IN THE SUPREME COURT OF MISSISSIPPI

CASE NO: 2009-TS-01614-SCT

DAVID PAUL ANDERSON — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

ON APPEAL FROM THE
CIRCUIT COURT OF HARRISION COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CRIMINAL ACTION NO. 2401-2007-0838

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Defendant/Appellant, hereby 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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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2. Honorable John Gargiulo, Circuit Court Judge
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Respectfully submitted,

DAVID PAUL ANDERSON

BY: DENHAM LAW FIRM, PLLC

BY: _____
LEILANI LEITH HILL
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STATEMENT WITH RESPECT TO ORAL ARGUMENT

With respect to the question of oral argument the undersigned attorney of record for the Appellant herein, David Paul Anderson, would respectfully state her belief that the issues raised by this appeal are of extreme importance and therefore oral argument would be helpful to the reviewing Court, therefore, oral argument is requested.

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BRIEF FOR APPELLANT

I. STATEMENT OF THE ISSUES

1. Whether trial counsel was ineffective for failing to request a psychological examination to determine whether or not the appellant was suffering from a disease or defect that rendered him legally insane or incompetent to stand trial and for trial counsel's general errors/omissions.

2. Whether the trial court erred in allowing the introduction of hearsay testimony pursuant to the tender years exception.

3. Whether the trial court erred in allowing the State to lead the victim.

4. Whether the trial court erred in denying Appellant's motion to exclude the testimony of Dr. Donald Matherne.

5. Whether the trial court erred in failing to quash Count I of the indictment.

6. Whether the evidence was insufficient to support Counts I and II of the indictment.

7. Whether the State violated the Golden Rule during closing arguments.

8. Whether the State violated the Appellant's right to remain silent during closing arguments.

9. Whether the Court erred by failing to submit the only defense exhibit to the jury.

10. Whether the cumulative effect of all the errors in the trial denied the Appellant, David Paul Anderson a fair trial.

11. Whether the verdict was against the overwhelming weight of the evidence.

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition in the Court Below:

The Defendant, David Paul Anderson, on or about the 22nd day of October, 2007, was charged by indictment in the Circuit Court of Harrison County, Mississippi (First Judicial District), with two counts of Statutory Rape, in violation of Section 97-3-65(1)(b), Miss. Code of 1972, as amended, and one court of Sexual Battery, in violation

of Section 97-3-95(2), Miss. Code of 1972, as amended. R.E. at 12. The indictment alleged that the incidents occurred on or about November, 2006, November 25, 2006, and December 2, 2006, respectively. R.E. at 12. Numerous motions were filed by the Defendant's counsel and the State of Mississippi, and were heard June 10, 2009, June 17, 2009, June 22, 2009. R. at 2-36, 38-53, 55-139, and 141-258. This case was tried before the Honorable Lisa P. Dodson, over a period of two days, June 22 and June 23, 2009. The jury retired and returned a verdict of guilty as to each count of the indictment. R. at 561; R.E. at 7. The trial court ordered that a pre-sentence report be completed and continued the sentencing to July 13, 2009. R. at 561; see also R.E. at 15. At the Sentencing hearing it is important to note that substantial evidence was admitted that called into question the Defendant's competence and mental capacity. R. at 578. In fact upon hearing the testimony the trial court ordered that the Defendant be tested both mentally and physically and receive any treatment necessary. R.E. at 9. Following the sentencing hearing the trial court sentenced the Defendant to serve a term of Life in Count I, Life in Count II, and thirty years (30) in Count III. R. at 608; see also R.E. at 9. On or about the 22nd day of September, 2009, the Court considered the Defendant's Motion for J.N.O.V. or in the alternative for a new trial. R. at 612. Upon hearing argument the trial court denied the Defendant's Motion. R. at 616-620; see also R.E. at 11.

B. Statement of the Facts:

The Appellant, David Paul Anderson, was charged by indictment with two counts of statutory rape and one count of sexual battery, with his biological daughter, A.N.A.[1], who was eleven at the time of the alleged incidents. R. at 445. The alleged crimes were

[1] Due to the age of the victim and the sensitive nature of the crime, the Appellant is referring to the victim by her initials A.N.A..

reported to the Gulfport police department by Denise Boller, the Appellant's sister, who reported that on or about December 2, 2006, she entered the home of David Paul Anderson to retrieve a purse for her sister, Rhonda Anderson, and upon entering the home she observed Mr. Anderson in his bedroom engaged in sexual intercourse with A.N.A.. R. at 405-406, 410. Mrs. Boller testified at trial, that she moved back from the doorway to the room and announced her presence in the home, retrieved A.N.A. and went back to her residence. R. at 407. Boller then stated that she questioned A.N.A. and that A.N.A. reported that this had been going on for quite some time. R. at 408. It is important to note that after allegedly walking in and observing her brother engaged in sexual intercourse with her eleven year old niece that Denise Boller, and the Appellant's other sister, Rhonda Anderson, waited approximately one month to report the incident to the police department. R. at 410. Denise Boller, didn't attempt to stop this horrific act, she merely backed out of the room and called her brother's name in an effort to interrupt him without calling attention to the fact that she had observed what was occurring. R. at 414. Neither sister called the police, took A.N.A. to the emergency room or the pediatrician, or reported this incident to the Mississippi Department of Human Services. R. at 415-416. This fact is startling considering that nature of the allegations and the fact that Rhonda Anderson is an assistant teacher, a mandatory reporter pursuant to statute, and fully aware of the reporting requirements. R at. 427.

The victim A.N.A., who was fourteen at the time of trial, testified via closed circuit television. R. at 342. After substantial leading from the State, A.N.A. testified that on December 2, 2006, David Anderson, her biological father, put his private in her private. R. at 346. The victim further testified, over the objection of defense counsel, that "it" had happened a lot. R at. 348. In order to attempt to introduce evidence to

support Counts I and II of the indictment with a victim who clearly could not recall dates, the Assistant District Attorney while pointing to a calendar basically testified himself as to the facts surrounding Counts I and II of the indictment, specifically the dates, which had been contested by defense counsel during trial and at pre-trial proceedings. R at 350-353.

The State called Anthony Clarite, an officer with the Gulfport Police Department, who testified concerning his forensic interview with the victim. R at 438. Officer Clarite interviewed the victim approximately one month after the alleged December, 2006, incident. R at. 446. Officer Clarite discussed his training and interview techniques using the Findings Words Protocol[2], which implements the use of open ended non leading questions which are of utmost importance when interviewing children. R at 437-439. It is important to note that during this interview in which the victim was not lead (unlike during the course of her testimony at trial), A.N.A. related one incident, not three as presented at trial. R at. 446. Furthermore, Clarite testified that the victim told him that all of her allegations occurred on the same day. R. at 446.

Perhaps the most troubling hearsay testimony at the trial of the instant matter was that from Dr. J. Donald Matherne, who was qualified as an expert in the field of clinical psychology and child sexual abuse, despite his testimony that he no longer sees patients and that he no longer receives training in the area of sexual abuse as that is one of the areas that he has moved away from. R. at 467. Dr. Matherne testified that he has developed his own protocol over the years to interview children, and that his technique cannot be found in any publication, nor has it been peer reviewed. R. at 474-475.

[2] A person trained in the Finding Words Protocol is generally advised not to interview a child multiple times as this further traumatizes the child and also increases the potential for the child to fabricate or provide inconsistent statements. The Finding Words Protocol takes into account pertinent research. http://www.ndaa.org/pdf/finding_words_2003.pdf.

Despite defense counsel's vehement objections to Dr. Matherne being qualified as an expert and being allowed to proffer hearsay testimony, his testimony was allowed. R. at 479-480.

Dr. Matherne testified that he interviewed the victim on January 10, 2007, again approximately thirty days following the alleged incident and subsequent to Anthony Clarite's interview. R. at 480. Dr. Matherne was also permitted to testify using his "fist technique" another self developed technique that he uses to determine whether or not there has been penetration and whether or not a child needs a medical exam. R. at 495. Although Dr. Matherne testified that A.N.A. told him that "it had happened more than one time" the only events that she relayed to him were that of the December 2006 incident. R at. 502-503. A.N.A. consistent with her statements to the other witnesses never provided any other dates, and more particularly never mentioned November 24 or 25, 2006, until the prosecutor lead her through her testimony at trial. *Id.*

The Defense, called Mr. Anderson's brother, Sam Anderson, to testify at trial. Sam Anderson testified that he specifically recalled Thanksgiving 2006, and that on the 25th day of November, 2006, he was present on the family farm with David and A.N.A. R. at 518. Sam Anderson testified that he and David worked on the tractor and that A.N.A. was present the entire time and played while the brothers worked. R. at 520. Sam Anderson further testified that A.N.A. was joyful and happy that day. R. at 522. Sam Anderson stated that David and A.N.A. left the farm before he did and that he closed and locked the gate as he left the property. R. at 521. Sam Anderson also testified that he was with David Anderson the entire time they were at the farm and that David and A.N.A. never went off together by themselves. R. at 522.

Of startling concern is the fact that the Defenses only exhibit[3] went missing from the jury room and there is not a clear record of whether or not all of the jurors had the opportunity to view the exhibit. R. at 567. The trial court announced the morning after the jury returned its verdict, that Exhibit D-1 could not be found and that the bailiff and the court reporter and the court administrator searched the jury rooms thoroughly and that the exhibit could not be found. R. at 567. The foreman of the jury was contacted and he advised that he could not remember seeing it or what had happened to it. R. at 568. The trial court after conferring with both State and Defense counsel had the court reporter contact all of the jurors and inquire as to whether or not they recalled seeing the document. *Id.* About half the jurors advised that they had seen the drawing, however, half could not recall one way or the other. *Id.* The Exhibit never surfaced.

III. SUMMARY OF THE ARGUMENT

The Appellant, David Paul Anderson, submits that the lower court committed numerous errors which warrant reversal of his conviction for two counts of statutory rape and one count of sexual battery. The most startling error in during the trial of the instant matter surrounds defense counsel's failure to request a psychological examination of the Appellant despite a plethora of information concerning both the defendant's lack of competency and lack of ability to understand right from wrong. R. at 563-593. If defense counsel would have requested a psychological examination the results at trial would have been substantially different. First, if it was determined that the Appellant was not competent then this case would have never been tried. The Appellant would have been remanded to the Mississippi State Hospital to determine if he could be restored to competency and would have at a minimum been afforded the right to be heard at an

[3] The Exhibit was a drawing of the floor plan of the home that Mr. Thompson asked Ashley to make in the course of her testimony. R. at 567.

evidentiary hearing. Second, if the Appellant was determined through a psychological examination not to understand the difference between right and wrong then he would have been afforded a defense that was not presented to the jury. There is no way to determine what the outcome at trial would have been if such a defense was presented.

The trial court also erred in allowing hearsay testimony to be introduced pursuant to the tender years exception. At the time of trial the victim was fourteen years old and no longer of tender years. R. at 343. Furthermore, the victim was allowed to testify via closed circuit television further removing the necessity for hearsay testimony. R at. 342. The testimony permitted by the trial court only served to bolster the testimony of the victim and did not aid the trier of fact. The court also erred in allowing the expert testimony of Dr. Matherne. Dr. Matherne should not have been allowed to testify specifically in reference to his "Fist Technique" as his testimony did not meet the requirements of Mississippi Rules of Evidence, Rule 702, or the standards enumerated by the United States Supreme Court in *Daubert.* Dr. Matherne's testimony was not based on sufficient facts or data, the product of reliable principles and methods, or applied reliably to the facts of this case and his testimony was in manifest error.

The trial court also erred in allowing the State to lead the victim. During the trial of this matter the issue of the dates for Counts I and II of the indictment, and the sufficiency of the evidence supporting said counts, were contested by the defense. R. at 13. Indeed the defense argued that Count I of the indictment should have been quashed as the defense was not provided enough information to prepare an adequate defense. It was not until trial that the victim provided two specific dates to support Counts I and II and only after being lead by the State. R. at 18. The State being permitted to lead A.N.A., in essence allowed the prosecutor to spoon feed the victim dates to support

Counts I and II of the indictment when the victim was previously unable to do so. Allowing introduction of evidence in this manner also resulted in a manifest injustice and reversible error. The trial court erred in failing to Quash Count I of the indictment due to insufficiency of the indictment and the evidence submitted at trial was not sufficient to support a conviction as to Counts I and II of the indictment.

The trial court also erred in failing to declare a mistrial when the prosecutor committed reversible error during closing argument when he violated both the golden rule and the Appellant's Fifth Amendment right to remain silent.

The failure of the Court to ensure that the defense's only exhibit was sent to the jury room for deliberation was also reversible error.

Finally, the cumulative effect of the many and various errors during trial denied the Appellant a fair trial and the verdict was against the overwhelming weight of the evidence.

IV. ARGUMENT

ISSUE 1

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution and its counterpart in the Mississippi Constitution guarantees the assistance of counsel to frame a defense for the accused in all criminal proceedings. *U.S. Constitution. Amend. VI.* The Mississippi Supreme Court has held that counsel is presumed to be competent. *Jackson v. State*, 476 So.2d 1195, 12004 (Miss. 1985). However, there is no Constitutional guarantee of error free counsel. *Cabello v. State,* 524 So.2d 313, 315 (Miss. 1988) (citing *Johnson v State*, 511 So.2d 1333, 1340 (Miss. 1987)).

In *Strickland v. Washington,* the United States Supreme Court outlined a two-prong test for ineffective assistance of counsel: first, the one claiming ineffective assistance of counsel must show the errors or omissions in the performance of counsel; second the claimant must show that such errors or omissions by counsel prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has held that the first prong of *Strickland* is satisfied as long as the attorney's representation is within the "broad spectrum of reasonable professional assistance." *Stringer v. State*, 627 So.2d 326, 329 (Miss. 1993). This Court has further held that the second prong of *Strickland* mandates a showing by the defendant that "but for" the errors or commissions of counsel, there is a "reasonable probability" that a different outcome of the criminal action would have occurred. *Mohr v. State*, 584 So.2d 426, 430 (Miss. 1991). Necessarily, if either of the *Strickland* inquiries fail, then the allegation of ineffective assistance of counsel also fails. *Foster v. State*, 687 So.2d 1124, 1130 (Miss. 1996).

In the matter giving rise to the instant appeal, Mr. Anderson's trial counsel was seriously deficient. The deficiency fell into two categories: failure of counsel to obtain or even move for a psychological evaluation to ascertain fitness to stand trial, or, the existence of an insanity or competence defense as to guilt,[4] and general errors and omissions such that Mr. Anderson was prejudiced.

A. Failure to obtain psychological examination

Miss. Code Ann. §99-13-11 provides that "in any criminal action in the circuit

[4] The undersigned filed a Motion for Psychological Examination with this Court on February 26, 2010, addressing specific concerns with Mr. Anderson's competency, more particularly with his capacity to confer with counsel, to understand the proceedings against him, to assist counsel, to appreciate the criminality of the charges, to understand and knowingly and intelligently waive or assert his rights, and whether he was suffering from a mental illness at the time of the alleged acts such that he is unable to understand right from wrong. These concerns were addressed to both the Appellant's competency at the appellate level and at the trial level.

court in which the mental condition of a person indicted for a felony is in question, the court or judge in vacation on motion duly made by the defendant, the district attorney or the motion of the court or judge, may order such person to submit to a mental examination by a competent psychiatrist or psychologist selected by the court to determine his ability to make a defense..." Furthermore Rule 9.06 of the Mississippi Uniform Rules of County and Circuit Court provides that "if before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court..."

The United States Supreme Court has defined competency to stand trial as "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824, 825 (1960) (per curiam); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836(1966); See also *Jay v. State,* 25 So.2d 257, 261 (Miss. 2009). This Court has further held that in order to be deemed competent to stand trial, a defendant must be: (1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity of the case. *Martin v. State,* 871 So.2d 693, 697 (Miss.2004) (quoting *Howard v. State,* 701 So.2d 274, 280 (Miss.1997) (overruled on other grounds)).

With respect to insanity it must be proved that at the time of committing the act the defendant "was laboring under such defect of reason from disease of the mind as (1)

not to know the nature and quality of the act he was doing or (2) if he did know it, that he did not know that what he was doing was wrong. *Woodham v. State,* 800 So.2d 1148, 1158 (Miss. 2001).

In the instant matter the record is replete with examples concerning Mr. Anderson's mental retardation and other mental disabilities, however, no motion was ever filed or presented to the trial court requesting a psychiatric examination, or addressing Mr. Anderson's mental retardation until after the jury had return a verdict of guilt and Mr. Anderson was before the trial court for sentencing. In fact Mr. Anderson's counsel had the following exchange with the trial court:

> Court: Are you prepared to go forward on sentencing, state?
>
> Mr. Gargiulo: Yes, ma'am
>
> Court: Defense?
>
> Mr. Thompson: No, Your Honor, we're not. We request a PSI. He has an absolutely clean slate.
>
> Mr. Gargiulo: We would not dispute the fact that he has no prior criminal history.
>
> Mr. Thompson: But I have some other matters that I think needs to be presented before sentencing.
>
> Court: Are those things you can present this evening, Mr. Thompson?
>
> Mr. Thompson: No. As a matter of fact, I've asked the family to start getting it. ***He's special, IQ. We got problems.*** I need to get the documents to make in the record.

R. at 563. Emphasis added.

During the trial of the instant matter during the cross-examination of Rhonda Anderson, the only mention of Mr. Anderson's limited mental capacity was when defense

counsel attempted to elicit testimony concerning Mr. Anderson's birth defect and subsequent speech impediment and mental retardation. R. at 431. The State objected to Defense Counsel's line of questioning, and after a conference at the bench the trial court sustained the question. R. at 431. No other testimony was elicited at trial with respect to Mr. Anderson's mental capacity.

Indeed as previously stated, it was not until sentencing that the issue of competency was raised. Pursuant to defense counsel's request, a Pre-Sentence report was complied and submitted to the Court for its review. The Pre-Sentence report is replete with blanks of information as due to Mr. Anderson's limited mental capacity he could not provide the information requested. R.E. at 15-26. The probation officer completing the pre-sentence report included the following: "offender seems to be very challenged with [sic] it comes to remembering his past history with education, employment, and drug use. He could not remember how to spell his ex-wife's first name during the interview. ***Further mental evaluation is recommended after interviewing Mr. Anderson.*** R.E. at 26. Emphasis added.

In response to the pre-sentence report, Mrs. Wilkerson addressed the Court as follows:

> "Your Honor, if you have looked at it you know that there's basically some not answers or blank spaces, and I tell you that because David doesn't read or write and he's special ed. And since the trial we have got some other reports, found out the he's got a fairly low I.Q., and that is why some of your blanks for school and different things are not filled in and not because he didn't cooperate, but other that that – other the part that asks for mental illness in the family, I know, Judge, there are some sister – at least one sister and some other children in the family that have had some mental issues, and they marked no on it, but I think that's probably incorrect.

R. at 579. Mrs. Wilkerson then submitted a bolus of documents that indicated that Mr. Anderson has a verbal I.Q. of 60 and that he was diagnosed as educationally

mentally retarded. R. at 581; see also R.E. at 48. All of these factors, the inability to read and write, and Mr. Anderson's low I.Q. are issues that should have been addressed by the filing of a Motion for Psychological Examination and through an evidentiary hearing to which Mr. Anderson is entitled as a matter of law.

The Defense called Alice O'Dell Anderson, the Appellant's mother, to testify at the sentencing hearing. Mrs. Anderson testified that Mr. Anderson was born with a hearing defect that was not discovered until Mr. Anderson was six years old. R. at 583. Mrs. Anderson further testified that her son could not talk and for the majority of his early childhood he just made motions. R. at 583-584. Mrs. Anderson further testified that Mr. Anderson cannot read or write[5] and that he couldn't take care of his educational or financial matters. R. at 584.

Wilda Switzer, the retired principal for the school for physically and mentally handicapped children, that Mr. Anderson attended, provided testimony that in her opinion Mr. Anderson is a truly mentally retarded person. R. at 586. Mrs. Switzer further testified that in her opinion Mr. Anderson is functioning on the level of a first or second grader and that his mental development was substantially affected by the fact that he was deaf during his early childhood. R at. 587. The most pivotal portion of Mrs. Switzer's testimony is the fact that she does not believe that Mr. Anderson knew that it was wrong to have sexual relations with his daughter based on his mental retardation. R at. 588.

Mr. Joseph Leonard testified that he was until the time of his incarceration, Mr. Anderson's employer. R. at 591. Mr. Leonard again testified to the fact that Mr. Anderson cannot read and write, that he was easily influenced by things and that he would get lost a good bit. R. at 593.

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[5] This is a fact that was readily apparent to undersigned counsel and added to the difficulty of conferring with the Appellant for purposes of preparing this Appeal.

In light of the statements made by Mr. Anderson's trial counsel with respect to ***He's special, IQ. We got problems,*** and the other evidence submitted at the sentencing hearing directly related to both competency and sanity, and Mr. Anderson's clear lack of comprehension, failure of trial counsel to request a mental examination should *per se* establish the first prong of *Strickland.* As to what might have been revealed if the Appellant had been afforded his constitutional right to a mental examination, the truth is that no one will ever know, however, if the Appellant is not competent to stand trial, as appellate counsel suspects then he would not stand in the position of serving two life sentences plus an additional thirty years. Also, if after a mental examination, it was determined that the Appellant suffered from a mental disease or defect such that he did not understand the difference between right from wrong then he would have had a valid defense at the trial of the instant matter, for which indeed there is a "reasonable probability" that a different outcome of the criminal action would have occurred. Additionally, undersigned counsel has serous doubts as to how Mr. Anderson was competent to waive his presence at pre-trial hearings; waive his right to have the victim conduct an in court identification, and to waive his right to testify. In light of the severity of the Appellant's sentences the Appellant urges that this Honorable Court find a "bona fide doubt" has been shown by the testimony at the sentencing hearing and the documents submitted to the trial court and that in order to properly resolve the doubt Anderson's conviction and sentence should be reversed and this matter remanded for a new trial.

B. General Errors and Omissions

Trial counsel's other general errors and omissions such as waiving Mr. Anderson's presence pre-trial hearings; waiving his right to have the victim conduct an in court identification, and to waiving his right to testify were such that Mr. Anderson was

denied ineffective assistance of counsel and therefore his conviction and sentence should be reversed.

ISSUE 2

HEARSAY TESTIMONY

The trial court erred by allowing the introduction of hearsay testimony pursuant to the tender years exception. Before trial, the court held a hearing and determined that various witnesses could testify about the statements A.N.A. had made to them under the tender-years exception to the hearsay rule found in Mississippi Rule of Evidence 803(25). Pursuant to this rule, 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. M.R.E. 803(25).

The first inquiry a trial court must make is whether or not a child is of tender years. There is a rebuttable presumption that a child under the age of twelve is of tender years. *Allred v. State,* 908 So.2d 889, 892(¶ 11) (Miss.Ct.App.2005). However, where an alleged sexual abuse victim is twelve or older, there is no such presumption and the trial court must make a case-by-case determination as to whether the victim is of tender years. *Hayes v. State,* 803 So.2d 473, 477 (Miss. 2001). This determination should be made on the record and based on a factual finding as to the victim's mental and emotional age. If the court finds that the declarant is of tender years, then it proceeds to the second inquiry

and must still rule on the Rule 803(25)(a) and (b) factors before admitting the testimony. *Id*.

Once the court finds that a declarant is of tender years, it must then determine whether the child's statements possess "substantial indicia of reliability." M.R.E. 803(25). The comment to Rule 803(25) recites several factors, commonly called the *Wright* factors, that the trial court may consider: (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 also Idaho v. Wright,* 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). However, the *Wright* factors are not an exhaustive list, and "no mechanical test is available." *Withers v. State,* 907 So.2d 342, 350(¶ 23) (Miss.2005) (quoting *Eakes v. State,* 665 So.2d 852, 865 (Miss.1995)). Instead, "the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made." *Bell v. State,* 797 So.2d 945, 948(¶ 13) (Miss.2001) (quoting *Wright,* 497 U.S. at 822, 110 S.Ct. 3139).

At the time of the trial of the instant matter A.N.A. was fourteen years old, her date of birth being January 3, 1995, therefore at the time of trial she was not of tender years and hearsay testimony should not have been allowed. R. at 343. After a pre-trial hearing, however, the trial court determined that A.N.A. was of tender years as she was

under the age of fourteen when the crimes giving rise to this prosecution took place, the court also noted that even though she was fourteen she did not appear to be a mature fourteen year old. R. at 239-245. During the pre-trial hearing the State tendered the testimony of the victim's two aunts, Denise Boller, and Rhonda Anderson, and that of Detective Anthony Clarite, and Dr. Matherne. R. at 246. These four witnesses essentially provided the same testimony regarding A.N.A.'s statement of what happened. R. at 246. Indeed even the trial court considered such testimony to be cumulative and advised that it wouldn't allow the State to put on all four witnesses to repeat simply the same statements over and over.[6] R. at 246.

a. DENISE BOLLER

Denise Boller is the Aunt of A.N.A., who testified at both the pre-trial hearing and at trial that she walked in and observed the Appellant engaged in sexual intercourse with A.N.A. R. at 146. Boller also testified that she told A.N.A. that she knew what was going on and asked if it had happened before and if it happened any other place. R. at 148. Boller testified that A.N.A. told her that it had happened before and that it had happened at the farm. *Id.* It is important to note that Boller testified that A.N.A. didn't say anything until Boller asked her a question and that other than saying "it happened" more than once, A.N.A. did not provide any other dates or clarify was exactly had happened. *Id.* It is also important to note that Boller did not report this incident to law enforcement officials until approximately one month after the alleged incident took place. *Id.*

[6] At the trial of the instant matter the State called Denier Boller, Anthony Clarite, and Dr. Matherne and all three witnesses provided hearsay testimony regarding A.N.A.'s statement to each respective person.

b. ANTHONY CLARITE

Anthony Clarite is a patrol officer with the Gulfport Police Department who conducted a forensic interview with A.N.A. R. at 161. Clarite testified that he had been trained to conduct forensic interviews and that he interviewed A.N.A. on or about January 3, 2007. R. at 161. Clarite testified that A.N.A. knew he was a police officer and that after building rapport with her, A.N.A. described the incident that had occurred in December 2006. R. at 164. Consistent with all the other hearsay witnesses, and upon being asked, A.N.A. advised that this had happened more than one time in the past, but did not elaborate. In fact Clarite, testified that upon being asked if it had happened more than one time in the past "she completely shut down." R. at 167. One wonders if A.N.A. really completely shut down or could not recall details of another incident because another incident did not take place.

c. DR. J. DONALD MATHERNE

Dr. J. Donald Matherne is a clinician in the private practice of clinical psychology.[7] R. at 177. A.N.A. was transported to Dr. Matherne's office by the Mississippi Department of Human Services for the purpose of her second forensic interview. R. at 184. Again, during this interview, A.N.A. discussed the incident which occurred December, 2006. Even, though Dr. Matherne used his own special methodology, A.N.A. did not provide any additional details or specifics which differed from her statements made to her Aunts and Officer Clarite. R. at 196. Again, however, upon being prompted A.N.A. provided that "this" had happened more than once and on

[7] There are two issues with respect to Dr. Matherne's testimony. First whether or not Dr. Matherne should have been permitted to provide hearsay testimony regarding the victim's statements and second whether or not it was proper to admit Dr. Matherne as an expert. The hearsay testimony will be addressed in this section and Dr. Matherne's expert testimony will be discussed in a subsequent section.

various days. R. at 199. It is important to note that even after being interviewed and questioned at least five times concerning this incident the victim was not able to recount a specific month other than the December date, until the trial of the instant matter, where she not only provided a month but two specific dates, November 23, and 24, respectively.

A.N.A. at the time of trial was not of tender years as contemplated by Rule 803(25), and even if this Court determines that the trial court made sufficient findings of tender years, A.N.A.'s statements did not possess a substantial indicia of reliability and therefore should have been excluded. Furthermore, the testimony of Denise Boller, Anthony Claite and Dr. Matherne was cumulative and in no way assisted the trier of fact and instead only served to bolster the victim's testimony and accordingly this matter should be reversed and remanded for a new trial.

ISSUE 3

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO LEAD THE VICTIM

The trial court erred in allowing the State to lead the victim during her testimony. Mississippi Rule of Evidence 611(c) disallows the use of leading questions during direct examination, however, it qualifies this general prohibition with the phrase "except as may be necessary to develop [the witness's] testimony." M.R.E. 611(c). As to this, the Supreme Court has identified that the " 'classic example' of a situation ripe for leading questions on direct is where the witness is a child." *Keyes v. State,* 733 So.2d 812, 814 (Miss.1999) (citation omitted). Furthermore, this Court has defined a leading question as one that "suggests to the witness the specific answer desired by the examining attorney." *Tanner v. State,* 764 So.2d 385, 405(¶ 58) (Miss.2000) (quoting *Clemons v. State,* 732 So.2d 883, 889(¶ 25) (Miss.1999)).

The insufficiency of the dates contained in the indictment specifically with respect to Counts I and II was an issue that resonated through out the entire trial of this matter. R. at 255. At pre-trial hearings the defense raised this issue in a Motion to Quash Count I of the indictment and again in its Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for a New Trial. R. at 13. In fact based upon the difficulty in developing a defense based upon the vagueness of the indictment defense counsel filed a Motion to Interview the Victim, which was denied by the trial court. R.E. at 40-71. The victim A.N.A. was permitted to testify via closed circuit television based upon her age and testimony that forcing her to testify in the court room would affect her emotional health. R. at 68. By allowing the State to lead the victim in such a manner with respect to the dates of the offense the court basically permitted the State to provide dates to the victim which up until trial she had been unable to do. R. at 18. On re-direct the State asked A.N.A. "did your dad have sex with you anytime before Thanksgiving in that month? And you don't have to point to a day, just did he. I'm asking you if he did." R. at 393. The victim responded, "I think he did, but I'm not quite sure." R at 393. It is the opinion of the undersigned that but for the State being allowed to lead A.N.A. with respect to the dates for Counts I and II of the indictment that A.N.A. never would have provided testimony other than a vague "it happened more than once" which is consistent with her statements made in the five interviews she had prior to trial. Therefore, permitting the State to lead A.N.A. in such a manner allowed the State to impermissibly introduce testimony tht but for the leading would have resulted in insufficiency of the evidence as to Counts I and II and most certainly a direct verdict as to those counts and as such constitutes reversible error and this case should be reversed and remanded.

ISSUE 4

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO EXCLUDE THE TESTIMONY OF DR. DONALD MATHERNE, PH.D

This Court amended Rules 701 and 702 of the Mississippi Rules of Evidence adopting *Daubert* Standards for the admissibility of expert testimony. Mississippi Rule of Evidence Rule 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge skill, experience, training, or education, may testify thereto in the form of opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of this case.

Trial counsel filed a motion prior to the trial of the instant matter to have the testimony of Dr. Matherne excluded on the basis that his expert testimony is not supported by the Daubert principles. R.E. at 36. Specifically, trial counsel objected to the introduction of Dr. Matherne's "fist technique," as the technique has never been subjected to peer review or publication, the potential rate of error is unknown, and the fist technique or test has never received general acceptance in the psychological or medical community. *Id.*

Admission of expert testimony is controlled by the trial judge's discretion, and an appellate court will not disturb that decision unless the trial court clearly abused that discretion. *Sheffield v. Goodwin*, 740 So. 2d 854, 856 (Miss. 1999). However, the discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. *Johnston v. State,* 567 So.2d 237, 238 (Miss. 1990).

During a pre-trial hearing, Dr. Matherne testified that he has a Master's degree in psychology from Louisiana State University, and residency training from the University of Texas, and a PhD and training from University of Southern Mississippi. R. at 178. Dr. Matherne further testified that he no longer treats patience but that he is in consulting. R. at 178. Dr. Matherne has been accepted as an expert in both the fields of clinical psychology and child sexual abuse. R. at 180. Dr. Matherne testified that he interviewed A.N.A. using basically his own methodology that he has developed from many years of participating in seminars and from reading. R. at 205. This methodology has not been peer reviewed. R. at 206. Dr. Matherne also testified that his "fist technique" is a demonstration tool that he has developed over the years to determine the extent of sexual abuse, in which he tells the child to make a fist and then tells them to use a finger on the other hand to demonstrate what happened. R. at 209. Dr. Matherne is not aware of any other psychologist or doctor and its reliability has not been tested, and it has been disallowed in at least one court. R. at 211. When questioned regarding his specific methodology for interviewing children, Dr. Matherne had difficulty recalling the specifics of his method. R. at 221-224. It is interesting to note that during the trial of this matter, Dr. Matherne testified that child sexual abuse is one of the areas that he has moved away from and that it is not a significant part of his practice. R. at 469, 472. Dr. Matherne did provide an expert opinion that based upon his interview that the symptoms presented by A.N.A. to him during her interview were consistent with what she alleged. R at 499.

The court clearly erred in introducing the testimony of Dr. Matherne in direct violation of Mississippi Rule of Evidence Rules 701 and 702. Dr. Matherne's testimony was not necessary to aid the jury in understanding the evidence or necessary to determine

a fact in issue. Furthermore, Dr.Matherne's testimony was not based upon sufficient facts or data, the product of reliable principles and methods, or applied reliably to the facts of this case. The testimony provided at trial was again merely to bolster the statement of A.N.A. and confusing to the trier of fact at best. By allowing Dr. Matherne to provide an expert opinion as to whether or not the alleged acts had occurred, the court not only bolstered A.N.A.'s testimony but made it appear as if Dr. Matherne had some scientific basis for his opinion. The introduction of Dr. Matherne's expert testimony was highly prejudicial and should have been excluded. Based upon the trial court's error in introducing Dr. Matherne's testimony this matter should be reversed.

ISSUE 5

THE COURT ERRED IN FAILING TO QUASH COUNT I OF THE INDICTMENT

Trial counsel filed a motion to have Count I of the indictment quashed on the basis that as written Counts I and II did not give enough specific detail regarding conduct to distinguish which alleged conduct in the discovery applied to which count of the indictment. R.E. at 30.

This Court in *Westmoreland v. State,* 246 So.2d 487, 489 (Miss.1971), stated the purpose of an indictment as the "pleading in the criminal case" is: To apprise the defendant of the charge(s) against him in fair and intelligible language (i) in order that he may be able to prepare his defense, and (ii) the charge(s) must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceeding. See also *Price v. State*, 898 So. 2d 641, 654 (Miss. 2005).

In the instant matter Count I of the indictment stated that on or about November, 2006, Mr. Anderson committed the crime of statutory rape, and Count II stated that on or about November 25, 2006, Mr. Anderson committed the crime of statutory rape. R. at 13.

At a pre-trial hearing regarding this matter, trial counsel agued that there was nothing in the discovery to distinguish what evidence the State intended to introduce for one charge or the other. R. at 13. The State countered this argument by stating that the victim had stated that it had happened frequently since she was nine to ten years old, and that it happened sometime prior to the December holidays. R. at 18. When questioned by the Court as to whether or not the State intended to introduce testimony with respect to two acts in November, the State responded that "the victim gave testimony that would for the most part narrow it down to the 25th of November, but in addition to that the victim has stated that the sexual abuse was frequent enough that at a minimum two acts occurred in November at a minimum." R. at 18-19. Defense counsel correctly stated to the trial court that other than the victim's assertion that it's been going on since she was nine or ten, there was nothing in the discovery where A.N.A. stated that it happened twice in November let alone a specific date. R. at 20. The State advised the court that there would be testimony that there could be up to twenty separate incidents that took place in November. R. at 23-24.

Indeed, although A.N.A. at trial, after being thoroughly led by the State, testified to two occurrences in November (and for the first time supplied two specific dates), no other witness corroborated the victim's testimony. In fact Mr. Anderson's brother, Sam Anderson, provided an alibi for the November 25, 2006, date. The fact that defense counsel was not provided more specific dates as to Counts I and II of the indictment certainly impeded the defense. If the defense has been afforded proper notice of dates and the specific charges against him with respect to Counts I and II, the defense would have been better able to develop its alibi defense or other defenses that would have been

available but for the ambiguity of Counts I and II of the indictment. Therefore the trial court erred in denying the defense's Motion to Quash Count I of the indictment.

ISSUE 6

THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT A CONVICTION AS TO COUNTS I AND II OF THE INDICTMENT

The victim A.N.A., who was fourteen at the time of trial, testified via closed circuit television. R. at 342. A.N.A., after substantial leading from the State, testified that on December 2, 2006, the Appellant, her biological father put his private in her private. R. at 346. The victim further testified, over the objection of defense counsel, that it had happened a lot. R at. 348. In order to attempt to introduce evidence to support Counts I and II of the indictment with a victim who clearly could not recall dates, the Assistant District Attorney while pointing to a calendar basically testified himself as to the facts surrounding Counts I and II of the indictment, specifically the dates, which had been contested by defense counsel during trial and at pre-trial proceedings. R at 350-353. No other evidence was admitted to support Counts I and II other than vague testimony that "it" had occurred more than once.

The Appellant's brother, Sam Anderson, however, testified that he specifically recalled the 25th of November, 2006, and that he was with Mr. Anderson and A.N.A. the entire day at the family farm. R. at 519. Sam Anderson testified that he and David worked on a tractor and that A.N.A. was present the whole time and played while the brothers worked. R. at 520. Sam Anderson further testified that A.N.A. was joyful and happy that day. R. at 522. Sam Anderson stated that David and A.N.A. left the farm before he did and that he closed and locked the gate as he left the property. R. at 521.

Sam Anderson also testified that he was with David Anderson the whole time and that David and A.N.A. never went off together by themselves. R. at 522.

On appeal, "the relevant question 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." *Bush v. State*, 895 So.2d 863, 843 (Miss. 2005). In addition,

> Should the facts and inferences considered in a challenge to the sufficiency of the evidence "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," the proper remedy is for the appellate court to reverse and render. Edwards v. State, 469 So.2d 68, 70 (Miss. 1995)(citing May v. State, 460 So.2d 778, 781 (Miss. 1984)). However, if a review if the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense, " the evidence will be deemed to have been sufficient.

Edwards, 469 So.2d at 70.

In this matter the evidence presented to the jury as to Counts I and II of the indictment after viewing the evidence in the light most favorable to the prosecution, is not sufficient to support a conviction as to those two counts and therefore this matter should be reversed and rendered as to Counts I and II.

ISSUE 7

THE PROSECUTOR IMPROPERLY COMMENTED IN VIOLATION OF THE GOLDEN RULE DURING CLOSING ARGUMENTS

During closing arguments the State improperly asked the jury to put themselves in the victim's place, thus violating the Golden Rule argument which this Court has long

prohibited. See *Chisolm v. State*, 529 So.2d 635, 640 (Miss. 1988). During closing arguments the prosecutor said the following:

> They want you to say because she was, happy, the crime didn't happen. She's supposed to be sad for all those years of her life and not smile at all because she's being abused. It doesn't happen that way. Remember in voir dire, ladies and gentlemen, we had members in the venire who raised there hand and said, they went through abuse for years—

R. at 557. This statement was objected to by defense counsel and sustained by the Court. R. at 557.

On appeal this Court reviews the propriety of closing arguments with discretion to the trial court. *Stevens v. Stevens*, 806 So.2d 1031, 1057 (Miss. 2001). The trial court is in the best position to determine if an alleged improper comment had a prejudicial effect; and therefore, absent an abuse of discretion, the trial court's ruling will stand. *Id.*

The Court has however, succinctly explained the justification for prohibiting a golden rule argument as follows:

> It is the essence of our system of courts and laws that every party is entitled to a fair and impartial jury. It is a fundamental tenent of our system that a man may not judge his own case, for experience teaches that men are usually not impartial and fair when self interests is involved. Therefore, it is improper to permit an attorney to tell the jury to put themselves in the shoes of one of the parties or to apply the golden rule. Attorneys should not tell a jury, in effect, that the law authorizes it to depart from neutrality and to make its determination from the point of view of bias or personal interest.

See Chisolm, 529 So.2d at 639. In the instant case the State clearly wanted to inflame the passions of jurors who were themselves victims of sexual abuse and in doing so make a determination of the victim's credibility based upon their own bias or personal interest. As the victim's credibility in this case is particularly poignant with respect to Counts I and II of the indictment, as those Counts were not corroborated by any other testimony or

evidence the State's comments in violation of the golden rule were prejudicial and without a cautioning instruction from the court should result in this matter being reversed and rendered.

ISSUE 8

PROSECUTOR'S COMMENTS ON ANDERSON'S RIGHT TO REMAIN SILENT

The Court erred in denying defense counsel's objection to the State directly commenting on the non-testimony of the defendant and by not declaring a mistrial.

The right not to testify against one's self is secured by the Fifth Amendment to the United States Constitution as we as in Article 3, section 26 of the Mississippi Constitution. This includes the right not to have the State comment on the exercise of this right. *Whigham v. State,* 611 So.2d 988, 995 (Miss. 1992). "The right would be eviscerated if the government were free to make invidious reference when an accused chose not to testify." *Id.* The prosecutor is prohibited from making both direct and indirect comments and those "which could be reasonably construed by a jury as a comment in the defendant's failure to testify." *Griffin v. State*, 557 So.2d 1300, 1307 (Miss. 1990). "[O]nce such improper comments are made the defendant is entitled to a mistrial. The error is incurable." *Livingston v. State,* 525, So.2d 1300, 1307 (Miss. 1998). This is regardless of the overwhelming weight of the evidence. *Id.* At 1306. In *Whigham* it was reversible error for the prosecutor to comment that the State's witnesses were unrebutted and unopposed, where the only one who could have rebutted the witnesses was the defendant. *Whigham,* 611 So.2d at 996.

Like *Whigham*, the State in the instant matter committed reversible error when it commented directly on Mr. Anderson's failure to deny that he committed the crimes for which he was charged. The prosecutor had the following exchange during closing

arguments: "I heard defense counsel up here, and it interests me because I took notes during the opening statement and during closing statement, and they say a lot of things. But the one thing I never heard come out of either of those attorneys mouths whose job it is to represent that defendant, is that *he did not do it.* R. at 555. Emphasis added. Mr. Anderson never made a statement to law enforcement officials or to any other witness that testified during the trial of this matter. The only logical inference to be made in response to the prosecutor's statement during closing arguments is that trial counsel did not state tell the jury that Mr. Anderson "did not do it" is because he was in fact guilty. This is a direct comment on Mr. Anderson's constitutional right and decision not to testify during trial and therefore is reversible error.

ISSUE 9

DEFENSE EXHIBIT

The trial court erred in failing to submit the only defense exhibit introduced into evidence to the jury. Of startling concern is the fact that the defenses' only exhibit went missing from the jury room and there is not a clear record of whether or not all of the jurors had the opportunity to view the exhibit during deliberations. R. at 567. The exhibit was a drawing of the floor plan of the home that defense counsel asked A.N.A. to make during the course of her testimony. R. at 576. The trial court announced the morning after the jury returned its verdict, that the Exhibit D-1 could not be found and that the bailiff and the court reporter and the court administrator searched the jury rooms thoroughly and that the exhibit could not be found. R. at 567. The foreman of the jury was contacted and he advised that he could not remember seeing it or what had happened to it. R. at 568. The Court after conferring with both the State and Defense counsel had the court reporter contact all of the jurors and inquire as to whether or not they recalled

seeing the document. *Id.* About half the jurors advised that they had seen the drawing, however, half could not recall either way. *Id.* The Exhibit never appeared.

Mississippi Code Annotated Section 99-17-37 states that "[a]ll papers read in evidence on the trial of any cause may be carried from the bar by the jury." More to the point Miss.Unif.Crim.R.Cir.Ct.Prac. 5.14 state in part: "The court shall permit the jury, upon retiring for deliberation, to take to the jury room a copy of the instructions and exhibits and writings which have been received in evidence, except depositions."

In the instant matter, although is appears that the court either inadvertently failed to send the defenses' only exhibit to the jury, or that one of the jurors removed the exhibit from the jury room, the fact that it is not clear whether all of the jurors had the opportunity to review the exhibit during deliberations is the important issue. There is no way to determine what weight if any each juror would have placed on the exhibit and therefore the fact that it is missing should be reversible error.

ISSUE 10

CUMULATIVE ERROR

Mr. Anderson's conviction and sentence should be reversed based upon individual numerous errors. These errors were the trial court's erroneous rulings on pre-trial motions, during the course of the trial, the failure to order a psychological examination of Mr. Anderson, and in the closing arguments.

In *Wilburn v. State,* 608 So.2d 702, 705 (Miss. 1992), this Court held that "individual errors, not reversible in themselves, may combine with the other errors to make up reversible error." The question that must be asked in these instances is whether the defendant was deprived of a "fundamentally fair and impartial trial" as a result of the cumulative effect of all errors at trial. *Id.*

The cumulative error in the instant matter was such that even if this Court determines that the various issues raised in this appeal are not reversible individually, then when the record is viewed as a whole the cumulative effects of the individual errors are such that this case should be reversed and remanded.

ISSUE 11

VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The evidence presented against Anderson at the trial of this matter lacked sufficient weight to support the verdict. The trial court denied Anderson's Motion for J.N.O.V, or in the alternative Motion for New Trial, requesting the trial court to vacate the judgment on grounds related to the weight of the evidence undergirding the verdict.

The appellate standard of review for claims that a conviction is against the overwhelming weight of the evidence was cited in *Pierce v. State*, 860 So.2d 855 (Miss. App. 2003) as follows: [This court] must "accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." A new trial will not be ordered unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice." *Id.* at 860-861, citing *Smith v. State*, 802 So.2d 82 (Miss. 2001).

There were numerous inconsistencies between the State's witnesses in this case, that it would have been difficult for a jury to conclude beyond a reasonable doubt that Anderson committed the crimes alleged in the indictment, particularly with respect to counts I and II of the indictment. The State relied heavily on the hearsay testimony of Boller, Clarite, and Dr. Matherne. Although these witnesses provided specific details relayed to them by the victim as to Count III of the indictment, the facts surrounding

Counts I and II were sketchy at best. No medical examination was performed on A.N.A. and no forensic evidence was submitted to corroborate the victim's statements. It is important to note that although A.N.A. was interviewed no less than five times, she was unable to recall specific dates or specifics surrounding Counts I and II until trial. This fact was raised by defense counsel prior to and during the trial of the instant matter.

The verdict in this case was against the overwhelming weight of the evidence and Anderson's conviction should be overturned, or alternatively he should be granted a new trial.

V. CONCLUSION

The trial court erred in eleven significant areas which denied David Anderson a fair trial and/or a sentence which passes constitutional muster with respect to its harshness. Based upon the errors at trial and the interests of justice, this Honorable Court should reverse the trial court and acquit David Anderson, or in the alternative grant to him a new trial; or alternatively remand this matter to the trial court with instructions to have a psychological examination conducted and an evidentiary hearing to determine whether or not Mr. Anderson was competent to stand trial or whether or not he suffers from a disease or defect such that he is unable to understand the difference between right and wrong.

Respectfully submitted,

DAVID PAUL ANDERSON

BY: DENHAM LAW FIRM, PLLC

BY: 

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CERTIFICATE OF FILING AND SERVICE

I, LEILANI LEITH HILL, of DENHAM LAW FIRM, PLLC, do hereby certify that I have mailed this day, first-class postage prepaid, true and correct copies of the Brief for Appellant to the following at their usual mailing address:

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SO CERTIFIED that I have deposited the Brief for Appellant in the United States mail on this the 27th day April, 2010.

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