Miss.1986)]. *Id.* To grant or deny a new trial based on newly discovered evidence is discretionary with the trial court. *Id.* See also, *Williams v. State* 754 So.2d 591(Miss. Ct. App. 2000).

Here, since Jackson’s prior conviction was under the wrong name, not even a

diligent search would have discovered it. With all of the conflicting testimony and juror reluctance and questioning of the evidence, the fact that the state's key witness had a prior conviction would probably be outcome determinative.

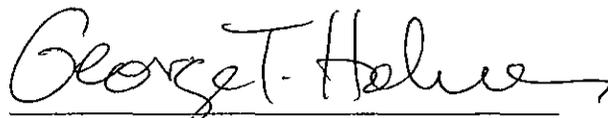
Appellant is aware that the newly discovered evidence would basically be impeachment evidence which normally does not justify nor require a new trial. But this case is different, because Jackson's prior conviction was for a crime of falsehood and because the evidence was so conflicting and because the jury was obviously troubled having asked so many questions. Appellant would respectfully suggest that the facts and circumstances of this case, justify a new trial.

CONCLUSION

Percy Bridgeman respectfully request to have his convictions reversed with remand for a new trial.

Respectfully submitted,
PERCY BRIDGEMAN

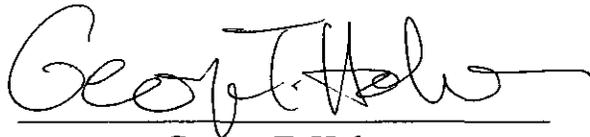
By:



George T. Holmes,
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CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 10th day of December, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Samac S. Richardson, Circuit Judge, P. O. Box 1599, Brandon, MS 39043, and to Hon. Rebecca Mansell, Asst. Dist. Atty., P. O. Box 121, Canton MS 39046, 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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