COURT OF APPEALS OF GEORGIA

RETURN NOTICE

March 23, 2015

To: Mr. Verneel Wyley, GDC440899 D1-101T, Central State Prison, 4600 Fulton Mill Road, Macon, Georgia 31208

Case Number: _____ Lower Court: County Superior Court

Court of Appeals Case Number and Style: _____

Your document(s) is (are) being returned for the following reason(s).

☑ **There is no current case pending in the Court of Appeals of Georgia under your name.**

☐ **A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia.** See OCGA §5-6-37. Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.

☐ **The Notice of Appeal must include a proper Certificate of Service.** A Certificate of Service must show service to the opposing counsel and contain the counsel's full name and complete mailing address. The opposing counsel must actually be served with a copy of your filing.

☐ **An Application for Writ of Habeas Corpus should be filed in the superior court of the county in which you claim you are illegally detained.** An appeal from a denial of an Application for Writ of Habeas Corpus is to the Supreme Court and not the Court of Appeals.

☐ **An Application for Writ of Mandamus should be filed in the superior court of the county official whose conduct you intend to mandate.** An appeal from a denial of an Application for Writ of Mandamus is to the Supreme Court and not the Court of Appeals.

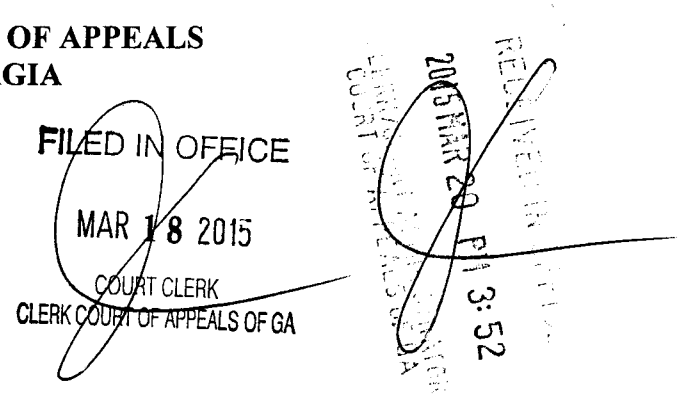
☐ **Your appeal was disposed by opinion (order) on** _____. The Court of Appeals _____. The remittitur issued on _____ divesting this Court of jurisdiction. The case decision is therefore final.

☐ **Your mailing/documents indicate that you intended to file your papers in another court rather than the Court of Appeals of Georgia.** The address of the Clerk of the is:

☐ **If an attorney has been appointed for you and you are concerned with the representation provided by that attorney, you should address that issue to the trial court.** As long as you are represented by an attorney, you cannot file pleadings on your own behalf. Your attorney must file a Motion to Withdraw as Counsel and it must be granted, before you can file your own pleadings in this Court.

☐ **A request for an out-of-time appeal should be made to the trial court from which you are appealing.** If your motion is denied by the trial court, you can file an appeal of that decision by filing a Notice of Appeal with the clerk of the superior court.

IN THE GEORGIA COURT OF APPEALS
STATE OF GEORGIA



VERNEEL WYLEY,
Appellant,

VS.

THE STATE OF GEORGIA,
Appellee.

CASE NO: _____

BRIEF OF APPELLANT

VERNEEL A. WYLEY
Pro se
Central State Prison/ GDC 440899#
4600 Fulton Mill Road.
Macon, Georgia 31208 D!-101T

Please serve:
Mr. Robert D. James
DeKalb County District Attorney's Office
700 DeKalb County Courthouse
556 McDonough Street
Decatur, Georgia 30030

Debra De Berry
Clerk of Superior Court
556 N. McDonough Street
Decatur, Georgia 30030

IN THE GEORGIA COURT OF APPEALS
STATE OF GEORGIA

VERNEEL WYLEY,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

CASE NUMBER: _____

BRIEF OF APPELLANT

STATEMENT OF THE CASE

A DeKalb County Grand Jury indicted Appellant on July 19, 2001. re-indicted on December 3, 2001, for rape, carnal knowledge, forcibly and against her will; kidnapping, aggravated assault (2) counts, child molestation (2) counts, enticing a child for indecent purposes one count each, and rape upon a 13-year-old in front of a 15- year-old. Appellant was tried and convicted of child molestation and enticing a child for indecent purposes upon the 13-year-old only. Counts 4 and 5 from an 8 singled out count indictment. On February 1, 2002, jury returned a guilty verdict on counts 4 and 5 after separating each count at deliberation phase, after a Directed Verdict of Acquittal was granted on count one rape. Where, trial judge accepted said verdict. A Motion for New Trial was filed on March 5, 2002,

 V.W

on Appellant's behalf (2) days after term of court expired due to first Appellate Attorney being from the same office as trial defense Attorney; and that motion was amended and heard on July 23, 2002. An ... .. order denying that motion filed on July 23, on July 30, 2002, a said timely Notice of Appeal was filed on August 19, 2002.

STATEMENT OF FACTS

Appellant was arrested on April 18, 2001.

The said evidence produced at trial established that Appellant Verneel Wyley was being charged with "rape" carnal knowledge, forcibly and against her will, kidnapping, aggravated assault (2) counts, child molestation (2) counts, enticing a child for indecent purposes one count each, kidnapping with bodily injury, and rape of one in front of the other. The alleged (2) victim's stated that Appellant approached them as they left South Dekalb Mall in Dekalb County on April 16, 2001 at or about 9:30 p.m. when Appellant allegedly stop them with the asking for a light, receiving one from the 15-year-old, it was said he started a conversation about sex, the two victim's stated they started to walk away when Appellant drew a black hand gun telling them both to go to a wooded secluded area at gun point and he allegedly raped the 13-year-old in front of the 15-year-old. The 15-year-old stated she tried to stop the seen penetration and was pistol whipped for her effort, where after receiving said injury to her face and wrist, they were released and they went to Burger King Restaurant using the restroom where the 13-year-old claimed she found her panties to be very bloody telling the 15-year-old of her finding they stated they took the bus to the 15-year-old home and told the Mother of the 15-year-old that the 13-year-old was raped and she the 15-year-old was pistol whipped trying to stop the seen penetration. The 15-year-old had in her possession, a napkin with the Appellant name and cell phone number wrote by his hand writing, stating he gave it to her. The Transcript transcribed that the napkin was given to the 13-year-old. No gun, no bloody panties, no evidence was submitted at trial to prove rape, Assistant

District Attorney as well as the Lead Detective stated in open court their rape evidence were critically insufficient to prove rape ever occurred as well the rape kit was proven negative thus, on cross-.. ...examination of the alleged victim's in open court they both stated they lied about the rape, kidnapping, aggravated assault, kidnapping with bodily injury, stating they received said napkin from Appellant during a brief conversation pertaining to employment. The trial transcript omitted all statement made about the reasons why the girl's gave a false report of a crime, at trial pertaining to the alleged unlawful incident. The only evidence produced at trial {sufficient} was the seven pairs of khaki uniform pants four polo type shirts with an emblem of PET SMART, along with the testimony of what the Appellant was wearing on the evening of April 16, 2001, coupled with the Chick-fil-A {napkin} retrieved from the girl's and what was retrieved from Appellant's home during the search warrant issued.

ARGUMENT

1. THE RECORD WILL REFLECT THERE WAS NO TRUE EVIDENCE TO AUTHORIZE APPELLANT'S CONVICTION (S) FOR RAPE, THUS, THE LESSER INCLUDED OFFENSES CHILD MOLESTATION AND ENTICING A CHILD FOR INDECENT PURPOSES.

(enumeration of error 1)

In his first enumeration of error, Appellant makes the clear assertion that the merger issue where neither party properly raises and argues a merger issue, the Court has no duty to scour the record searching for merger issues, However, if the court notice a merge issue in a direct appeal, as is here, {t}he court regularly resolve this issue, even where it was not raised in trial court and is not enumerated as error on appeal. See Nezario V. State, 293 GA. 488 (2) (b), 746 S.E.2d 109 (2013). Also see Bryant V. State, 229 GA. APP. 534 (1) 494 S.E. 2d 353 (1997). This first enumeration of error should be seen as merit. The evidence being the lack thereof, clearly established that a false report of a crime was made, {t}he alleged victim's testified in open court they both lied about the rape as an whole on April 16, 2001.

The evidence produced at trial established the element of penetration which the indictment applies to... rape, incest, and statutory rape, is not an element of child molestation therefore could not be applied to child molestation as sexual intercourse charge thus, erroneous charge as to a method of committing child molestation with the intent to commit rape. Where, the conduct related to each as in this case being different, distinct, and separate. The charge of the jury must be taken as a whole and each part therefore considered in connection with every other of the charge. Georgia has by statute extended the prohibition of double jeopardy beyond those substantive constitutional limits by placing procedural bars on multiple prosecutions arising out of the same criminal conduct. O.C.G.A.§ § 16-1-6, 16-1-7. § 16-1-8.

Child Molestation and enticement count merged as a matter of fact where the enticement counts of the Indictment specifically alleged that Defendant enticed the child for the purpose of, with the intent to commit child molestation and, thus, in order to prove the enticement counts, the prosecution had to prove all facts used to prove the child molestation counts. See Wells V. STATE, 222 GA. APP .587, 474 S.E. 2d 764 (1996). Penetration is no element of child molestation no matter how slight therefore, rape on the face of the multiple count indictment was an erroneous charge due to no age was mention pertaining to the put on notice charge of rape see 1933 CODE ANN, § 26-2001, being prosecuted through the descriptive language to the jury in its entirety on the face of the indictment thus, allowing the jury to believe that an act of child molestation may have been all that was committed, regardless of whether the lesser offense contain certain elements that are not essential to the greater offense rape. See Heggs V. The State, 246 GA. APP. 354 (2000). The Georgia Supreme Court regularly decides merge issues, and vacates convictions and sentences, even where the issue was not raised in the trial court and is not enumerated as error on appeal. This case challenges this criminal conviction properly brought before this court where the court will see by the record based on appellant's argument, that the record shows that child molestation and enticing a child for an indecent purposes merged due to both was allegedly committed by the intent to commit rape of a child under the age of 16, on the face of the indictment, where, to disregard said convictions and sentences and continue to allow appellant to serve a sentence from void counts that can –will be identified as illegal and void, that do not comport with fundamental fairness and due...

process of law. A void conviction and illegal sentence have never been subject to general waiver rules. Merger claims are as species of void conviction, just like a conviction on an indictment that is void such being a speaking demurrer indictment. Finally, the proper way to instruct the jury on the lesser included offense option invokes consideration of the line of cases that hold that no conflict in the evidence, and the jury need not unanimously acquit the Defendant of the greater charge before turning their attention to the lesser charge where this was done for them due directed verdict of acquittal. See Cantrell V. State, 266 GA.700 (1996), also see Kunselman V. State, 232 GA. APP.323 (1998). Consequently, a recalcitrant superior court judge is attempting to circumvent the appellate procedure by misapplied 1933 Code Ann.§ 26-2001 on the face of said re-indictment thus, allowing the Defendant to be tried on erroneous charges thus, void counts where on the review to the Georgia Court of Appeals must be viewed in the light most favorable to the verdict and defendant no longer enjoy the presumption of innocence. A defendant is entitled to be tried on an indictment that is perfect in form. A general demurrer set's up an appeal on the sufficiency of the evidence affecting the substance and merits of the offense charged, like a failure to charge a necessary element of the crime whereas, a special demurrer challenge the sufficiency of the indictment because it does not contain the correct essential element intent. Because a general demurrer attacks the legality of an indictment, it may be raised any time during the trial and may be even after the verdict by a motion in arrest of judgment where a motion for new trial is not the proper method to attack the sufficiency of an indictment and does not provide a basis for the Georgia Court of Appeals to review the indictment. The record will clearly reflect from the conviction (s) and concurrent sentence (s)due to such skillful manifest necessity to circumvent the appellate court procedures the indictment would not have withstood a timely general demurrer, and trial counsel's performance would be deficient in her failure to timely challenge the validity of the child molestation counts. This failure to do so necessarily contributed to Appellant's conviction(s) on void counts; thus, it harmed Appellant and prejudiced his defense. Where, such skillful necessity to circumvent the reviewing court procedure deprived Appellant his first appeal by deliberately filing an improper motion after the

term of trial court had expired. The trial court erred in not granting ... Appellant's amended motion for new trial on this ground. This enumeration has true merits thus conviction(s) and sentence(s) are void.

2. APPELLANT HAS MET HIS BURDEN TO ESTABLISH BOTH CLEAR VOID AND ABUSE OF DISCRETION

(enumeration of error II)

(2). The trial judge willfully and knowingly influenced the out come of the jury's verdict by Directed Verdict of Acquittal on count one rape, allowing through its sound discretion, instructing the jury to continue its deliberation on the remaining counts as to { piecemeal} the indictment. Because, the jurisdiction of the court extends to such matters as the law has declared criminal, and no other. Wherefore, court can not use a false report of a crime, whereas, when a court undertakes to punish for offenses to which no criminality attaches, however deplorable such offense may be in the form of conscience, the court acts beyond the court jurisdiction. O. C. G. A. § 17-9-1. SEE Riley V. Garrett, 133 S.E.2d 367 (1963). The record will reflect that the court's recharge in open court that whether what was put in the re-indictment was an essential element of the charge rape, as to penetration, describing sexual intercourse in the act of child molestation by placing his penis on the vagina of the 13-year-old, this that continue to influence the jury to believe the prosecution is pertaining to rape, left the jury without any guidance for determining whether an allegation was material or not, which could have led it to conclude that any allegation in the indictment, even though material, did not have to be proven beyond a reasonable doubt if the jury found it immaterial as a matter of fact. See O.C.G.A. § 9-12-16. Absent jurisdiction, { jurisdiction to prosecute} judgment a nullity. The trial court erred with respect to the relationship between the rape, carnal knowledge, forcibly and against her will, of a child under the age of 16, and child molestation void counts regarding each of the alleged victim's. The State may seek guilty verdicts on alternative theories of rape of a child under the age of consent and child molestation in the...

presence of, where, when the elements of rape and child molestation both exist in a rape case due to the rape of a child under the age to consent, for sentencing purposes the trial judge is to merge the lesser-included offense into the greater offense rape. See Mackey V. The State, 235 GA. APP. 209 509, S.E.2d 68 (1998). O. C. G. A. § 16-6-1. Trial court's skillful circumventing ability, the reviewing court saw the result as when an indictment charges an offense, and the jury returns a verdict of guilty on a lesser included offense, the verdict operated as an acquittal of the greater offense. Thus, if a jury returns a verdict on a lesser – included offense, further deliberation are precluded. The rule is otherwise, however, if the jury returns a verdict of guilty with regard to an offense that was not within the range of the given instruction by the court. Thus, guilty or not guilty of rape, trial judge properly refuses to allow defense counsel to continue questioning witnesses based upon the possibility that such examination might lead to evidence of prosecutorial misconduct.

Whereas, the continuous demurrer to evidence by trial defense attorney, that will sustain the insufficient to the evidence claim on Motion for New Trial, the trial judge notice the exposing of prosecutorial misconduct, and of said skillful manifest necessity discretion, to circumvent appellate court procedures willfully knowingly directed verdict of acquittal of count one rape, to achieve the outcome needed from the jury,{ A verdict that a jury returns as directed by the judge as instructions}. Most strongly sustain the verdict authorizing the erroneous charges in fact instructs the jury to consider the lesser- included offenses, to sustain the insufficient evidence of rape and the rational trier of fact could have found Defendant was not guilty of rape, but guilty of the lesser offenses. Erroneous charge, a charge which permitted the jury to hear evidence of forcible rape pursuant to former CODE ANN. 1933, § 26-2001. see O. C. G. A. § 16-6-1. The record will reflect from the not guilty pled, defendant did not consent passively to the indictment this is why after the verdict was read nullity was requested, even though said request was omitted from the record thus, transcript. See O. C. G. A. § 5-6-41(f). The State may not use a false report of a crime to obtain a conviction, even when the falsity relates solely to the credibility witness. See Shotkin V, State, 73 GA. APP. 136, 35 S. E.2d 556 (1945). Also see 2014 GA. Lexis 817...

Hulett V. State, October 20, 2014. Nevertheless, {t}he court agree that " an accused" that has been convicted of a crime has neither a vested right to nor a reasonable expectation of finality as to a pronounced conviction (s) sentence(s) which is null and void.

CONCLUSION

The GEORGIA COURT OF APPEALS, erred by affirming said conviction due to aforesaid skillful trial judge manifest necessity discretion, to circumvent appellate court procedure where the question on review was when the jury stated it had reached a verdict of guilty on an indicted lesser- included offense, that should have been included within an indicted offense, where the jury further stated that it was unable to agree on the indicted offense rape, was it error for the trial court to reject the verdict and to require the jury to reach agreement on the indicted offense before rendering a verdict on the lesser- included offense. The court held that when an indictment charged an offense, and the jury returns a verdict of guilt on a lesser-included offense, the verdict operates as an acquittal of the greater offense. WHEREFORE, if an order and judgment are void and a nullity on the face of the record, no petition, notice, service, hearing, or order is necessary to set the judgment aside, it may be disregarded.

Respectfully Submitted,

This___ day of _____ 2015. /s/ _____

Verneel Wyley pro se.

CERTIFICATE OF SERVICE

This is to certify that I have served the Clerk of Georgia Court of Appeals, 47 Trinity Avenue Suite -501, Atlanta. Georgia 30334 and Robert D. James District Attorney of Stone Mountain Judicial Circuit, 700 Dekalb County Courthouse, 556 N. McDonough Street, Decatur, Georgia 30030-3221 as well as the Clerk of Superior Court Debra DeBerry, 556 N. McDonough Street, room G-140 Decatur, Georgia 30030-3221 with a complete and accurate copy of Appellant Brief by Placing the same in an envelope, and with sufficient postage affixed, placed in the United States Mail therefore addressed as above stated.

This 18 day of March, 2015.

/s/ Verneel Wyley

VERNEEL WYLEY pro-se
GDC# 440899 D!-101T
Central State Prison/
4600 Fulton Mill Rd.
Macon, Georgia 31208

CLERK OF SUPERIOR COURT
DeKalb County Courthouse
556 North McDonough RMG60
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CENTRAL STATE PRISON
4600 FULTON MILL RD
MACON, GA 31208

Debra DeBerry
CLERK OF SUPERIOR COURT

404-371-2836

To: Verneel Wyley #440899
Central State Prison D-1 101-T
4600 Fulton Mill Road
Macon , Ga 31208

MAR 16 2015

The item(s) listed below are being returned to you for the following reason(s):

1. **Supplement Brief of Appellant**
2.
3.
4.
5.
6.
7.

Other: Please Sign and date your Brief. Style it to Court of Appeals . Send it to Court of Appeals.

Document(s) Returned:

_____ Brief

_____

_____

Checks Returned:		**Checks Returned:**	
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If you have any questions, please dial 404-371-2836 option 5 _____

Date received March 9th, 2015

Rebecca Jewel
Clerk's Name

3/12/15
Date

Sincerely yours,

Fayron Woodley
Court Record Supervisor
Adoption/Appeals Division

We regret to inform you that this office cannot advise you of what steps you need to complete your paperwork. To advise you would constitute practicing law, which we are forbidden to do per O.C.G.A. 15-19-51(a)(4).

IN THE SUPERIOR COURT OF DeKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	**Case No.: 01-CR-5262-4**
	)	
VERNEEL WYLEY,	)	
	)	
Defendant.	)	

ORDER GRANTING PAUPERIS STATUS

This Court hereby **GRANTS** pauperis status to Defendant Wyley in the above styled and numbered case for the purpose of his appeal of this Court's Order denying his petition entered October 1, 2014.

SO ORDERED, this 29 day of January, 2015.

GAIL C. FLAKE, Judge
DeKalb County Superior Court
Stone Mountain Judicial Circuit

cc: Lee Grant, Deputy Chief Assistant District Attorney
Verneel Wyley, Defendant
GDC# 440899
Central State Prison
4600 Fulton Mill Road
Macon, GA 31208