

**COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR APPLICATIONS**

September 14, 2015

To: Mr. Kangoma Celestine, GDC1001134184, Dooly State Prison, Post Office Box 750, Unadilla, Georgia 31091

Docket Number: Style:

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09/03/2015

To the clerk court of Appeals
of Georgia
47 TRINITY AVENUE, suite 501
Atlanta, GA 30334

* NOT an
Application
* NO case before
COA.

* 911-15 (KAP)

SEP 11 2015

Dear clerk court of Appeals of Georgia
Hello. Please I don't have a good English in this time
because I am new here in the unite state. so I try my
best FOR write in the first time in your office. I send
to you this Document By myself FOR I explain to the
court of Appeals what was exactly the true problem
in this case FROM the beginning to the end. because
the superior court make many many error on me
in this case. and I don't have any paperwork FROM
the court about my testimony. I don't know did this
court Rithing my testimony OR not I don't know, FOR
that I send to the court of Appeals myself this -
testimony FOR the court of Appeals EXAMINE OR -
Review FOR me. so please I know I have a new
Attorney in this case. so she was not with my testimony
OR the Paper work FOR my testimony. is myself I
sent to her FROM the prison the same I send to you
FOR that I send to you this Victim testimony and
my testimony FOR you Remember what was the
the Rong in this case OR who lying in this case
between me and the Victim Family.

Thank you

Celestine Kangouma

RECEIVED IN OFFICE
2015 SEP 10 PM 03:00
My testimony STORY.

MY Name is KANGOMA Celestine. I don't have a good english in this time - because I am new here in the unite state. FOR that please anyone who - Reading this Document listen very Hot you understant my english. because I don't have anybody FOR my help. so in the Power of the LORD God I try myself FOR I wrieth to your office FOR I explain to you whi was the problem in this case FROM the begining to the end betwee me and the alleged Victim Family in this case.

in Fact

I am a native of Democratic Republic of Congo Kinshasa, I am here - in the unite state on ASylum, I was granted in 2009 ^{by} SUSANE CULUSU. who was my ATTORNEY that time in Catholic immigration social - Service. when I came here in the state I lieving with my BROTHER Koble Kibul in DEKALB county clarkston Georgia wrieth now.

when my BROTHER moving Georgia to Florida state. I went lieve with my Friend KABONGO PATRICK in wellow Riege Apartment in Decatur in th Same complex with the alleged victim Family. their was in bulding 3. me and KABONGO in bulding 8. so KABONGO said to me celestine m Job is to FAR away FROM here to Gainesville GA, so I buy the Hou: in CORNELIA GA so we going to CORNELIA. that I went to cornelia with KABONGO. FROM KABONGO House I was with my paperwork - FROM immigration. because the victim mother went liar to th COURT she said I went wait the paperwork in his House. that is NOT TRUE

From CORNELIA I don't Find the Job. then I told to Kabongo here in CORNELIA no Job I can't stay in the house like this I have the Paper-work and I have the Family in the country. so please I want go back to Atlanta mybe I will go get the Job. and Kabongo said no problem then I came back in wellow Riege Apartment to the victim Family House.

When I came to their house was in the night in the mornin' KABURA the victim mother said to me celestine you been long time here in this complex you know my children is too much liar and no respect. so you open your eye to them. in the House we was 5 people. was me, KABURA the victim mother, AKIZA the victim Broth JHON MINAMU the victim ONCLE and KABURA brother. in that time EVELINE the victim was 11 year old.

From Decatur KABURA said we moving here in Decatur we we going in Clarkston in NORTH AV Apartment together the 5 people From Clarkston I went get the job in BRANDS MART U.A.S to DORAVILLE and I WORKING in night chift. that time one woman was - coming pick me up every night his name was NADEGE KAMON. his Phon Number is 770-870-9997 FOR MORE information mybe you need.

in Clarkston that time ^{EVELINE} was with his Friend From BROOK AV in Decatur Near Lowranceville Hwy. she came in - vacation to EVELINE the victim. one day I come From my work we 9:00 Night I saw EVELINE Friend out the DOOR CRYING. I ask the GIRL what problem. did you Faith With your Friend OR with your Friend BROTHER she said no. so what you PRY FOR ?

She said I cry because EVELINE make SEX with his BROTHER AKIZA. I said what you talking about. she said yes I told you the TRue. when I went unto the ROOM I saw EVELINE the pants was - open and inzaped. then I ASKING EVELINE in your age 16 year old you KNOW AKIZA is your BROTHER and wy you don't said to you FRIEND go coll the people out. she said to me AKIZA came by FORCE on me. so I wait my mom FROM the job I talk this probk myself I talking to his mother and to JHON his uncle.

so his uncle JHON said I can't talk about this probl because my sesther children is no Respect to me. Now two month litte JHON the victim uncle said I want go visite my uncle to OHIO state. so I don't know where is the Bus - station. then me celestine I said I know the Bus station in - CARNETT train station in DOWTOW Atlanta. then me and - KABURA the victim mother we went DROP him to the Bus station.

FROM OHIO JHON came back with one man his nam was EMILE NITUNZI. is this man who came with the Trouble in the House to EVELINE the victim. when their came FROM OHIO was in the Night so in the morning JHON MIMAMU said this man don't have place in OHIO. because his uncle wife don't like the man in the house because the man make SEX with his uncle Daughter. is me I ASKING JHON you know the man is like that why go

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- came with here in Georgia. here in this complex the people how the Daughter. the same in this house we have the daughter. Jhon said the man will ~~moving~~ when he get the place. But from that time the man never ever moving the house until this situation came in the house.

- so one day in the morning the victim mother call me she said - Celestine we have the problem here in the house. I said what is the problem. she said this man EMILE he make sex with EVELINE I ASKING KABURA how you know the man make sex with EVELINE. she said celestine believe me I am a woman I know the problem between man and women.

Then I said to KABURA if is like that call 911 on the man or put the man about the house. But KABURA never do that to the man and KABURA said to me celestine keep control the man. I said to KABURA I can't do that because is not me who came with the man in the house. so is your brother Jhon who is the responsible who came with the man in the house no me.

the second I told you call the police on the man you don't do that why. Now in the family meeting me and KABURA ONCLE we said if like that BRING EVELINE to the doctor FROM the doctor she came back she crying. then she said to me celestine BRING EMILE staff about the house I said I can't do that is your BROTHER can do that no me. Then KABURA herself she went BRING the man staff ab.

about the House. so I asking them again why you don't
coll 911 for this man. But no one answer to me. and
the people said the man was their cousin. and the same
man was the same language and the same village with
this Family.

in that time when KABURA came told me about
EMILE and EVELINE SEX. myself I went talk to JHON
the victim uncle, But JHON said to me that is not my -
problem, I said is you who came with this trouble in the
House, the same I went talk to EMILE I said be careful
KABURA said you make SE with EVELINE. so the man said
to me love is love.

Now when EMILE went about the House EVELINE the
victim said to me is you Celestine went talk my secret
to my mother, I said no is your mother who came told
me this problem between you and your boyfriend EMILE
Then I said to EVELINE why you are a little girl why
you make love with the man who are like JHON
your uncle, so EVELINE answer me that is not your
business this is AMERICA. close your muth and you
will see. then for every answer this people give to me
I went talk to KABURA the victim mother.

Two hours later when the man went about the police came in the house was AMOS with his friend BOTH I was in living room with JHON the victim uncle. AMOS was with the camera he asking me what is my name and what language I talk, I said my name KANGOMA - Celestine and I talk Lingala. then AMOS take the picture in the camera on me no on JHON.

Then he said to me nobody can restay in this house wright now. when AMOS came in the house he - NEVER ASK what was the problem in the house and he don't ASK How many old man live OR stay in the house NEVER. then I said to AMOS I don't have the car now and I have many stuff what I do, he said I give you my phone number if you get the car you call me so I will come help you.

The same morning I went meet somebody who was with the car his name was PATRICK MAMBO his phone is 404-399-3686 this man is the same country with the victim family. From burundi the people. then I went find my place in BROCKETT Rd Apartment the same - complex with PATRICK MAMBO. From the first time I was like Hommelees man after I go get the place.

Now 3 year litle the same AMOS came ARREST me again then I went to the jail 6 month. FROM the jail the Public - Defandant coll me she said if I need a lowyer I said yes. then she came meet me in jail with a lingala - enterprete the lowyer was Ms Jennifer snyder.

FROM the jail I talking my testimony everyting to ms - Jennifer who was my attorney that time. so FROM the jail I went see the Judge in the Bulding is neer the jail Ms Jennifer was no there in the COURT ROOM I went see one lowyer man with the same enterprete and the Judge said I pay \$ 22.000 I said I don't have this money. then my GIRLFRIEND ANNIE TOE came Release me in the jail by Bonding - Company.

Now litle the same lowyer Jennifer sent me the APPoIntment letter FOR the court day. Now When I went the first day to the court Ms Jennifer change the enterprete so the Judge said I don't ear what the enterprete said, myself I can't ear what their said in english the same in the COURT ROOM I NEVER EVER ear their talking about my testimony NEVER and I don't have any paper - WORK FOR my testimony. I don't know did the COURT - WRiGhting my testimony OR NOT I don't know. My question is why this court don't have my testimony TRAscrip why?

From the jail I talking to ms Jennifer in this case the first witness is the victim mother who went see the problem between EVELINE and his Boyfriend EMILE and she is the same who came gave me the story FOR his Doughter.

The second witness is JHON MIMAMU who came with EMILE in the house FROM OHIO. so please ms Jennifer make strong you BRING JHON and EMILE in the court room. But she never do this FOR me OR the court never do this FOR me.

The second I asking the lawyer and the court FOR I going with EVELINE to the DOCTOR FOR the D.A.M - EXAMINATION this court this court don't do that FOR me. so my question is why this court don't GAVE me any opportunity in this case.

My second question is KABURA the victim mother was a young woman why I don't make love with and I go make love with the Doughter? and in the court room their said the victim testimony in this case is Really Mumbo-Jumbo what Mumbo-Jumbo mean in english - because in my language Mumbo-Jumbo mean something is None sence. Now if this case is like mumbo-Jumbi why I am here in this Fals imprisonment?

From now I am in ~~big~~ confusion about this imprisonment FOR
That I thinking this COURT OR this Judgment was been FROM
2010 by the Judge BACKER FROM BACKER to the Judge -
Michael Why the two Judge don't make theirself the
Decision in this case.

Then in August 2013 the Judge Michael sent the case to the
Jury FOR the Final Trial then the Jury OR the court
centered me FOR 20 year to serve 7 year in the prison
and 13 year in probation. I don't know How a GIRL who
have 16 year old can forgeth his testimony story are you
sure you accept that

I don't know I think this court sent me in prison
because I don't have a good english, maybe because I -
don't have money FOR I pay my one pay lawyer OR because
I don't have the family can following this case very strong
OR because I am FROM AFRICA

So please my people in the court of appeals FROM my countr
I NEVER been in criminal case, I NEVER been in the court
in the jail OR in prison NEVER, this is my FIRST time FOR
I be in the situation like this. I don't have any court -
law in my life and what I can do FOR I be release in
this Rongy prison on me

FOR that I wright everywhere FOR I Find the people who can help me FOR I be release in this imprisonment. so please the people in the COURT Room of Appeals I don't have any Family here in this country. I am new in this country So the law is here in the unitate state the same low we have in my country about the children.

So here in this country my Family is you the government - if I have same problem or trouble on me is you my Daddy or my mother is you the responsible in my life here in the - U.S. so please in this case I am very innocent like - Joseph who was in prison in EGYPT country by the liar of Potiphar wife. FOR that by myself I make - strongly FOR I send to the court of appeals this - Document is my testimony with the alleged victim Testimony then ~~the~~ the court of appeals Review OR their EXamine who talking the TRUE and who talking the Rong. I know I have my new attorney But my New attorney this court don't Give as my testimony story. because myself I don't have any PAPERWORK FROM the court in my testimony.

in this case the people FROM my country put me
in the Wrong way. because After I go start the
Court Day. their said to me celestine here in
America if you Give the case to the lawyer
you can't talk in the court Room. only your -
Attorney will talking FROM the begining to
the end.

if I know the people can talk theirself
I want talking myself that time and I was no
be in this Wrong prison. and about this english -
that I am here in this prison. I know you the -
Court of Appeals you are the one who Review
the Wrong case and who examine every ERROR in
the people cases. the same testimony I sent to my -
New lawyer FOR that I send to you the court of
Appeals FOR you remember what was EXACTLY the -
True problem FROM the begining to the end in the
Case.

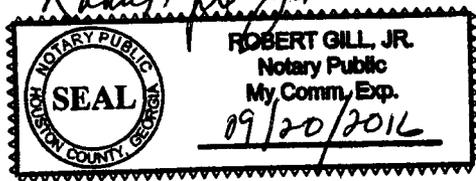
FOR that I sent the same my testimony to my New -
Attorney. so please the court of Appeals you consider
Ⓢ this Document is the TRUE story was between me
and this Family. if the court of appeals EXamine
very good the victim testimony and my testimony
the court will Find HOW the last court make
many many ERROR in this case

my last question is - How a GIRL who have 16 year can ^{FORGOth his} _{Testimony!}
so I lieve everything to the LORD God who KNOW
where is the TRUE and where is the Rong way in this
case. so I lieve the court of appeals to the Hand of
the LORD God who have the STRONG power FOR EVER!
body in this world. THANK you FOR the court of -
Appeals Review this case and THANK you FOR my
Release in this Prison by the court of Appeals.

THANK YOU and

31st day of August 2016

Respectful submitted



Celestine Kangoma
Celestine Kangoma

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

-vs-

CELESTINE KANGOMA,
Defendant

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CASE NO. 12CR-1182-6

AMENDED MOTION FOR NEW TRIAL

NOW COMES the defendant in the above-styled case and hereby amends his motion for new trial and shows the court the following in support thereof:

Chronology of the Case/Statement of the Facts:

Celestine Kangoma was tried before a jury on August 5, 2013 on two counts of child molestation and two counts of sexual battery against a child under 16. He was convicted on counts 1, 2, and 4. Count one, child molestation, charged him with "placing his hand onto and upon the female sex organ" of the victim. Count two, child molestation, charged him with "attempting to place his male sex organ onto and upon the female sex organ" of the victim. Count four, sexual battery against a child under 16, charged him with making "physical contact with the intimate parts of the body of [the victim]... by placing his hand onto and upon her breast." The jury found Mr. Kangoma not guilty on count three, which charged him with the offense of sexual battery against a child under 16 by "placing his hand onto and upon [the child's] anus".

Mr. Kangoma, a native of the Democratic Republic of Congo, is in the United States on asylum, speaks little English, and was provided a Lingala interpreter for the trial.

The facts established at trial showed that Mr. Kangoma lived in a two bedroom apartment with Eveline (the alleged victim, 11 years old at the time), her brother, and her mother. (T. at 45.) The mother testified that she allowed Mr. Kangoma to stay with the family because she wanted to help him while he was waiting for his paperwork. (T. at 90.) Mr. Kangoma and the brother shared a bedroom, and Eveline and her mother shared a bedroom. (T. at 46.) The mother worked nights, and Mr. Kangoma stayed with the children. (T. at 46.)

At trial, Eveline was not clear on exact dates, but she stated that on one occasion, Mr. Kangoma came into her bedroom at night while her mother was working and touched her breasts with his hands. (T. at 48.) She testified that on another occasion, while she was sleeping, he attempted to come into the room, but she told him to get out and he did. (T. at 50.) She testified that the third and final time that Mr. Kangoma came into her room, he touched her under her pajamas, but she yelled. (T. at 51.) Her brother heard her, came to the room, and told her to go back to sleep. (T. at 59, 79.) It is unclear when Eveline made an outcry, but she did tell her mother what happened at some point. (T. at 66.) According to the brother, the mother was told at a family meeting held between two days and two weeks after the event. (T. at 82, 83.) The mother took Eveline to the hospital upon learning of the allegations. (T. at 96.) Eveline was interviewed by a forensic interviewer on February 1, 2011. (T. at 129.) The interviewer testified that she

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was challenged by Eveline's accent, that Eveline's native language was Swahili, but that Eveline did not want an interpreter present during the interview. (T. at 129-130.)

Additional Enumerations of Error:

4. **The evidence was insufficient to support a conviction as to Count 2 of the indictment.**

Specifically, Count 2 reads that Celestine Kangoma "did commit an indecent act to Eveline Manirambona, a child under the age of 16 years, with the intent to satisfy the sexual desires of himself by attempting to place his male sex organ onto and upon the female sex organ of said child." According to the testimony of the alleged victim, Mr. Kangoma only touched her with his hands. On page 55 of the transcript, the assistant district attorney questioned the alleged victim as follows:

Q: And did his hands touch your skin?

A: Yeah, he was touching like this going down.

Q: Okay. Was there—did he ever touch you or try to touch you with any other part of his body?

A: No.

(Transcript "T." at 55.)

Then, on page 57, the assistant district attorney further questioned the alleged victim about the defendant's penis:

Q: Okay. Pants were open. Did you see the Defendant's penis?

A: No.

Q: Did you feel it?

A: No.

Q: Did you feel it on any part of your body at all?

A: No.

(T. at 57.)

interview because you've been trying to forget about this?" and defense counsel sat silently. (T. at 71.)

The prosecution continued this practice in its questioning of the expert. At one point for example, the ADA asked her expert witness the following questions, which drew no objection:

Q: And it was with the use of the anatomical dolls that she remembered the Defendant had been kissing her at certain points?

A: At that point, yes...

Q: And with speaking with Eveline, did she have a tendency to try and tell you a lot of things all at once?

A: Yes.

Q: And was it at times hard to parse different incidents?

A: Sometimes, yes, it was.

(T. at 182-183.) Again, this prejudiced the defendant by allowing the State to create the testimony it wanted against the Defendant and explain away the flaws in its evidence.

In addition to failing to challenge the prosecution, counsel also created circumstances allowing a State's witness to provide prejudicial testimony that this Court had previously excluded for the benefit of the Defendant. At one point during the cross-examination of the State's expert witness (the forensic interviewer), defense counsel's questions were so poorly phrased and convoluted that they resulted in the interviewer referencing redacted and non-redacted portions of the videotaped interview:

Q: Let me ask you this: did you have conversations with her, other than what's videotaped?

A: Yes there are other things on this video not played.

Q: Other than this videotape?

A: The one that you just—that was just shown, the one that's retracted [sic]—

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evidence by failing to timely object. (T. at 71, 182, 195, 196.) Several times, defense counsel objected but then failed to obtain rulings on the record afterwards. (T. at 180-181, 197, 205, 240.) This series of professionally unreasonable failures and errors

X prejudiced the Defendant because they each allowed the jury to hear evidence that may not otherwise have come in, diminished defense counsel's credibility with the jury and the court, and resulted in several objections not being preserved for appellate review. The record is replete with instances of counsel's error.

Specifically, during the redirect examination of the victim, the Assistant District Attorney asked an inflammatory leading question, and defense counsel failed to object on the proper grounds:

Q: Why would you try to forget about it?
A: Because I don't want to—I always—I don't know.
Q: Is it hard to talk about? Yes?
A: Yes.
Q: Not something you like to remember; right? Not something you like to remember?

(T. at 70.) Defense counsel objected at this point, citing relevancy. (T. at 70.) The objection was overruled based on the objection made, however the questions were clearly leading. Had defense counsel made the proper objection, the objection would likely have been sustained. Allowing the prosecution to ask this loaded leading question allowed the State to literally create the testimony it needed to convict and explain why the alleged victim was hesitant in her testimony.

The prosecution's improper method of frontloading its leading questions to the alleged victim continued throughout direct examination but the defense counsel failed to challenge it. For example, the ADA asked the victim on direct: "You watched the

sent me July out, and defense counsel attempted to explain her question:

Ms. Snyder: My question to the witness is did she have any other conversations with the alleged victim, other than what is on the recording. What I meant was in this interview. And the confusion, I think, and correct me if I'm wrong, is that there is a redacted portion and an unredacted portion. I am not referring to the redacted portion as opposed to the unredacted portion. My question encompasses the entire—

The Court: The entirety of the interview.

Ms. Snyder: -- interview. And I just didn't want that coming out.

The Court: Yeah, I think that addresses itself to the artful reconstruction of the question.

(T. at 161-162.)

Despite the fact that the witness referred to redacted and non-redacted portions of the interview, defense counsel made no effort to object, ask for curative instructions, or preserve the error for appellate review in any way. It was highly prejudicial to the Defendant for the jury to hear that portions of the tape involving discussions with the alleged victim were redacted, implying that what the jury heard of the allegations was only a portion. This probable inference prejudiced the defendant because but for counsel's poorly phrased questions, the jury would not have known about the redacted portions of the video, which were inadmissible.

In addition to the forgoing deficiencies, several times throughout the trial, defense counsel failed to obtain a ruling on the record regarding objections she did make, thus undermining the ability of the objectionable issue to be preserved for appellate review. For example, counsel objected when the State's expert witness was asked to clarify what the victim said on a video the jury viewed for itself. (T. at 180.) The attorneys

relevance as the grounds for the objection rather than improper character evidence. (T. at 218.) Although the testimony was not relevant to the charges—the defendant was charged with sexual battery and child molestation, not evading or resisting arrest—the court allowed the testimony.¹ (T. at 218.) Defense counsel's failure to timely and properly object to the "fugitive task force" witness, Investigator Bothwell, and Detective Amos's characterization of the defendant as "a fugitive," prejudiced the defendant because it allowed the jury to hear significant and improper prejudicial evidence. Investigator Bothwell's presence and testimony at the trial implied that the Defendant was evading arrest, which was not alleged in the indictment and not a proper allegation before the jury on the issue of the charges. Instead, it likely resulted in the jury believing that the Defendant, who was transitionally homeless at the time, was on the lam because of his guilt as to the charges. Investigator Bothwell's testimony that he searched through the jail database to in an attempt to find Mr. Kangoma patently implied that the Defendant had a prior criminal record, exacerbating the purported guilt of the Defendant in the minds of the jury. (T. at 195-196.) Defense counsel's failure to properly challenge this testimony and allow the Defendant's character to be put at issue compromised his right to a fair trial before an impartial and unbiased jury.

While each of these errors alone sufficiently harmed the Defendant to warrant a new trial, the cumulative prejudice must be considered. No one individual error by

¹ While the proper and specific legal objection involved impermissible character evidence, the investigation into the defendant's whereabouts was in fact not relevant to the jury's decision at the guilt-innocence phase of the trial and served only to imply that the defendant was evading arrest.

approached and had an off-record discussion, but no ruling was obtained on the objection and the discussion was not transcribed. (T. at 181.)

As another example, on the second day of trial, defense counsel moved for a mistrial on the grounds that she failed to obtain rulings on the record and failed to cite the proper grounds for objecting to a witness on the first day. (T. at 203.) The objectionable witness was Investigator Bothwell, a police officer assigned to the fugitive task force. (T. at 195.) At the time of the officer's testimony, defense counsel objected, citing relevancy as grounds for the objection. (T. at 197.) Again, a bench conference was held off the record, and defense counsel did not obtain a ruling on the record regarding this objection. (T. at 197.) At her motion for mistrial the next day after the testimony, she correctly stated that the witness and his testimony improperly placed the defendant's character in issue, however the objection was not timely and was therefore waived. (T. at 203.) Before this Court ruled on that motion for mistrial, defense counsel voluntarily waived the motion by requesting curative instructions in lieu of a mistrial. (T. at 204.) The Court did not issue any curative instructions, and did not rule on the waived motion for mistrial. Defense counsel renewed the motion at the close of the State's evidence just before moving for a directed verdict. (T. at 238-240.) The Court denied the motion for directed verdict, and again did not issue a ruling regarding the motion for mistrial. (T. at 240.)

The above example also reflects defense counsel's failure to cite the proper legal basis for objections. In the example above, the State was able to improperly inject the defendant's character into evidence through Detective Bothwell. In a second instance occurring shortly after the first one, the State's witness, Detective Amos, testified that the Defendant was a fugitive. (T. at 218.) Defense counsel objected, but again cited

While the State's expert witness testified that the alleged victim told her that "he tried to use his penis," (T. at 136) the victim's own testimony at trial is in direct contradiction with this statement, thus no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, (1979).

5. Defense counsel was ineffective in that she committed numerous errors throughout the course of the trial which prejudiced the defendant by 1) failing to preserve several issues for appellate review, 2) permitting jurors to hear testimony they would not otherwise have heard, and 3) diminishing defense counsel's credibility with the jury and the court.

Defense counsel owes to the defendant the overarching duty to advocate the defendant's cause as well as the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); See *Powell v. Alabama*, 287 U.S., 45, at 68-69(1932). When counsel unreasonably fails to carry out those duties and that failure harms his client, counsel has rendered constitutionally deficient representation compelling reversal of any ensuing conviction. "To prevail on such a claim of ineffective assistance of counsel, a defendant must show two things: (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense to the point that a reasonable probability exists that, but for counsel's errors, the outcome of the trial would have been different." *Smith v. State*, 690 S.E.2d 867 (Ga.App., 2010). Here, both conditions have been met.

At trial, defense counsel made numerous errors in objecting, failing to object, and failing to get rulings on objections. At times, she objected at the proper time but on the wrong grounds. (T. at 70; 197, 218.) Other times, she waived the challenge to improper

defense counsel should be considered in a vacuum and "it is the cumulative prejudice of counsel's errors which is constitutionally relevant." Schofield v. Holsey, 281 Ga. 809, 812 (2007). Each of the errors in this case created a factual circumstance in which the jury likely and impermissibly heard bolstering of the prosecution and undermined the defense counsel's, and thus the Defendant's, credibility with the jury. Viewed in succession as the jury would have observed them at trial, the errors of defense counsel resulted in the amelioration of the defense. It is likely that but for those failures, reasonable doubt would have lingered.

Conclusion:

WHEREUPON, Defendant prays that these, his grounds for a new trial, be inquired of by the Court and that a new trial be granted.

Respectfully submitted,

Shari Gunnin
Attorney for Defendant
Georgia Bar No. 943100

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the office of the District Attorney of Dekalb County, Robert James, with a true and correct copy of the within and foregoing MOTION FOR NEW TRIAL by personal service.

This 9th day of September, 2014.

Shari Gunnin

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**IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

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CASE NO. 12CR-1182-6

-vs-

CELESTINE KANGOMA,
Defendant

SECOND AMENDED MOTION FOR NEW TRIAL

NOW COMES the defendant in the above-styled case and hereby amends his motion for new trial and shows the court the following in support thereof:

The section labeled **Chronology of the Case/Statement of the Facts** is hereby amended to add the bolded sentences, and should now read as follows:

Celestine Kangoma was tried before a jury on August 5, 2013 on two counts of child molestation and two counts of sexual battery against a child under 16. He was convicted on counts 1, 2, and 4. Count one, child molestation, charged him with "placing his hand onto and upon the female sex organ" of the victim. Count two, child molestation, charged him with "attempting to place his male sex organ onto and upon the female sex organ" of the victim. Count four, sexual battery against a child under 16, charged him with making "physical contact with the intimate parts of the body of [the victim]... by placing his hand onto and upon her breast." The jury found Mr. Kangoma not guilty on count three, which charged him with the offense of sexual battery against a child under 16 by "placing his hand onto and upon [the child's] anus".

Mr. Kangoma, a native of the Democratic Republic of Congo, is in the United States on asylum, speaks little English, and was provided a Lingala interpreter for the trial.

The facts established at trial showed that Mr. Kangoma lived in a two bedroom apartment with Eveline (the alleged victim, 11 years old at the time), her brother, and her mother. (T. at 45 and 74.) **According to testimony from a defense witness, social worker Jodie Ng , a maternal uncle also lived in the home. (T. at 245). Additionally, the forensic interviewer called by the State also testified that an uncle lived in the house. (T. at 156.) The lead investigator on the case, Detective Amos, also testified that he was aware that there had been other males staying in the house or visiting the house. (T. at 229.) Despite the evidence of at least one other adult male living in the apartment, the victim and her brother denied at trial that an uncle lived in the apartment with them when these events occurred. (T. at 45 and 74.)** The mother testified that she allowed Mr. Kangoma to stay with the family because she wanted to help him while he was waiting for his paperwork. (T. at 90.) **Eveline testified that Mr. Kangoma and the brother shared one bedroom, while Eveline and her mother shared the other. (T. at 46.)** The mother worked nights, and Mr. Kangoma stayed with the children. (T. at 46.)

At trial, Eveline was not clear on exact dates, but she stated that on one occasion, Mr. Kangoma came into her bedroom at night while her mother was working and touched her breasts with his hands. (T. at 48.) She testified that on another occasion, he attempted to come into the room while she was sleeping, but she told him to get out and he did. (T. at 50.) She testified that the third and final time that Mr. Kangoma came into her room, he touched her under her pajamas, and she yelled. (T. at 51.) Her brother heard her, came to the room, and told her to go back to sleep. (T. at 59, 79.)

Eveline was interviewed by a forensic interviewer on February 1, 2011. (T. at 129; State's Exhibit 3R.) The interviewer testified that she was challenged by Eveline's accent—Eveline's native language was Swahili, which the interviewer did not speak—but that Eveline did not want an interpreter present during the interview. (T. at 129-130.) In the forensic interview, Eveline was not clear on how many separate incidents occurred, or during which specific incident her brother came into the room. (T. at 157-160, and State's Exhibit 3R.) In fact, the interviewer conceded that she did not even discuss a third incident with Eveline (T. at 160), that she did not clarify how many incidents occurred (T. at 157), and that she clarified no details about how far Eveline's brother came into the room or what he did when he came into the room during the incident in which he was involved. (T. at 160.)

The colloquy in the forensic interview is difficult to understand in parts, and the Court announced at one point in the trial about the recording of it: "That is really mumbo-jumbo, and I don't know if that clarifies anything." (T. at 173.) There were also several inconsistencies between the interview and the testimony at trial. For example, during the interview, Eveline stated that when her brother got to her room after hearing her cry out, she told him what the Defendant had allegedly done; the Defendant yelled "no no!" and insisted that she was lying. (State's Exhibit 3R at 2:53:08-2:53:41 and 3:02:55-3:03:08). At trial, Eveline's brother testified that when he went to his sister's bedroom, he saw the Defendant "power walking" away from the room, but the Defendant did not say anything to him (T. at 78-79). Eveline said that when her brother came in, the Defendant just ran out without saying anything. (T. at 57.)

It is unclear when Eveline made an outcry, but she did tell her mother what happened at some point. (T. at 66.) According to the brother, the mother was told at a family meeting held between two days and two weeks after the event. (T. at 82, 83.) Detective Amos testified that the mother told him Mr. Kangoma was present at the family meeting and he denied the allegations. (T. at 234.) The mother took Eveline to the hospital the day after learning of the allegations. (T. at 97.)

Enumerations of Error:

Enumeration of Error 5, which read “Defense counsel was ineffective in that she committed numerous errors throughout the course of the trial which prejudiced the defendant by 1) failing to preserve several issues for appellate review, 2) permitting jurors to hear testimony they would not otherwise have heard, and 3) diminishing defense counsel’s credibility with the jury and the court” is hereby withdrawn.

6. The evidence was insufficient to support a conviction as to any count on the indictment.

The evidence at trial does not support the jury’s verdict. The State relies heavily on the forensic interview, and the interview, held in February of 2011, is factually inconsistent with the testimony at trial over two years later.

On cross examination, the forensic interviewer admitted that it was not clear how many incidents occurred based on the forensic interview:

Q: Now ma’am, getting back to the sequential order, she did tell you that the first time Celestine came into her room, she

was fighting him, and then the ~~next time he came in, her~~
brother came in. Didn't she say ~~that to you?~~

A: She said that, but I don't know if ~~that was one incident, or~~
if she was breaking it down into separate incidents. She
doesn't—it's difficult to understand if she's talking about
one incident or more than one. Although I asked her if it
happened one time or more than one time, she's not—or
I'm not understanding it to be three separate incidents on
three separate days or one incident with everything
happening.

Q: When did you ask her?

A: Well, when I asked her if it happened one time or more
than one time, she said three times, as you allowed me to
hear, and then she-- then, as she goes through the interview,
she continues to say the same incident that he tried to touch
her, and then gives me details, and then shows me with the
dolls. But it's difficult to understand if it's one time, one
full incident, or separate days. And no, I didn't ask her that,
if it was separate days.

~~(T. at 157.)~~ Two years later, the victim clearly testified at trial that there were three separate
incidents (T. at 50), but the forensic interviewer testified that she did not discuss any details of a
separate third incident with Eveline. (T. at 160.)

There were a number of significant factual inconsistencies between the victim's testimony
and her statements during the forensic interview. As one example, Eveline told the forensic
interviewer that the defendant took off her pants when he came into her bedroom. (State's
Exhibit 3R at 2:55:20-2:55:47). At trial, however, she testified only that he tried to put his hands
under her pants. (T. at 55.) As a second example, Eveline twice said in her interview that when
her brother came into her room after she cried out, she told him what the Defendant had done. In
response, the Defendant cried out "no, no!" and insisted that she was lying. (State's Exhibit 3R at
2:53:08-2:53:41 and 3:02:55-3:03:08). But at trial, Eveline's brother said the Defendant did not
say anything to him at the time. (T. at 79.) Eveline said at trial just that the Defendant ran out
when her brother came to the room. (T. at 57.)

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There were also significant contradictions in the details of the alleged sexual touching. In her forensic interview, ~~Eveline stated~~ that the Defendant kissed her (State's Exhibit 3R at 3:03:30-3:04:45.) At trial, however, she did not mention kissing, even when she is specifically cross-examined about it. (T. at 66.) Eveline told Dr. Ellis, the physician who examined her after her outcry, that "a man that was living with them would come into her bedroom at night and he would touch her vaginally and rectally with his fingers." (T. at 209.) At trial, however, Eveline never indicated that the Defendant touched her rectally. Eveline also told Dr. Ellis that the Defendant had exposed himself to her (T. at 209), but this is in direct contrast to Eveline's testimony at trial, where she said that she did not see the Defendant's penis. (T. at 57.)

The inconsistencies in the facts surrounding the allegations in this case extend beyond the specific claims as to what the Defendant purportedly did. Most notably, the claims by Eveline and her brother that no other adults stayed in their small apartment other than their mother (T. at 45 and 69) were contradicted by several witnesses, including the prosecution's. Both the forensic interviewer and the social worker testified that they understood an uncle lived in the apartment. (T. at 156 and 245.) Detective Amos also testified that he believed other men stayed in the apartment as well as visited it during the time of the alleged incidents. (T. at 229.)

Finally, because of these significant and highly critical inconsistencies in the stories put forth by the victim as well as the ambiguities within the forensic interview and her statements to the medical examiner, no jury could conclude that the Defendant committed the acts as alleged in the indictment beyond a reasonable doubt. *See Jackson v. Virginia, 443 U.S. 307*

7. This Court should exercise its discretion and, acting as the 13th juror, set ~~aside the jury verdict as that verdict was contrary to the evidence and the~~ principles of justice and equity (OCGA § 5-5-20), and strongly against the weight of the evidence (OCGA § 5-5-21).

A defendant's claim under OCGA §§ 5-5-20 and 5-5-21 imposes a duty on the trial court to review the evidence and determine whether a new trial is warranted as a matter of fact. See *Alvelo v. State*, 288 Ga. 437, 438-39 (1) (704 SE2d 787) (2011); *Ricketts v. Williams*, 240 Ga. 148, 149 (240 SE2d 41) (1977), vacated on other grounds, *Williams v. Ricketts*, 438 U.S. 902 (98 SCt 3119, 57 LEd2d 1145) (1978); *Wilder v. State*, 193 Ga. 337, 338 (1) (18 SE2d 546) (1942); *Mills v. State*, 188 Ga. 616, 622 (4 SE2d 453) (1939).

This review is broader than *Jackson*. It appeals to the "judicial conscience." *Mills* at 624. It requires the trial judge to sit as a "thirteenth juror," "consider[ing] the credibility of witnesses." *Ricketts v. Williams*, 242 Ga. 303, 304 (248 SE2d 673) (1978)(*Ricketts II*), quoting, 2 Wright & Miller, *Federal Practice and Procedure: Criminal* 486-487, § 553 (1969).

Here, the verdict, even if factually sufficient, arises in a case where it is "decidedly and strongly against the weight of the evidence," and this Court has the authority to set it aside. Consequently, even if this Court could find that there is slight evidence to support the verdict, that evidence is so contradictory and suspect that it should be set aside and the Defendant granted a new trial.

Conclusion:

WHEREUPON, Defendant prays that these, his grounds for a new trial, be inquired of by the Court and that a new trial be granted.

Respectfully submitted,

Shari Gunnin
Attorney for Defendant
Georgia Bar No. 943100

CERTIFICATE OF SERVICE

This is to certify that I have this day served the office of the District Attorney of Dekalb County, Robert James, with a true and correct copy of the within and foregoing MOTION FOR NEW TRIAL by electronic mail.

This 9th day of January, 2015.

Shari Gunnin