IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY N. JENKINS, JR. — APPELLANT

V. — NO. 2010-KA-1156-COA

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Larry N. Jenkins, Jr., Appellant
3. Honorable Brenda F. Mitchell, District Attorney
4. Honorable Kenneth L. Thomas, Circuit Court Judge

This the 11th day of April, 2011.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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COUNSEL FOR APPELLANT

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

JENKINS' INDICTMENT FOR FONDLING DID NOT PUT HIM ON ADEQUATE NOTICE AS REQUIRED BY LAW, THUS VIOLATING HIS RIGHT TO DUE PROCESS.

ISSUE TWO:

JENKINS' CONVICTION(S) FOR FONDLING MERGE WITH HIS CONVICTION(S) FOR SEXUAL BATTERY AND THEREFORE, VIOLATES HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

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TRIAL COUNSEL'S INEFFECTIVENESS DEPRIVED JENKINS OF HIS CONSTITUTIONALLY MANDATED RIGHT TO A FAIR TRIAL.

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THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT HIS MOTION FOR A NEW TRIAL ON THE GROUNDS THAT OVERWHELMING WEIGHT OF THE EVIDENCE DID NOT SUPPORT THE VERDICT.

STATEMENT OF INCARCERATION

Larry Jenkins, the Appellant in this case, is presently incarcerated by the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. § 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from a trial taking place Mar 3-5, 2010 in the Circuit Court of Bolivar County, Mississippi. The Honorable Kenneth L. Thomas presided over the proceeding in which a jury convicted Larry Jenkins of two counts of sexual battery and two counts of fondling. Jenkins was sentenced to the maximum sentence on all counts under **Mississippi Code Annotated 99-19-81**, resulting in ninety (90) years imprisonment in the custody of the Mississippi Department of Corrections.

FACTS

Jennifer Jenkins and Larry Jenkins, the Appellant, were married and lived together in

Cleveland, Mississippi with their three children, including Mary[1], the prosecutrix in this case. (T. 119-121).

Jennifer testified that when they lived in Cleveland, Jenkins did not work. (T 122). According to Jennifer, while Jennifer was in school and teaching Sunday School, Jenkins merely stayed at the house. (T. 122). Jennifer testified she trusted Jenkins with their kids. (T. 123).

Between the two parents, Jennifer admitted Larry was the disciplinarian of the two. (T. 123). Jennifer testified Mary, as a teenager, was not allowed to date. (T. 123). On March 3, 2008, Mary told Jennifer that Jenkins was "messing with her." (T. 125). Jennifer confronted Jenkins, and Jenkins denied the allegation. (T. 125). Jennifer, instead of taking the children with her, left the house to get a movie. (T. 126). When she returned home, Jenkins left the house. (T. 126). Jennifer subsequently called the police. (T. 127).

Mary was born on July 17, 1992. At the time of trial, she was in Eleventh Grade, though her mother testified she was in tenth. (T. 206, T. 123). At the time in question, Mary lived in Cleveland, Mississippi with her mother, her two sisters, and her father. (T. 206-07).

During the time the family lived together in Cleveland, Jenkins, according to Mary's testimony, stayed at home. (T. 209). Jenkins was also a strict disciplinarian and would spank Mary with a board. (T. 209). Mary testified, however, that Jenkins did not discipline her sisters in that manner. (T. 209).

Mary testified that she and her father were always together, and didn't take her sisters with them when running errands. (T. 209). Jenkins would not allow Mary to date. (T. 210).

On March 3, 2008, according to her testimony, Mary was alone with her mother and told her

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1. Because this case involves a minor, her name has been changed to protect her identity.

about the purported incidents with Jenkins. (T. 210-12).

On September 19, 2008, Mary attended a friend's birthday party. (T. 212). Jenkins accompanied his daughter to the party, and, at one point, came outside and told some male partygoers not to "touch" Mary. (T. 213). On the ride home, according to Mary, Jenkins began to "mess with" her. (T. 214). Mary testified Jenkins reached up her shirt, pulled down her bra, and reached under her pants, and inside her underwear. (T. 215). Mary testified that Jenkins' contact on that incident was "just on the outside." (T. 217). She reiterated on cross-examination that he did not put his finger inside of her vagina. (T. 320). Jenkins was charged with both fondling and sexual battery with digital penetration for this purported incident. (C.P. 4).

On October 11-12, 2008, Mary and Jenkins were returning home from an Octoberfest celebration. (T. 218-19). Mary and Jenkins attended the event alone, while her Mother stayed home with the two other children. (T. 218-19). Mary testified that, on the way home, Jenkins reached his hand to her chest area, touching her breast. (T. 219). Mary's further testimony about that incident is full of "inaudibles" and phrases which, despite the undersigned counsel's best attempt, cannot be discerned. When the two arrived home, Mary's mother was awake. (T. 221). Mary decided to go to bed. (T. 222). As it relates to the "Octoberfest" incident, when asked on cross whether Jenkins penetrated her on that day, Mary responded "Not that I can remember." (T. 322). Jenkins was charged with fondling for this purported incident. (C.P. 4).

On February 22, 2009, Mary and her father were at the house, while her mother and her sisters were at Sunday school. (T. 229). According to her testimony, Mary went to her room, and was followed by Jenkins, who propositioned her. (T. 232). Jenkins allegedly asked to take Mary's virginity. (T. 232). Mary rejected him, which caused Jenkins to push her into the dresser. (T. 232). Jenkins then pushed Mary on her bed, pulled off her pants and underwear, and attempted to push

between her legs. (T. 232). Mary testified to hitting him and screaming, finally falling on the floor. (T. 232). Mary stood up, and was pulled towards Jenkins. (T. 232). He then allegedly inserted his fingers into her vagina. (T. 232, 235). Mary left, and went to the living room. (T. 232). As it relates to this incident, Jenkins was charged with sexual battery with digital penetration. (T. 5-6).

Mary testified that there had been encounters between her and Jenkins in the past, but that she didn't want to tell, because she didn't want to hurt her mom. (T. 224). Mary never had a boyfriend prior to the time Jenkins left the house. (T. 224). She testified that Jenkins did not want her to have one. (T. 225). Mary testified that Jenkins told her that before she had a boyfriend, she had to lose her virginity to him. (T. 225). Mary also stated that Jenkins told her that if she told anyone about the alleged incidents, he would shoot himself. (T. 225).

Mary eventually told her mother that Jenkins had been sexually molesting her. (T.237). After Mary told her mother, her mother left, leaving Mary home with Jenkins. (T. 238). Mary's mother apparently left to go get a movie. (T. 282). According to her testimony, Jenkins then called Mary to him, and asked her why she told. (T. 238).

On cross-examination, Mary admitted to both of her parents allowing her to participate in after-school activities. (T. 250). Mary also testified that her dad's physical discipline caused her and her mother to be angry with him. (T. 252). Her mother, however, never spanked her. (T. 252-53). Mary also testified that her sisters were rarely disciplined, but conceded that they made good grades. (T. 253).

Mary also admitted to having phone conversations with a friend. (T. 255). The boy and her talked frequently, and Mary informed a friend that she wanted to run away with him. (T. 256). Throughout the course of cross-examination, Mary revealed that a couple months after she made allegations against her father, she had set up both Facebook and Myspace accounts. (T. 304). Prior

to her father's arrest, she was not allowed to have one. (T. 304). Also, it was revealed during testimony that Mary was, in fact, pregnant at the time of trial. (T. 304).

Dr. Mark Blackwood, a physician at Delta OB/GYN in Cleveland, Mississippi examined Mary. (T. 195). Dr. Blackwood testified that during the course of his examination, he noted that Mary's hymen was intact. (T. 197). Blackwood testified that Mary "had a normal 16 year old's exam." (T. 197).

Being advised of both his right to and to not testify, Jenkins took the stand in his own defense. (T. 340-41). Jenkins testified that he was not a part of Mary's life, but was given the opportunity to reconnect and be a father to her. (T. 344-45). Jenkins testified that he was not working when the family was living in Cleveland. (T. 345). In 2005, Jenkins had heart surgery and he ran into a significant amount of problems. (T. 345-46).

Jenkins testified that he walked the children to school at did volunteer work at the school part-time. (T. 347). Jenkins testified to disciplining Mary when she was in trouble. (T. 349). Sometimes he would just ground her from her makeup, cell-phone or television. (T. 350). Other times, when it was more serious, Mary would be spanked. (T 350).

Jenkins testified he took Mary to the birthday party in question, and when they arrived, the teenagers were already in the backyard. (T. 352). Jenkins testified he stayed inside for a little while and then went outside. (T. 353). Jenkins admitted to telling the males that were there that Mary came with him to the party, and that she would be leaving with him, and that if they had any other intentions, they should find anther girl. (T. 353). Jenkins testified that Mary was embarrassed, but said that he wished he had not embarrassed her. (T. 353). Jenkins denied ever touching Mary's breast on the ride home from the birthday party. (T. 354). He further denied touching any part of Mary's body during the ride home. (T 354).

Jenkins testified that he and Mary went to Octoberfest together, and he allowed Mary to walk with some of her friends, while he stayed around and consumed a few beers. (T. 355-56). Jenkins testified that they drove home that evening and that nothing eventful happened. (T. 357-58). Jenkins denied ever touching Mary, or asking her to pull down her top. (T. 359-60).

When Jennifer asked Jenkins whether he had touched Mary, Jenkins said he had not. (T. 371). The two had a discussion, but it was not lengthy. (T. 372). Jennifer left to pick up movies, at Jenkins' suggestion. (T. 372). Jenkins testified he then went inside, walked to Mary's room, asked Mary where her phone was, took her phone and broke it in two, saying he was not going to spoil her if she was going to make such accusations against him. (T. 374). Eventually, Jenkins got into the car and went to get cigarettes. (T. 375). Jennifer asked if he would stay, but Jenkins told her that he was angry and that he needed to clear his head. (T. 375).

When Jenkins eventually arrived home, the other vehicle was gone, and the lights were on in the house. (T. 376). Jenkins walked to the back door, entered the home, and no one was home. (T 376). Jenkins tried to call Jennifer, but his call went straight to voicemail. (T. 376). Jenkins got every pill he could find in the house, swallowed them, and wrote a suicide note. (T. 377). After seeing a picture on the computer of him and his daughters from a vacation, Jenkins called 911 and was taken to the psychiatric ward. (T. 377). After being released, Jenkins was eventually arrested at his grandparent's house in Tupelo. (T. 378-79).

After deliberations, the jury returned convictions on two counts of sexual battery and two counts of fondling. (C.P. 44-45). On June 14, 2010, Jenkins filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial. (C.P. 46-48, 10-12). This cited to numerous civil cases. Presumably, noticing such, trial counsel filed an additional motion on June 23, 2010 simply arguing that the verdict was against the overwhelming weight of the evidence and

that the State's evidence was insufficient. (C.P,. 58, R.E. 19). On June 30, 2010, the motion was denied. (C.P. 63 R.E. 23).

SUMMARY OF THE ARGUMENT

Jenkins' indictment for fondling did not put him on adequate notice. The indictments contain the term "private parts," rather than a clear and definable term, thus violating the notice requirement under the rules and denying Jenkins due process.

Jenkins' conviction for fondling under Count I of the indictment merges with his conviction for sexual battery. Accordingly, his conviction for fondling should be reversed, in accordance with the requirements of due process and double jeopardy.

Jenkins' trial counsel was clearly ineffective. During cross-examination of the State's first witness, trial counsel unwittingly asked for testimony regarding the defendant's prior felony convictions. Because these convictions were otherwise inadmissable, trial counsel was clearly ineffective. Furthermore, because of the he said/she said nature of this case, the error is not harmless and warrants reversal.

The State presented insufficient evidence to support Jenkins' conviction of sexual battery under Count II of the indictment. Mary herself testified that there was no penetration. Accordingly, Jenkins' conviction for Count II should be reversed and rendered.

Jenkins' convictions are against the overwhelming weight of the evidence.

ARGUMENT

ISSUE ONE: JENKINS' INDICTMENT FOR FONDLING DID NOT PUT HIM ON ADEQUATE NOTICE AS REQUIRED BY LAW, THUS VIOLATING HIS RIGHT TO DUE PROCESS.

Appellate review of indictment claims is *de novo*. *Peterson v. State*, 671 So.2d 647, 652

(Miss.1996).

The indictment references fondling at the top of the page with the code section "Miss. Code Ann. 97-5-23(1)." All three of the counts for fondling charge Jenkins with unlawfully touching Mary's "private parts." Rather than use proper anatomical terms, the State chose to indict Jenkins as if it were talking to school children. Jenkins respectfully submits that the indictments for fondling are woefully inadequate and fail to satisfy the notice requirements under the rules.

Under **URCCC 7.06**, "[a]n indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It must fully notify the defendant of the nature of the charge and the cause of the accusation." ***Garner v. State***, 944 So. 2d 934, 940-41 (Miss. Ct. App. 2006). See also ***Farris v. State***, 764 So. 2d 411 (Miss. 2000). [2]

In ***Garner v. State***, *supra*, the Court reiterated that the purpose of a criminal indictment under **U.S. Const. Amend. VI** and **Miss. Const. Art. 3, § 26**, is, *inter alia*, "to furnish the accused such a description of the charge against him as will enable him to make his defense" and "to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction." **944 So. 2d 940-41.**

In ***Garner***, the defendant was charged with multiple armed robberies and alleged that one of his indictments failed to charge an essential element of armed robbery, namely, the exhibition of a deadly weapon. ***Id.*** The claimed error in ***Garner*** was that one of the indictments charged the crime was committed by putting the victim "in fear of immediate injury to her person 'by representing that he had a pistol when in fact he was pointing a finger concealed by a coat at the cashier and demanded the cash from the store cash register ....'" ***Id.***

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2. Under former authority, the State's failure to plead a statutory element was fatal to the prosecution of the case. ***Smith v. State***, 82 Miss. 793, 35 So. 178 (1903).

The ***Garner*** court ruled that, "because the indictment omitted the 'exhibition of a deadly weapon' element, Garner was not placed on notice that the State would attempt to prove that he had exhibited a deadly weapon", thus the indictment, factually pled, only charged simple robbery. ***Id.*** The effect was that, "the circuit court lacked subject matter jurisdiction over the offense of armed robbery [but not] ...the crime of simple robbery. *See also* ***Neal v. State***, 936 So.2d 463 (Miss. Ct. App.2006).

The indictment is this case clearly had a substantive defect in failing to sufficiently identify how Jenkins was alleged to have committed fondling.

> ¶ 7. It is well-settled that in order for an indictment to be sufficient, it must contain the essential elements of the crime charged. ***Peterson v. State***, 671 So.2d 647, 652-53 (Miss. 1996). The Mississippi Supreme Court has held that where a deficiency appearing in an indictment is non-jurisdictional, it may not be raised for the first time on direct appeal absent a showing of cause and actual prejudice; however, the State's failure to include the essential elements of the crime in the indictment is a jurisdictional defect that is **not** waivable by the defendant. See ***Banana v. State***, 635 So.2d 851, 853 (Miss. 1994). Furthermore, the State's failure to include an essential element of the crime cannot be cured by notice outside of the indictment. ***White v. State***, 851 So.2d 400, 403(¶ 5) (Miss. Ct. App. 2003).

Pollard v. State, 932 So.2d 82, 85-86 (Miss. Ct. App. 2006) [emphasis supplied].

As a matter of due process, a defendant is entitled to reasonable advance notice of the charges against him and a reasonable opportunity to prepare and present his defense to those charges. ***Jones v. State***, 461 So.2d 686, 693 (Miss. 1984). Jenkins' indictment was defective and he is entitled to have his conviction and sentence vacated.

It is Jenkins' position here that, as in *Garner, supra,* since his indictment contained vague language, the indictment fails to conform to **URCCC 7.06** to charges of fondling. If this Court concludes that trial counsel somehow waived Jenkins' right to raise this issue on appeal for failing to demur to the indictment at trial, such conduct would clearly be ineffective assistance of counsel

as set forth in Issue Three, below.

ISSUE TWO: JENKINS' CONVICTION(S) FOR FONDLING MERGE WITH HIS CONVICTION(S) FOR SEXUAL BATTERY AND THEREFORE, VIOLATES HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

i. Standard of Review.

Mississippi Appellate Courts apply a *de novo* standard of review to claims of double jeopardy. ***Brown v. State***, 731 So. 2d 595, 598 (Miss. 1999).

ii. Fondling is a lesser included offense of sexual battery with penetration, and Jenkin's conviction of both is in violation of his Double Jeopardy rights.

The Double Jeopardy clause exists for three separate purposes. It protects criminal defendants from:

> (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction and (3) multiple punishments for the same offense. These protections stem from the premise that an accused should not be *tried or punished twice* for the same offense.

Brawner v. State, 947 So. 2d 254, 266 (Miss. 2006)(internal citations omitted)(emphasis added).

The United States Supreme Court has consistently interpreted the Double Jeopardy Clause "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." ***Burks v. United States***, 437 U.S. 1, 11 (1978) (internal citations omitted).

In ***Whalen v. United States***, the United States Supreme Court addressed whether cumulative punishments for the offenses of rape and of the killing of the same victim in the perpetration of the crime of rape was contrary to constitutional law. ***Whalen v. United States***, 445 U.S. 684 (1980). The ***Whalen*** Court relied on ***Blockburger v. United States***, 284 U.S. 229 (1932) holding that the two statutes in controversy proscribed the same offense.

The ***Blockburger*** Rule states:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304.

The ***Whalen*** Court noted, however, that ***Blockburger*** established a rule of statutory construction:

> The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

Whalen, 445 U.S. at 691-92.

In the instant case, there is nothing to indicate that the Mississippi Legislature authorized the fondling and sexual battery to be punished cumulatively for the same act. Under Mississippi Law, fondling is a lesser-included offense of sexual battery with penetration. ***Friley v. State***, 879 So. 2d 1031, 1035 (Miss. 2004).

With respect to Mississippi Courts, in double-jeopardy claims, Mississippi applies the "same elements" test set forth in ***Blockburger***. See, e.g., ***Thomas v. State***, 711 So. 2d 867, 870 (Miss. 1998). Even though a defendant may be charged with violation of two separate statutes, we look to see whether "each [statutory] provision requires proof of a fact which the other does not." ***Blockburger***, 284 U.S. 299 at 304.

A conviction can withstand double-jeopardy analysis only if each offense contains an element not contained in the other. ***Powell v. State***, 806 So.2d 1069, 1074 (Miss. 2001). If they do not, the two offenses are, for double-jeopardy purposes, considered the same offense, barring prosecution

and punishment for both. ***Id.***

Mississippi Code Annotated § 97-3-95 provides, in pertinent part;

> (1) A person is guilty of sexual battery if he or she engages in sexual penetration with:
>
> > (d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) more months older than the child.

Miss. Code Ann § 97-3-95.

Mississippi Code Annotated § 97-5-23 defines the crime of fondling occurs when:

> (1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of sixteen (16) years, with or without the child's consent. . . ."

Miss. Code Ann. § 97-5-23.

In Mississippi courts, it is long-standing precedent that two independent crimes merge into one when the greater crime necessarily includes all of the elements of the lesser crime as a lesser included offense. ***Newburn v. State***, 205 So. 2d 260, 264 (Miss. 1967).

In ***Friley v. State***, the Supreme Court, in an opinion written by then Presiding Justice Waller, concluded that molestation (fondling) is a lesser included offense of sexual battery. ***Friley v. State***, 879 So. 2d 1031, 1035 (Miss. 2004).

In ***Friley***, the defendant was indicted under **97-3-95** for sexual battery, but ultimately convicted under **97-5-23** after the trial court, over objection, allowed the State's lesser-included offense instruction for fondling. ***Id.*** at 1036. On Appeal, the Supreme Court ultimately found that the jury instruction was proper because fondling was a lesser included offense of sexual battery with penetration. The Court held:

> Friley was indicted for sexual battery, which requires penetration. He was convicted

> of molestation, which requires touching. A plain reading of the statutes shows that sexual battery (penetration) includes molestation (touching). **It is impossible to penetrate without touching.**

Id. at 1035 (emphasis added).

To this end, the ***Friley*** Court explained the intent to touch for lustful purposes is necessarily inferred from the very acts of touching or grabbing the victim's genital area; "There is absolutely no other reason why Friley would have performed these acts. It is well settled that intent can be inferred from a defendant's actions." ***Id.*** (Internal citations omitted).

The ***Friley*** Court concluded that: "Where penetration has been achieved by touching a child under the age of 14, molestation is a lesser-included offense of sexual battery." ***Id.***

Accordingly, Jenkins' conviction for fondling in Count II is not supported by law and this Court should reverse said count(s).

iii. Conclusion.

Therefore, the two offenses merge for the purposes of ***Blockburger*** and demand that Jenkins' conviction for touching be reversed and rendered as violative of the Double Jeopardy Clause of the United States Constitution.

ISSUE THREE: TRIAL COUNSEL'S INEFFECTIVENESS DEPRIVED JENKINS OF HIS CONSTITUTIONALLY MANDATED RIGHT TO A FAIR TRIAL.

I. Standard of Review

"When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel's performance." ***Roach v. State***, 938 So. 2d 863, 869 (Miss. Ct. App. 2006)(citing ***Colenburg v. State***, 735 So. 2d 1099, 1102 (Miss. Ct. App. 1999).

The benchmark for judging any claim of ineffectiveness of trial counsel is whether counsel's

conduct undermined the proper functioning of the adversarial process so that the trial cannot be relied on as having produced a just result. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to successfully claim ineffective assistance of counsel, the Appellant must meet the two-pronged test set forth in ***Strickland*** and adopted by the Mississippi Supreme Court. ***Stringer v. State***, 454 So. 2d 468, 576 (Miss. 1984).

Under the ***Strickland*** test, Jenkins must prove that (1) his attorney's performance was deficient and (2) such deficiency deprived him of a fair trial. ***Id.*** at 477. Such alleged deficiencies must be presented with "specificity and detail" in a non-conclusory fashion. ***Perkins v. State***, 487 So. 2d 791, 793 (Miss. 1986).

The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. ***Hiter v. State***, 660 So. 2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney and there is a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. ***Id.*** The Appellant must show that there is a reasonable probability that, but for his trial attorney's errors, he would have received a different result in the trial court. ***Stringer v. State,*** 627 So. 2d 326, 329 (Miss. 1993). With respect to the overall performance of the attorney, "counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy." ***Cole v. State***, 666 So. 2d 767, 777 (Miss. 1995). In order to find for the Appellant on the issue of ineffective assistance of counsel, this Court will have to conclude that his trial attorney's performance as a whole fell below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial below. ***Coleman v. State***, 749 So. 2d 1003, 1012 (Miss. 1999).

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

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed.

Wilcher v. State, 863 So. 2d 776, 825 (¶ 171) (Miss. 2003).

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

ii. Introduction of Jenkins' Prior Convictions.

As soon as trial counsel had an opportunity to cross-examine the State's first witness, Jenkins' defense was hopelessly prejudiced due to missteps, unpreparedness, and wholesale ineptitude. At the onset of trial counsel's cross-examination of Jenkins' ex-wife, the following dialogue took place:

> Q. – and Larry did not work, did he volunteer in the community, any community projects?
>
> A. He worked some mornings at school. But then there was a call from the central office and he wasn't allowed to come back to the school anymore.
>
> Q. What would have been the cause of that?
>
> A. It was because the central office and then he wasn't allowed, a complaint about him. I don't know if I should say what the complaint was.

(T. 132)(emphasis added).

The witness, obviously instructed by the State not to go into the fact that Jenkins was a convicted felon, was hesitant to answer defense counsel's question. Perhaps trial counsel could have seen this as a particularly glaring warning to not proceed with her line of questioning. On the contrary, trial counsel ignored the obvious warning, and continued:

> Q. Yes, please.
>
> A. That he was a convicted felon and he did not need to be around children, and

therefore they did not allow him around back at the school.

(T. 132-33).

Trial counsel, not happy with the somewhat predictable answer to her question, approached the bench.

> [BY TRIAL COUNSEL]: Your Honor, I did ask what the complaint was about, however, his previous conviction is not to be admissible in this trial.
>
> [BY THE TRAIL COURT] Well, normally, that is correct. But you asked for the answer. Now, I can ask the jury to disregard that answer if you'd have me do that.
>
> [BY TRIAL COUNSEL] I would have you do that. And also, a limiting instruction would be very helpful.
>
> [BY THE STATE] Your Honor, if I may. She did open the door by her question.
>
> [BY TRIAL COUNSEL] My question was what was the complaint to cause all this.
>
> [BY THE STATE] And the complaint was going to be that. And submitting an instruction, and that's why she hesitated. Your Honor, that is the answer to the question. Asking that it be stricken is to ask that one's answer be stricken and it was not by her volunteering it.
>
> [BY TRIAL COUNSEL] This is ridiculous. And I move for a mistrial if you're not going to give a limiting instruction.
>
> [BY THE TRIAL COURT] I will give a limiting instruction, but I will not give the mistrial because you asked for the answer that you received even though it was not the type of answer that you may have wanted the witness to have given.

(T. 134).

Trial counsel then answered the trial court, all but admitting that she had not performed adequate trial preparation: "No. I wanted to know what the complaint was about. This is the first I've heard of it." (T. 134). The trial court subsequently provided the jury with a limiting instruction. (T. 135).

A. Relevance

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

The ***Derouen*** case merely provides that admission of allegations of sexual misconduct against the same child, and other children, is not *per se* reversible error, if such evidence is otherwise relevant under **Mississippi Rules of Evidence 403 and 404(b)** to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" and is not more prejudicial than probative.[3] 994 So. 2d 752-56. Regardless, ***Derouen*** is inapplicable in the instant case, as Jenkins' prior felony convictions were for burglary.

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

In ***Gallion v. State***, 469 So. 2d 1247, 1249-50 (Miss. 1985), the Court responded to the

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3. Rule 403. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity. or absence of mistake or accident.

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

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

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

In ***Sawyer***, the defendant was charged with armed robbery and with being a felon in possession of a firearm. ***Id.*** Sawyer offered to stipulate to the prior conviction, but the state and trial court declined the stipulation and the jury received the evidence about Sawyer's prior conviction. The ***Sawyer*** Court concluded that any probative value of the defendant's prior convictions was substantially outweighed by the danger of unfair prejudice under Mississippi Rule of Evidence 403. *Id.* As here, in *Sawyer* a limiting instruction did not cure the error. *Id.*

B. Prior Convictions as Impeachment Evidence

Regarding the prior convictions being used as impeachment evidence by the state, Jenkins' trial counsel should have first determined if the state intended on using his prior convictions and then should have obtained a ruling from the trial court under ***Peterson v. State***, 518 So. 2d 632, 636 (Miss. 1987).

The holding in ***Peterson*** is that a trial court must weigh the following factors in deciding whether to admit a prior felony for impeachment of a non-party witness or party witness under

Mississippi Rules of Evidence 609 (a) and (b):

> (1) The impeachment value of the prior crime, (2) The point in time of the conviction and the witness' subsequent history, (3) The similarity between the past crime and the charged crime, (4) The importance of the defendant's testimony, (5) The centrality of the credibility issue.

See, ***Robert v. State***, 821 So. 2d 812, 816 (Miss. 2002).

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

The *Triplet* court saw "little, if any, impeachment value in Triplett's prior burglary convictions and his receiving stolen property conviction" since "burglary is not necessarily a crime affecting veracity." *Citing* ***Townsend v. State***, 605 So. 2d 767, 769 (Miss. 1992). Triplett's receiving conviction was "close" to ten (10) years old and had "little probative value." 881 So. 2nd at 307. Triplett's prior convictions for burglary and receiving were too "similar to the crime for which Triplett was being tried, business burglary," making "the prejudicial effect of admitting the convictions is very high." *Id.*

Applying the five ***Peterson*** factors to the present case, it is clear that, as in ***Triplett***, all of Jenkins prior convictions were more than ten years old, he would have been released from the sentence before the ten year mark, rendering the prior convictions, like Triplett's, of little or no probative value. Any admission of a prior conviction is prejudicial to a criminal defendant. Likewise, the prior convictions were similar to the accusations in the present case augmenting the prejudicial effect. Therefore, the admission of Jenkins prior convictions by his own counsel was

more prejudicial than probative which is forbidden by **Rule 609 (1)(b)**.(See also, **Mississippi Rule of Evidence 403**). The result was an infringement on Jenkins' fundamental constitutional fair trial and due process rights.

The facts of the case *sub judice* are indistinguishable from ***Sea v. State***, 49 So. 3d 614 (Miss. 2010), wherein the Mississippi Supreme Court reversed a defendant's conviction because defense counsel allowed into evidence Sea's prior convictions that were otherwise inadmissible.

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

ISSUE FOUR: THE TRIAL COURT ERRED WHEN IT OVERRULED JENKINS' MOTION FOR JNOV BECAUSE THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR SEXUAL BATTERY.

I. Standard of Review

The Mississippi Supreme Court has set forth the standard of review for a sufficiency of the evidence claim as follows:

> This Court must review the trial court's finding regarding sufficiency of the evidence at the time the motion for JNOV was overruled. *See* ***Wetz v. State***, 503 So.2d 803, 807-08 (Miss.1987). The evidence is viewed in the light most favorable to the State. All credible evidence supporting the conviction is taken as true; the State receives the benefit of all favorable inferences reasonably drawn from the evidence. ***McClain v. State***, 625 So.2d 774, 778 (Miss.1993). Issues regarding weight and credibility of the evidence are for the jury to resolve. ***Id.*** Only where the evidence, as to at least one of the elements of the crime charged, is such that a reasonable and fair minded juror could only find the accused not guilty will this Court reverse. ***Id.***

Holloman v. State, 656 So.2d 1134, 1142 (Miss. 1995).

ii. Taking the evidence in the light most favorable to the state, the evidence is such that reasonable and fair minded juror could only find Jenkins not guilty of sexual battery in Count 2 of his indictment.

Mississippi Code Annotated § 97-3-95(2) provides:

> (2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

Miss. Code Ann. § 97-3-95(2).

Sexual penetration has been defined as the essential element of sexual battery. ***Johnson v. State***, 626 So.2d 631, 632 (Miss.1993) (citing ***Thompson v. State***, 468 So.2d 852, 853 (Miss.1985)). It should be noted, though, that "Penetration, however slight, is sufficient to establish the penetration element of sexual battery." ***Burrows v. State***, 961 So.2d 701, 706(¶ 17) (Miss.2007) (citing ***Johnson***, 626 So.2d at 633). Specifically, sexual penetration includes "cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body." **Miss. Code Ann. § 97-3-97(a) (Rev.2006)**. Further, penetration does not need to be established by actual medical evidence. ***Wilson v. State***, 606 So.2d 598, 600 (Miss.1992). Additionally, penetration, "need not be proved in any particular form of words, and circumstantial evidence may suffice." ***Lang v. State***, 230 Miss. 147, 158-59, 87 So.2d 265, 268 (1956).

Jenkins was convicted of sexual battery with digital penetration for the September 19, 2008 incident involving Mary. Mary's own testimony is illustrative of the insufficient evidence on this count. Mary testified Jenkins reached up her shirt, pulled down her bra, and reached under her pants, and inside her underwear. (T. 215). Importantly, Mary testified that Jenkins' contact on that incident was "just on the outside." (T. 217). On cross-examination, she reiterated that Jenkins did not put his finger inside of her vagina. (T. 320).

Mary's own words are that there was no penetration. Accordingly, the state did not present sufficient evidence to support Jenkins' conviction of sexual battery under Count II of the indictment.

Accordingly, this Court should reverse and render Jenkins' conviction for sexual battery on this count.

ISSUE FIVE: THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT HIS MOTION FOR A NEW TRIAL ON THE GROUNDS THAT OVERWHELMING WEIGHT OF THE EVIDENCE DID NOT SUPPORT THE VERDICT.

I. Standard of Review

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth***, 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. ***Id.*** When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a thirteenth juror, but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court stated:

> "A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial."

Id.

Indeed, in the context of a defendant's motion for new trial, although the circumstances

warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (Miss. 1922). However, though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at 737.

ii. Jenkins' convictions are against the overwhelming weight of the evidence.

Jenkins' defense at trial was that he was an overbearing father, and, perhaps that led Mary to concoct a story of molestation. While the record may have sufficient evidence to support some of the counts against Jenkins, the record lacks any clear and notable evidence to support those convictions. To the contrary, the record shows that Mary's actions and behavior subsequent to her purported molestation support Jenkins' theory of defense that his overbearing disciplinarian nature resulted in the allegations. Mary was unable to have certain internet social networking site accounts. (T. 304). As soon as her father was gone, she signed up for those. (T. 304). Mary was unable to date. (T. 123, 210). When her father left the house, she soon became pregnant. (T. 304). Also notable is that there is no forensic evidence to support the allegations. (T. 195-97).

Should this court find Jenkins' conviction is not against the overwhelming weight of evidence, Jenkins asserts that the relative weakness of the State's case, which is "he said/she said," essential when analyzing the claim of ineffective assistance of counsel stated above.

iii. Conclusion.

Because the weight of the evidence overwhelmingly points towards a verdict of not-guilty.

Jenkins respectfully requests that this honorable Court reverse his convictions and remand this case to the lower court for a new trial.

CONCLUSION

Jenkins herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and Jenkins' convictions and sentences should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment, with instructions to the lower court. In the alternative, Jenkins would submit that the judgment of the trial court and the convictions and sentences as aforesaid should be vacated, this matter rendered, and Jenkins discharged from custody, as set out hereinabove. Jenkins further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T Cook
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Larry N. Jenkins, Jr., do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 11th day of April, 2011.

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