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IN THE MISSISSIPPI COURT OF APPEALS

No. 2006-KA-00417-COA

ARTHUR WOODS — APPELLANT

Vs.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

Appeal from the Circuit Court of Leflore County, Mississippi

Jim Arnold (MS Bar No. [redacted]
333 East Mulberry Street
Durant, Mississippi 39063
(662) 653-6448

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.

Arthur Woods
Appellant/Defendant

Jim Arnold,
attorney of record for the Appellant.

Chokwe Lumumba
trial attorney for Appellant

Brad McCullough,
Joyce I. Chiles
Assistant District Attorneys

Jim Hood
Attorney General

The State of Mississippi
Appellee

Honorable W. Ashley Hinds
Circuit Court Judge, Leflore County, Mississippi.

SO CERTIFIED, this the 16th day of January, 2007.

Jim Arnold

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STATEMENT OF ISSUES

1. The prosecution committed misconduct in having the witnesses vouch for the truthfulness of the complainants' allegations of statutory rape.

2. The trial court erred in refusing to allow the defense to play a prior consistent statement made by Wakevia Hill.

3. The trial court erred in allowing the prosecution to cross-examine Wakevia with her grand jury testimony where that testimony was not provided to the defendant.

4. The trial court erred in allowing the prosecution to elicit hearsay.

5. The prosecution committed misconduct when it vouched for their case during closing argument.

6. The evidence is insufficient to support the verdict or, in the alternative, the verdict is against the overwhelming weight of the evidence.

7. The errors taken together are cause for a new trial.

STATEMENT OF THE CASE

The indictment:

Arthur Woods was indicted on two counts of statutory rape. CP. 1. He was alleged to have had sex with Wakevia Hill and Latricia Palmer on October 15, 2003. CP. 1; RE. 18. At that time, Wakevia was fourteen years old (she would be fifteen on December 18, 2003) and Latricia was fifteen (she would be sixteen on November 22, 2003). T. 202.

The trial:

The trial commenced in January 2005.

The case began with a note intercepted by a teacher. Susan Bailey teaches eighth grade science classes at Amanda Elzey High School in Greenwood. T. 143. She testified that on October 15, 2003, she intercepted a note being passed between Wakevia Hill and Latricia Palmer. T. 145. When she was finally able to read it, it disturbed her and when Wakevia's mother, who worked at the school, approached her on another matter, Bailey showed her the note. T. 149. On cross-examination, Ms. Bailey admitted that she has taken notes from students in her twenty-four years of teaching and that it is impossible to know whether what students have written represents truth or fantasy. T. 150-151.

Betty Brown is the girlfriend of Latricia's father. T. 152. In October, 2003, she received a phone call from Wakevia's mother, Juanita Hill. T. 154-154. After they got off the phone, Juanita and Wakevia came to Betty's house and

showed her the note. T. 164. After she read the note, Betty called the sheriff. T. 155. Both Latricia and Wakevia were crying. T. 156.

Betty testified that Arthur Woods lives across the street. T. 157. She never saw Latricia or Wakevia having sex with him. T. 157. But since that day, Latricia "ain't never herself." T. 157.

James Nichols is Latricia's father. He testified that in October of 2003, Juanita Hill came to their house and brought a note for them to look at. T. 167. Latricia was acting nervous and crying. T. 168. After seeing the note, they called the sheriff. T. 169.

Leflore County Sheriff's Deputy Donald Radford testified that on October 15, 2003, he responded to a call about a possible rape. T. 172. When he arrived at the house where one of the complainants lived, he was shown a note. T. 174. The two girls were crying and acting like they had been caught doing something. T. 175. Later, Radford took Arthur Woods into custody. T. 177.

Sheriff's Department Investigator Theodore White testified that the alleged statutory rape was alleged to have taken place at the house of Arthur Woods in Greenwood. T. 183. At that time, Woods was 52 years old and is sometimes known as Honda Joe or Motorcycle Joe. T. 184, 185.

White also took a statement from Wakevia Hill. T. 185. Wakevia appeared upset and embarrassed when he took her statement. T. 186. Latricia Palmer was so upset, she could not give a statement. T. 187.

Wakevia Hill, seventeen at the time of her testimony, testified that she has been friends with Latricia Hill since second grade. T. 203. In October 2003, her mother allowed her to spend the night at Latricia's house. T. 205. That night, she and Latricia went to Mr. Woods' house to watch television. T. 206. Wakevia testified that she did not have sex with Arthur Woods. T. 217. She admitted that she had given a statement that she and Latricia did have sex with him. T. 217. According to Wakevia, when she and Latricia went to Arthur's, they were accompanied by Willie Ray and Curtis. T. 229. She did not mention them in her statement, though. T. 230. A few days before the trial, she gave a taped statement to the defense denying that she had had sex with Woods. T. 232.

On cross, Wakevia explained that when she wrote the note taken by Ms. Bailey, she had just been playing. T. 236. She told her mother that the note was not true but her mother began to put pressure on her to say otherwise. T. 236. In the note she said she was worried about being pregnant because he "had cum" in her. T. 237. But in the statement, she told investigators that he had put on a rubber before they had sex. *Id.* Her mother told her after the letter was found that she would beat her if she didn't say that she had sex with Arthur Woods. T. 242.

Latricia Palmer was sixteen at the time of her testimony. On October 10, 2003, she was a few months shy of fifteen. T. 260. At trial, she testified that she and Wakevia were best friends in October, 2003. T. 261. Latricia testified that she had sex with Joe but did not want to testify against him. T. 266. On that

night in October, 2003, Wakevia came to her house to spend the night. They walked across the street to Joe's (Arthur's) house. T. 267. They sat in the kitchen and watched tv. T. 268. Willie Ray and Curtis knocked on the door. T. 267. Latricia stated that she did not know whether Willie Ray and Curtis stayed or whether they left. T. 268. Joe came into the kitchen and then they went to Joe's bedroom and were watching tv. T. 269. Joe then had sex with her and then with Wakevia. T. 270. He had sex with each of them twice. T. 270. Later Latricia told Willie Ray that she did not want anything to happen to Joe so Willie Ray got her in touch with Joe's investigator. T. 272. She gave a taped statement to the investigator saying that Joe did not touch her. T. 272. Latricia testified that she loves Joe and does not want anything to happen to him. T. 273. Joe has told her that if she ever needed anything, he would be there for her. T. 274. She did not like it that Joe had sex with Wakevia. T. 273. When she told Joe that, he said "hump". T. 276. She told Joe that Wakevia claimed that she told him no and that Joe had pulled her pants down. T. 276-77. Joe said that Wakevia pulled her own pants down. T. 277. In the note, Latricia stated that she was "going to start calling Bo to fuck me." T. 278. Joe, Latricia testified, was always saying that he did not want a baby by a young girl. T. 279.

On cross-examination, Latricia admitted telling Wakevia that if she did not testify against Joe, her parents would put her out of the house. T. 291. She also admitted telling the defense investigator that she never had sex with Arthur Woods. T. 312. When she denied having ever told the investigator that she had

not had sex with anyone over the age of 30, the defense played that part of her taped statement in which she said that the oldest person she had ever had sex with was thirty years old. T. 316. Latricia also signed a sworn statement saying that she had not had sex with Arthur Woods. T. 320.

The prosecution rested and the defense made a motion for directed verdict.The trial court granted the motion with respect to Count 1, statutory rape of Wakevia Hill. T. 337.

Wakevia's mother Juanita Hill testified on behalf of Arthur Woods. T. 342. She was shown a note by Ms. Bailey when she went to the school to pick up her daughter's report card. T. 342. The note made her upset and she went home and confronted her daughter who was sick in the bed. T. 342. She asked Wakevia what the note meant and Lakevia told her that nothing had happened. Juanita hounded her daughter until she finally gave up and said "you told me if I told you and said this happened, you would leave – you would leave me alone – you would leave it alone." T. 343. After she told Juanita that something had happened, though, Wakevia became depressed. On New Years Day, Wakevia told Juanita that she was not going to go to court and lie on Arthur Woods because it wasn't true, Juanita had pressured her into saying it. T. 344. This reminded Juanita of when Latricia told Juanita that nothing had happened to her or Wakevia but that Latricia's stepmother told Latricia that if she didn't come to trial and say that that man had sex with her, they would put Latricia out. Latricia told Juanita, "I don't have anywhere to go." Because Latricia had already made this statement to

Juanita, Juanita believed Wakevia when she, too, admitted that nothing had happened and that she had only said that it did when she was pressured to. T. 347.

Curtis Johnson testified that one day in October, he, Willie Ray, Wakevia, and Latricia went to Arthur Woods' house to watch BET. T. 357-58. Willie Ray was conducting some business with Arthur having to do with a car. T. 358. That was the only time he was at Arthur Woods' house the same time as Latricia. T. 358. He was never out of the presence of Woods or Latricia long enough for them to have had sex that night. T. 358.

Arthur's twenty-two year-old son, Kendrick Anderson, a student at Mississippi State, testified that Latricia came to his father's house one time and knocked on the door at 3 in the morning. T. 367. Kendrick stated that his father had told him that Latricia, who lived across the street, had no business being at his house so Kendrick called Latricia's father who seemed shocked that Latricia was out so late. Kendrick testified that he thinks Latricia's father whipped her. T. 367.

Loretta Davis McLea testified that she dated Arthur Woods for about seven years and lives with him. One Friday evening in October she was in the bedroom when she heard some male and female voices coming from the front of the house. T. 374.

The jury found Arthur Woods guilty of Count II, statutory rape of Latricia Palmer. CP. 48; RE. 19.

At the sentencing hearing, Arthur's mother and pastor testified on his behalf. T. 433-437. The court handed down a sentence of thirty years and imposed court costs of $561.50.

Mr. Woods was allowed to post bond pending appeal. CP. 76.

SUMMARY OF THE ARGUMENT

This is a case based on the testimony of a single witness who recanted her allegations before trial and then unrecanted them at trial. Her credibility, then, was really the sole issue in the case. The errors presented below are mostly evidentiary issues along with some instances of prosecutorial misconduct. What is striking about the trial court's rulings in this case is that the court erred on the side of giving the prosecution the most leeway in proving its case, even making erroneous rulings to do so, but applied nonexistent restrictions to the defense to prevent it from fairly defending against the allegations. The result was an unfair trial.

This started out with the prosecution, over objection, asking the witnesses to vouch for the truthfulness of the alleged victims' statements that they had had sex with the defendant. The trial court then refused to allow the defense to query one of the alleged victims with a prior consistent statement but allowed the prosecution to elicit hearsay evidence to bolster its case. The prosecution was allowed to impeach the recanting victim with her grand jury testimony even though such testimony was never provided in discovery to the defense. The

prosecution committed misconduct by using the hearsay evidence that should never have been admitted in the first place as substantive evidence against Arthur Woods.

All in all, the evidence was insufficient to support the jury's verdict. Although the defense contends that any one of these errors supports a new trial, when taken together, a new trial must be ordered in light of the weakness of the prosecution's case.

LAW AND ARGUMENT

1. The prosecution committed misconduct in having the witnesses vouch for the truthfulness of the complainants' allegations of statutory rape and in vouching for the truth of Latricia's testimony.

This is a case based solely on the testimony of a single victim. There was no physical evidence and the second alleged victim testified that there was no rape – statutory or otherwise – of either girl. And, in fact, both alleged victims had gone back and forth as to whether they had ever had sex with the defendant. Credibility, then, was key. Because it was so important, the prosecution repeatedly asked questions designed to bolster the credibility of the girls' statements when they claimed that they had sex with Arthur Woods (as opposed to their statements recanting the allegations). Given that the credibility of the initial allegations was everything in this case, the prosecution's action were anything but harmless. Moreover, the trial court repeatedly sustained objections to this tactic. The

prosecution continued asking improper questions notwithstanding the objections and, in most of the cases, the desired testimony was elicited from the witness even when the court upheld the defendant's objection.

For instance, at the conclusion of Betty Brown's direct examination, the prosecution asked her whether she believed what Latricia told her in October, 2003, when she stated that she and Wakevia had had sex with Arthur Woods. Betty answered and the prosecution repeated the question even **after** the trial court sustained defense counsel's objection. The exchange went as follows:

Q. That night back in October did you believe what she was saying?

A. Yeah.

Mr. Lumumba: That's irrelevant.

The Court: That objection is sustained.

Q. Go ahead, Ms. Brown.

A. Yeah, I really believed her.

The Court: The objection is sustained.

T. 158; RE. 20.

On redirect, the prosecution attempted the same tactic.

Q. Now how long have you been living in the house?

A. I say about seven or sight years.

Q. Since she was four years old.

A. Yeah.

Q. Can you tell when she's lying to you or when she's telling the truth?

A. Yeah.

Mr. Lumumba: Objection.

A. Yeah.

Mr. Lumumba: Excuse me.

A. Because I know her that well.

Mr. Lumumba: Excuse me, Judge. Objection.

A. I sure do.

The Court: Well, the objection is sustained.

T. 163-64; RE. 21-22.

When Latricia's father testified, the prosecution tried again to have the witness vouch for his daughter. This time, though, when the prosecution asked "Mr. Nichols, that night – did you believe what she was telling you that night," the defense's objection was sustained before Mr. James was able to answer. T. 69.

Deputy Radford, though, was able to get his opinion to the jury before the court could rule on the defense's objection.

Q Could you tell if these girls were lying that night?

A. No.

Mr. Lumumba: Excuse me - - -

A. No, sir, they weren't lying.

Mr. Lumumba: Excuse me. Hold it. Objection. How is going to testify whether the girls were lying?

The Court: Well that objection is sustained.

T. 181, RE. 24.

When Latricia took the stand, the prosecution asked her, "You and I talked for a while yesterday, didn't we?" Latricia responded, "yes." She was then asked, "and you told me that you were going to tell the truth and tell the jury exactly how you felt?" T. 266; R.E. 25. The defendant's objection was sustained (CT. 267; RE. 267), but, as in the colloquys reprinted above, the information was already before the jury.

Having Latricia's relatives and the deputy testify that they believed the girls when they said that they had had sex with the defendant was improper vouching and error for several reasons. First of all, the questioning is argumentative. The witness on the stand is called to testify about his perceptions, not those of another witness; comparing and contrasting the witnesses' testimony is for the lawyer to do during closing argument, not during cross-examination. Secondly, the questions ask the witness to give an improper, inadmissible opinion. The witness is being asked for an opinion as to the truthfulness of another witness's **testimony.** This, however, is improper under Rule 701 of the Mississippi Rules of Evidence. With the proper foundation, the witness could be asked for an opinion as to the other witness's **character** for truthfulness or untruthfulness under M.R.E. 608, but the witness cannot give an opinion as to the truthfulness of the witness's statements.

And, finally, the questions are irrelevant to the extent they invade the province of the jury. *Hart v. State*, 637 So.2d 1329 (Miss. 1994). It is the jury's

role to evaluate credibility of witnesses and decide the relative reliability of the facts. A witness's opinion of the credibility of another witness's testimony is therefore irrelevant.

The difference between questions regarding a witness's credibility and those designed to have the witness testify regarding the truthfulness of a particular statement was explained by the Mississippi Court of Appeals in *Smith v. State*, 925 So.2d 825 (Miss.App. 2006). An opinion as to a witness's credibility goes to the witness's capacity for belief. *Smith*, 925 So.2d at 836 n. 16. Vouching for a witness's veracity involves an opinion as to whether a witness is being truthful; it has "a weightier effect" and is inadmissible. *Id.*

In *Grifffith v. State*, 584 So.2d 383 (Miss. 1991), the Mississippi Supreme Court reversed a conviction where a witness was allowed to testify that she believed the ten-year-old victim when the ten-year-old stated that the defendant had fondled her. The witness was the victim's teacher. She testified that that the victim "could not have told this story twice and almost word for word if she h ad not experienced it. That is the reason why I truly believe her." *Griffith*, 584 So.2d at 386. In finding this testimony to have been admitted in error, the court stated, "[a] direct opinion offered by a witness in a child sexual abuse case as to the child's veracity has been held by a majority of courts to be inadmissible." *Griffith*, 584 So.2d at 387.

The Mississippi cases distinguishing between questions designed to elicit an opinion as to the general truthfulness of the victim or witness and improper

questions designed to elicit an endorsement of a victim or witness's particular statement are in accord with the law in other jurisdictions. *See, e.g., United States v. Akitoye,* 923 F.2d 221, 224-225 (1st Cir. 1991) (describing the difference between the objectionable "was-the-witness-lying" question and the "more palatable" question inquiring into the existence of any known basis for bias on the part of another witness); *United States v. Freitag*, 230 F.3d 1019, 1024 (7th Cir. 2000) (finding, in prosecution for mail fraud and related charges, trial judge erred, but harmlessly, by allowing prosecutor to cross-examine defendant about whether she or other witnesses were telling the truth; the appellate court observing that the "government's cross-examination of [defendant] was far from model"); *United States v. Geston*, 299 F.3d 1130, 1135-37 (9th Cir. 2002) (reversing on "due process" grounds defendant's convictions for assault and use of force under color of law, because trial judge allowed prosecutor to cross-examine law enforcement officers about veracity of other witnesses' testimony); *United States v. Jae Shik Cha*, 97 F.3d 1462 (9th Cir. 1996) discussing *United States v. Hinton*, 31 F.3d 817, 824-25 (9th Cir. 1994) and *United States v. Richter*, 826 F.2d 206, 208-09 (2d Cir. 1987) (finding, in prosecution for conspiracy to distribute methamphetamine and money laundering, trial judge harmlessly erred by allowing government counsel to cross-examine defendant about whether other witnesses were lying when they testified inconsistently with his testimony).

In this case, the questioning was no less than prosecutorial misconduct. The prosecutor knew, at least after the trial court sustained the defendant's first

objection, that questioning the witnesses as to the veracity of the statements made by the girls when they claimed that they did have sex with Arthur Woods was improper. The prosecution nevertheless continued to ask these questions and, indeed, obtained the desired testimony. Such wilfull misconduct cannot be allowed to go unpunished. In this case, where the credibility of the initial allegations was the **only** issue in the trial, the prosecution's misconduct was sufficient to undermine confidence in the jury's verdict. The resulting verdict and conviction must be reversed.

2. The trial court erred in refusing to allow the defense to play a prior consistent statement made by Wakevia Hill.

The prosecution called as one of its witnesses Wakevia who testified on direct that she had fabricated the allegations of sex with Arthur Woods under duress and that she had never had sex with the defendant. The prosecution then proceeded to impeach her with prior inconsistent statements. On cross-examination, the defense, in order to rebut the prosecution's theory that Wakevia was lying when she recanted the allegations, attempted to put into evidence the previous statement Wakevia made to a defense investigator. In that statement, Wakevia she denied that anything had happened between herself and Arthur Woods. The trial court, however, sustained the prosecution's objection and refused, on the grounds that it was hearsay, to allow the statement to be introduced. T. 239.

M.R.E. 801 (d)(1)(b) allows a party to introduce a prior consistent statement where "[th]e declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." M.R.E. 801(d)(1)(b). *See also Wells v. State,* 849 So.2d 1231 (Miss. 2003); *Jackson v. State,* 766 So.2d 795, 808 (Miss.Ct.App.2000); *State v. Saltz,* 551 S.E.2d 240 (S.C. 2001) (trial court erred in not allowing defense to play a prior consistent statement of its witness to rebut allegations of recent fabrication and improper motive).

The error could hardly be harmless. The ruling denied Woods his right to present a defense. The only proof of the prosecution's case against Arthur Woods was the statements made by the victims. Here, where credibility was everything, the jury and Arthur Woods were entitled to hear everything bearing on credibility. The trial court, however, consistently allowed the prosecution to present any and all evidence to support the veracity of the statements that the girls did have sex with Arthur Woods but refused to allow Arthur Woods to attack those statements as he was allowed to do under the rules.

The trial court's ruling refusing to allow the defense to introduce evidence of a prior consistent statement was error. This is especially so in light of the unevenness of the trial court's rulings.

3. The trial court erred in allowing the prosecution to cross-examine Wakevia with her grand jury testimony where that testimony was not provided to the defendant.

The prosecution impeached Wakevia by questioning her about what she said to the grand jury. Defense counsel objected to this as a discovery violation, inasmuch as the grand jury testimony had never been provided to the defense. T. 249. The trial court overruled the objection -- not because the defense was not entitled to the discovery but on the basis that grand jury testimony was not "transcribed traditionally around here." T. 249.

The trial court's ruling was error. Uniform Circuit and County Court Rules 4.06(a)(1) and 4.09 clearly contemplate that grand jury testimony given by witnesses for the state be disclosed to the defendant in discovery. *Harris v. State*, 901 S.2d 1277, 1279 (Miss.App. 2004).

9.04(A) and (I) requires that when there is a discovery violation, the court must grant a continuance or exclude the testimony. The trial court in this case did neither. Again, this was another example of the trial court applying the rules in an uneven manner to allow the prosecution greater latitude to prove its case than it did to the defendant to defend himself. The overall effect of these rulings denied Arthur Woods a fair trial.

4. The trial court erred in allowing the prosecution to elicit hearsay.

During the direct examination of Latricia, the prosecution had her read from the note that started the investigation. The trial court overruled the defense's

hearsay objection ruling that the prosecution could use it to show state of mind. T. 262-63. And although Latricia was unable to read the note at first (T. 265), the prosecution was eventually able to have Latricia read much of the note over the defendant's repeated objections. T. 275-279

The prosecution then proceeded to read parts of the note to the jury during closing argument.

> This little note that was written, that was read by Latrice [sic], Wakevia, "I told Dude, and he said humm. I said, don't say humm to me, bitch. You didn't have no business doing that. Why did you do that? I told him, no means no. Then he going to tell me, you pulled it down yourself. I said, you ain't going to lie." You remember the testimony of Latrice [sic]? She was getting on the defendant about having sex with her friend. She told the defendant that her friend told her that she didn't want to do it. And then Latrice [sic] gets on the defendant about "Wakevia told me she said no, and no means no. Now, why did you do that?" That's what this little notes and things are all about, according to the testimony. "I'm going to start calling Bo over – come and fuck me." This is Latrice telling her man, because she don't like her man having sex with her friend, so she tells him she going to start calling somebody else to have sex with her if he's going to do stuff like that. Does that sound like somebody who hasn't had sex? Do you think these children were writing this note just to be writing it? It's too true. What's in her statement is too true.

T. 423-24.

A minute later, the prosecutor again read from the note.

> "Little nasty bald dude. And he going to look at me like I was lying or something." This is Latrice [sic]. And the response to her. "Oh, well, I know that's right. I ain't got you know what on no more. You heard me. My Boo called me over to my sister's house yesterday girl. He come to see me Thursday night. I said no, that's not going to work no more. But he's straight. I have nothing against him. Nothing against Joe. But I can't get caught up with you like that, you know. We did" – no – "where did dude nut? In me I

> believe." You heard what she read, when Wakevia read that. Here's Latrice [sic]. "No, cause he don't want no baby by no young girl." And I'll skip that part. "did he use a raincoat?" "when did it do it? The last time?" "yeah." "Humm, behind or when he first started."

T. 425.

The letter was a statement made out of court and, thus, hearsay. Hearsay evidence is inadmissible unless it meets an exception under M.R.E. 803. Moreover, it was a prior consistent statement not admissible except under M.R.E. 801(d)(1).

In *Quimby v. State*, 604 So.2d 741 (Miss. 1992), the defendant was charged with sexual abuse of his six-year-old daughter. The victim testified as to one incident but was unable to recall a previous instance of abuse. The prosecution called a police detective to the stand to testify concerning the victim's out-of-court statement that she had previously been assaulted. On appeal, the Mississippi Supreme Court held that this testimony was error. "Our hearsay rule, M.R.E. 802, states in no uncertain terms that '[h]earsay is not admissible except as provided by law.' The prohibition is loud and clear. 'Hearsay is incompetent evidence.'" *Quimby*, 604 So.2d at 746 quoting *Murphy v. State*, 453 So.2d 1290, 1294 (Miss. 1984).

In *Caston v. State*, 823 So.2d 473, 488-489 (Miss. 2002), the trial court allowed the prosecution to question their witnesses about statements that they had made some 30 years previously – statements that corroborated their testimony at trial. The trial court did not, however, allow the prosecution to show the

statements to the jury. On appeal, the Mississippi Supreme Court held that the trial court's ruling was error. "[E]liciting prior consistent statements in the absence of a challenge to the witness's veracity should be given only for the purpose of rebuttal." *Caston*, 823 So.2d at 489.

"[A]dmission of a prior consistent statement of a witness where the veracity of the witness has been attacked is proper but should be received by the court with great caution and only for the purpose of rebuttal so as to enable the jury to make a correct appraisal of the credibility of the witness. " *White v. State,* 616 So.2d 304, 308 (Miss.1993).

In reading the note to the jury during closing argument, the prosecution was using the note as substantive evidence of guilt.

5. The prosecution committed misconduct when it vouched for their case during closing argument.

During the closing argument, the prosecution told the jury that in most cases, when the victim recants, the prosecution dismisses the case but that it refused to do so in this case. "And it's like I said," the prosecution stated, "we could have easily dismissed this case. We wouldn't have had to fight so hard for these two girls who didn't want to be here to start with." T. 403.

> A lot of times when people change their stories, or when someone goes out and gets a whole brand new statement from somebody and they recant their story and say, oh, this didn't happen, a lot of times the state of Mississippi say, okay, then we going to dismiss it. But it's because of the circumstances of how and where those statements were taken and the victims recanting their stories that the state of

> Mississippi says, no; we are not going to roll over like this and let this 51 year old man get away with having sexual intercourse with no 14 year old regardless of what she wanted. It would have been so easy to write this little motion. "Judge, we hereby move, the state of Mississippi, to dismiss the case against Arthur Woods," and we need your signature and we could have all gone home. What he did was wrong. It's not only wrong; it's a violation of the law.

T. 404.

The prosecutor was essentially testifying as to the practices in her office, i.e. that usually her office will dismiss cases in which the alleged victims change their story but not so in this special case - and telling the jury that those practices are another reason to convict Arthur Woods. None of this was in evidence - and it would have been improper if it were in evidence – but telling the jury that the prosecution's making a special exception for this case was another reason they should convict Arthur Woods was thoroughly improper.

First of all, the prosecution's general practices were not in evidence and, thus, not fair game for closing argument. *See, e.g., Flowers v. State*, 842 So.2d 531, 556 (Miss. 2003) (finding that the cumulative effect of the prosecution's repeated instances of arguing facts not in evidence denied the defendant a fair trial) More importantly, though, the prosecution improperly vouched for the merits of its case by telling the jury that this was no ordinary case but one so worthy of prosecution that it was pursued despite circumstances that would compel the dismissal of an "ordinary" case.

A similar vouching argument was made in a drug case, *United States v. Hermanek*, 289 F.3d 1076 (9th Cir. 2002), in which the prosecution, during closing argument, repeatedly used the terms of "us" and "we" in describing the criminal investigation. For example, the prosecutor talked about the government's wiretaps: "Wiretaps are very carefully controlled and every ten days we have to submit a periodic report to the judge. You saw the periodic reports. Every 30 days we have to get an extension, convince the judge that we have good reason to keep the wiretaps going." *Hermanek*, 289 F.3d at 1098.

On appeal, the Ninth Circuit held that the prosecution's argument constituted improper vouching. "By identifying themselves as participants in the criminal investigation during closing arguments, the prosecutors assumed a witness-like role in addition to serving as advocates." *Hermanek*, 289 F.3d at 1099. "Their statements conveyed to the jury a message that prosecutors 'personally believed, based on [their] own observations,' in the integrity and good faith of the investigation." *Id.*

The rule against vouching is "designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the 'fundamental distinctions' between advocates and witnesses." *United States v. Edwards*, 154 F.3d 915, 922 (9th Cir. 1998).

The prosecution in this case told the jury that this was a special case that was worthy of their belief despite the fact that the alleged victims had gone back

and forth on whether they had had sex with Arthur Woods. This argument was unfair and highly prejudicial in light of the conflicting statements and the paucity of the evidence. And if this error standing alone isn't sufficient reason to reverse, reversal is nonetheless required taking into account this prosecutorial misconduct along with the other errors present in this case.

6. The evidence is insufficient to support the verdict or, in the alternative, the verdict is against the overwhelming weight of the evidence.

The only substantive evidence in this case was the testimony of Latricia Palmer and, given her vacillating statements – first she did have sex with Arthur Woods, then she didn't and finally, at trial, she did – that testimony was insufficient given the lack of any corroborating evidence. Especially in light of the fact that Latricia admitted that she has said that her parents told her that they would put her out of the house if she did not say that Arthur Woods had had sex with her.

The Mississippi Supreme Court has stated on numerous occasions that when determining whether a verdict should be overturned that the "Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused it discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182 (Miss. 1998). Under this standard, the prosecution is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss. 1992). When making this review, the Court will reverse only if the jury's verdict is "so

contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Dilworth v. State,* 909 So.2d 731, 737 (Miss. 2005). The evidence is weighed "in the light most favorable to the verdict." *Bush v. State,* 895 So.2d 836, 844 (Miss. 2005).

When reviewing the sufficiency of evidence in a case, the Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Gray v. State*, 926 So.2d 961, 968 (Miss.App. 2006).

The Mississippi Supreme Court has held that the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where that testimony is not discredited or contradicted by other credible evidence. *Collier v. State,* 711 So.2d 458, 462 (Miss.1998). This is especially true when the victim physical and mental condition after the incident is consistent with having been the victim of a sex crime and when the victim immediately reports the incident. *Riley v. State,* 797 So.2d 285, 288 (Miss.2001). In this case, the alleged victims did not immediately report any crime. In fact, the allegations were forced out of the girls only after they were caught passing a note concerning their having had sex with a person named Joe. Nor did the girls manifest any physical or mental symptoms of having been the victim of a sex crime.

In *Todd v. State*, 806 So.2d 1086, 1088 -1098 (Miss. 2001), the defendant argued that the victim's testimony was insufficient where there was evidence that

she had previously lied about other sexual encounters and had even fabricated rape charges before. The Mississippi Supreme Court found otherwise stating that the victim "freely admitted to her past fabrications, which she claims were the product of coercion by her aunt. Her testimony with regard to Todd appears to be free of her aunt's influence, and Todd offers no testimony or evidence other than the suppressed letter which contradicts E.K.'s account of events." *Todd*, 806 So.2d at 1091. Here, there **is** evidence that Latricia's testimony was the product of coercion on the part of her parents. Given this and the fact that she had previously recanted her allegations, and the lack of any corroborating evidence, there can be no doubt but that the evidence was insufficient to support the conviction.

7. The errors taken together are cause for a new trial.

The Mississippi Supreme Court has recognized that several errors not individually sufficient to warrant a new trial may, when taken together, require reversal. *Stringer v. State*, 500 So.2d 928, 946 (Miss. 1986); *Hickson v. State*, 472 So.2d 379, 385-86 (Miss. 1985). In this case, the court made several errors in its evidentiary rulings that, cumulatively, had the effect of denying Arthur Woods a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 1047 (1973) (reversing based on various evidentiary errors resulting in a denial of due process). If this Court finds that no single error in this case calls out for reversal of the convictions and./or sentences, it should

nonetheless consider a new trial based on the plethora of errors that prevented Arthur Woods from obtaining due process.

Conclusion

For these reasons, Arthur Woods' conviction and sentence must be vacated or reversed and remanded for a new trial.

Respectfully submitted,

ARTHUR WOODS

By: _____

Jim Arnold MSB [redacted]
333 East Mulberry Street
Durant, Mississippi 39063
(662) 653-6448

CERTIFICATE OF SERVICE

I, Jim Arnold, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing document to the following:

Hon. Jim Hood
Mississippi Attorney General
P.O. Box 220
Jackson, MS 39205

District Attorney Joyce Chiles
P.O. Box 426
Greenville, MS 38702-0426

Hon. W. Ashley Hines
Leflore County Circuit Court Judge
P O Box 1315
Greenwood, MS 38702

This, the 16th day of January, 2007.

Jim Arnold MSB [redacted]