2007-KA-00970-SCT T

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-KA-00970-SCT

SCOTT CALDWELL — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

Mr. Scott Caldwell, Appellant;

William C. Bristow, Esq., trial attorney;

Leslie Lee, Nicole Short, Patricia Booker, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Dennis Farris, Esq., Assistant District Attorney, Office of the District Attorney;

Kimberly Brown, Esq., Assistant District Attorney, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Sharion Aycock, presiding Circuit Court Judge; and

Lee County Police/Sheriff's Department, investigating/arresting agency.

Respectfully submitted,

PHILLIP W. BROADHEAD, MSB[redacted]
Clinical Professor, Criminal Appeals Clinic

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NO. 2007-KA-00970-SCT

SCOTT CALDWELL — APPELLANT

vs.

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS BOTH COUNTS AFTER THE PROSECUTION BROUGHT THE CASE IN THE WRONG VENUE AND "MIS-CHARACTERIZED" THE ILLEGAL TESTIMONY AS *M.R.E. 404(B)* EVIDENCE, ALLOWING THE JURY TO HEAR IMPROPER AND HIGHLY PREJUDICIAL TESTIMONY WHEN SUCH EVIDENCE FATALLY PREJUDICED THE JURY.

ISSUE TWO:

A.

WHETHER IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE TESTIMONY ABOUT PRIOR SEXUAL ABUSE BY THE CHILD AND THE PERPETRATORS UNDER *M.R.E. 412*, WHICH WOULD HAVE SUPPORTED THE DEFENSE THEORY THAT SOMEONE ELSE HAD COMMITTED SEXUAL ABUSE ON THE CHILD, AND THAT WAS THE REASON FOR HER FALSE ACCUSATION AGAINST HER STEPFATHER AND HER KNOWLEDGE OF SEXUAL TERMINOLOGY.

B.

WAS IT ERROR TO THEN ADMIT HEARSAY REBUTTAL TESTIMONY UNDER *M.R.E. 803(25)*, THE "TENDER YEARS" DOCTRINE, REGARDING THAT ALLEGED PRIOR ABUSE WHEN THE CHILD WAS AVAILABLE AND CAPABLE TO GIVE SUCH TESTIMONY HERSELF, GIVING THE DEFENSE AN OPPORTUNITY TO CROSS-EXAMINE ON AN ISSUE THAT WAS

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WHETHER, GIVING ALL REASONABLE INFERENCES TO THE JURY'S VERDICT, THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL BASED ON THE WEIGHT OF THE EVIDENCE, GIVEN THAT THE ONLY EVIDENCE AGAINST THE DEFENDANT WAS IMPROPER HEARSAY THAT ONLY SERVED TO BOLSTER A NINE-YEAR OLD CHILD'S INCONSISTENT TESTIMONY.

STATEMENT OF INCARCERATION

Scott Caldwell is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001).***

STATEMENT OF THE CASE

This is a case where an already terrible situation escalated after a false accusation, fueled by confused anger, was made by a traumatized child. Jane Doe[1], the accuser, had been repeatedly molested by her two older stepbrothers. (T. I. 92-97) Once Jane's mother and stepfather, Scott Caldwell, the Appellant herein, became aware of the sexual abuse, they took measures to ensure it ended, but they also tried to keep it a secret. (T. III. 368-370) Jane Doe's stepfather, whom she called "daddy," (T. I. 52) was, in her mind, her protector, and

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[1]A fictitious name has been substituted.

his failure was the ultimate betrayal. Confused and upset, Jane Doe wanted to punish her stepfather for not keeping her safe. (T. II. 365-368)

When her Aunt, Christina Gray, asked her about a bruise she had received on the playground, Jane Doe saw an opportunity to get even with her stepfather. (T. I. 3) Instead of telling her aunt what had really happened, which was that her stepbrothers had molested her, she told her aunt that her daddy was "sexing" her. (T. I. 4) From that point, the situation grew exponentially. Everyone who got involved in finding the truth about what happened to Jane Doe, from the DHS worker to the investigators, failed. They decided that Scott was guilty and did nothing to explore any other possibilities. They ignored any evidence that would exonerate Scott, and disregarded the possibility that Jane Doe was not telling the truth. The fact that she was molested by her older stepbrothers was regarded as "irrelevant and unimportant." (T. I. 77-80, R.E. 19-22, 25).

Scott Caldwell was indicted for two counts of sexual battery on February 19, 2005. (CP. 3-4, R.E. 10-11), and he was tried by a jury in Lee County Circuit Court on both counts on the 26th through the 27th day of February, 2007. Prior to the trial, the State requested a hearing to determine whether or not Jane's hearsay statements regarding the alleged molestation by Scott would be admitted under the "tender years" doctrine. Despite the Court's findings that Jane "was able to articulate well the acts that allegedly have been committed on her," the request to allow the hearsay testimony was granted. (T. I.118-19, R.E. 19-22). At trial, the State called family members, a forensic investigator, a Department of Human Services investigator, and a child psychologist to bolster Jane Doe's confessions of

Scott allegedly "sexing" her; of Scott allegedly putting "his thingy in her mouth and white stuff [coming] out" (T. II. 282); of Scott allegedly touching "her lips with his winkle more than one time that it tasted really bad." (T. III. 314) The jury was allowed to repeatedly hear atrocious tales of sexual molestation by Scott, but the jury was not allowed to hear the story of the real source of Jane's molestation: The story of the stepbrothers, Chad and Eric Caldwell.(T. II. 196). During the State's case-in-chief, the testimony revealed that Count II of the indictment in this case actually occurred in Itawamba County, which was the wrong venue. The trial judge initially ruled that the Lee County Circuit Court had no jurisdiction in that case (T. II 249-251) and was posed to dismiss the count, but changed her ruling based on the prosecution's argument that the Count II testimony was admissible under ***Mississippi Rule of Evidence 404(b)*** and allowed the State to continue to present testimony concerning this count. (T. II 254-255)

The Court denied Appellant the opportunity to present his theory of defense through the testimony of the two stepbrothers . (T. II. 196) The trial court denied Scott the opportunity to demonstrate that Jane's "injuries could have been caused by someone other than Mr. Caldwell." (T. 187) Instead, the jury heard accusations from law enforcement investigators who failed to look into leads that pointed to others besides Scott, (T. I. 77-80 & T. III 301-304) and who improperly testified that "it was very obvious that Mr. Caldwell was lying." (T. II. 302). The Department of Human Services admitted to having never investigated Jane Doe's prior molestation by the two stepbrothers because it was "old information." (T. I. 79). The jury was filled with stories of molestation of this child by not

one, but six people: Jane Doe, her aunt, her grandmother, Detective Fincher, Angie Floyd and Dr. Koranek. The repetitive testimony left little room for the jury to consider the possibility that Scott was scared to report the abuse by the stepbrothers because he feared "it would get blamed on him." (T. III. 369). Scott was given directions not to go to the authorities, but to go to the Lord. Scott's spiritual leader, Reverend Merchant testified that "if it was the boys that done it...just put it in the hands of the Lord and the Lord will work it out." (T. 413).

Scott did not go to authorities, and the possibility that Jane Doe might have made up a story because she was angry about Scott's inaction was never looked into or sufficiently presented to the jury. Durenda, Jane Doe's mother, testified that Jane would "make threats" when things would not go her way. (T. III. 384). Scott testified that when he or Durenda "got onto [Jane Doe] or anything...she got mad" and threatened to move out. (T. III. 374-75). She would move out to "punish" them. But Jane Doe's punishment went further than moving out on this occasion. Jane Doe's punishment had consequences she never imagined in her seven-year old mind.

After a considerable amount of debate and numerous objections by both sides, the jury instructions were given by the trial court. Based on the testimony, evidence, instructions from the trial court, and arguments of counsel, the jury returned a verdict of guilty. Scott was sentenced to 35 years in the custody of the Mississippi Department of Corrections, with five years suspended. (T. 460, R.E. 26). The defense filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. (CP. 59-60, RE. 15-16) The motions were denied by the trial court. (CP. 59-60, RE. 15-16) Feeling aggrieved by the verdict and

sentence of the lower court, the Appellant herein perfected this appeal to the Mississippi Supreme Court on June 1, 2007. (CP. 61-62, RE. 16-17)

SUMMARY OF THE ARGUMENT

This tragic injustice began with the word of a hurt, abused, and angry nine-year old child against the word of her stepfather who failed to protect his stepdaughter from his predatory sons. When a child claims that an adult has molested her, our instinct is to protect the child and punish the perpetrator. The child pointed at her stepfather, and from that point on no other suspects or possibilities were investigated, and the trial court refused to admit evidence that would allow the defense to adequately present their theory of defense to the jury. In cases such as this where the evidence is not overwhelming, procedure at trial must be careful to err on the side of the defendant in order to ensure that the best possible defense is presented to the jury. The cornerstone of our justice system is "innocent until proven guilty," and that is why the jury should hear all of the facts and surrounding circumstances. The prosecution was allowed to improperly pad their case and the defendant was barred from presenting evidence to the jury that would raise reasonable doubt.

The trial court first failed to declare a mistrial upon recognizing that venue was not proper in Lee County Circuit Court on one of the counts in the indictment that occurred in Itawamba County. It further allowed more inflammatory testimony regarding the Itawamba count throughout the State's case-in-chief, which was highly prejudicial to the Appellant. Even though the trial court ultimately granted a directed verdict on the Itawamba County

count and gave the jury a verbal limiting instruction to disregard the Itawamba County testimony, the trial court should have immediately dismissed Count II (the Itawamba County charge) and declared a mistrial as to the remaining Lee County charge. The trial court's refusal to initially grant a mistrial due to improper venue and a fatally defective indictment, as required by law, allowed the jury to hear improper and highly prejudicial testimony that could not be cured by any limiting instruction. The directed verdict at the end of the State's case-in-chief was not sufficient, and a mistrial should have been immediately declared. Instead of presenting evidence relating only to the crimes for which Mr. Caldwell was on trial, the State was also allowed to introduce testimony about other alleged "bad acts" that only served to prejudice the jury against Mr. Caldwell. As a result of the trial court's lack of venue and allowing this improper "propensity" evidence, the trial judge abused her discretion and this honorable Court should reverse this case, and remand it to the lower court with proper instructions for a new trial.

Further depriving the Appellant of his right to a fair trial, the trial court erred by refusing to allow Mr .Caldwell to properly present his defense theory by cross-examination of Jane or through the testimony of the perpetrators who had already been adjudged of molesting Jane. While the trial judge specifically recognized that it was important that the jury know that the child's knowledge of sexual terms could have come from prior molestation, the court refused to allow the perpetrators or the child to testify regarding the abuse. Additionally, it was key that the perpetrators testify to present the inference that the child may have been upset with her stepfather for not preventing the molestation. The trial

judge clearly abused her discretion in refusing to allow the defense to present this testimony under a misinterpretation of the exceptions and the policy purposes of ***Mississippi Rule of Evidence (M.R.E.) 412***, therefore, this honorable Court should reverse this case, and remand it to the lower court with proper instructions for a new trial.

Further compounding this error in disallowing defense testimony, the trial court allowed the prosecution, on rebuttal, to present a witness previously allowed under ***M.R.E. 803(25)*** to testify regarding the prior sexual abuse. Defense counsel objected, and requested that the trial court require the prosecution call the child as a rebuttal witness. By overruling the defendant's argument and denying his request, the trial court deprived the Appellant of his Sixth Amendment right to confront the witness. The Appellant contends that the rulings of the trial court misapplied the "tender years" exception to the prohibition of hearsay testimony that deprived him of his constitutional right to adequately confront the witnesses against him. While the child did testify in the State's case-in-chief, the State was explicitly prohibited by the trial court from questioning the child about anything regarding the prior sexual abuse. Therefore, when the issue of prior sexual abuse came up during the State's rebuttal, the defense had no opportunity to cross-examine the child about the abuse unless the State specifically called the child as a rebuttal witness. Therefore, the ***M.R.E. 802(25)*** witness' hearsay testimony on rebuttal was not sufficient to satisfy the Confrontation Clause of the Sixth Amendment The Appellant respectfully requests this Court to find the trial court's application of the "tender years" exception to be error, reverse this case, and remand it to the lower court with proper instructions for a new trial.

Finally, the weight of the evidence does not support the conviction. While this Court has repeatedly held that the uncorroborated testimony of a sexual assault victim is sufficient to establish a *prima facie* case, one must also look to inconsistencies that present themselves in the child's testimony and take into account that the remainder of the prosecution's witnesses added nothing new. If the cases of the prosecution and the defense are given the same weight and measured by possible inconsistencies and corroboration, the jury did not have enough evidence to support a conviction of Mr. Caldwell. The overwhelming weight of the evidence presented at trial should have resulted in a verdict of not guilty. The Appellant requests that the Court reverse this case, remanding it to the lower court with proper instructions for a new trial.

Mr. Caldwell was found guilty of sexual battery on highly prejudicial evidence that could not in any way be described as overwhelming, following a trial infected with multiple procedural errors which can only be described as an almost complete failure of the trial process established by state and federal constitutional guarantees that all defendants receive a fair trial. Therefore, for the above reasons, this honorable Court should reverse and remand for a new trial on the merits of the case, with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS BOTH COUNTS AFTER THE PROSECUTION BROUGHT THE CASE IN THE WRONG VENUE AND "MIS-CHARACTERIZED" THE ILLEGAL

TESTIMONY AS *M.R.E. 404(B)* EVIDENCE, ALLOWING THE JURY TO HEAR IMPROPER AND HIGHLY PREJUDICIAL TESTIMONY WHEN SUCH EVIDENCE FATALLY PREJUDICED THE JURY.

In the prosecution's rush to judgment in this case, it is undisputed from the record that Count II of the indictment was brought in the wrong venue and that even after the trial judge realized the Lee County Circuit Court did not have jurisdiction over the case, at the urging of the State, allowed the prosecution to present highly prejudicial testimony related to this count as admissible under ***Mississippi Rule of Evidence M.R.E. 404(b)***. The question before this honorable Court is whether the trial court erred when it failed to direct a verdict in favor of the defendant as soon as the trial judge realized venue was improper, but instead continuously allowed the improper, highly prejudicial testimony by attempting to mis-characterize it during trial as "other bad acts" at the urging of the prosecution. As this issue involves the proper jurisdiction authorized circuit courts after having established venue under ***Miss. Code Ann. 99-11-1(3)*** (Supp. 2007) and the proper application of ***M.R.E. 404(b)***, a mixed question of law and fact is presented, and the appropriate standard of appellate review is also mixed. ***Nester v. Jernigan***, 908 So. 2d 145, 147 (Miss. 2005). The review of the trial judge's application of the law of venue and jurisdiction is reviewed *de novo*, while the "clear error" standard of review applies to the trial court's findings of fact. ***Id.***

Venue is an essential division of proof in a criminal prosecution. So essential is proper venue to the accused that Mississippi has safeguarded this right constitutionally and statutorily. "In all criminal prosecutions the accused shall have a right to... a speedy and

public trial by an impartial jury of the *county where the offense was committed.*" ***Miss. Const. Art 3, sec. 26*** (Supp. 2007) (emphasis added). Furthermore, "the local jurisdiction of all offenses...shall be in the county where committed." ***Miss. Code Ann. Sec. 99-11-3(1)*** (Supp 2007). When the issue is brought to the trial court's attention that venue is improper, the trial court has a duty to immediately dismiss the case to comply with the safeguards established to guarantee the defendant a fair trial in the court of proper jurisdiction.

In this case, the trial court erred in its duty to immediately grant the Appellant a directed verdict as to Count II when it became apparent that the State had brought the case in the wrong county. The Appellant was charged with a two-count indictment both alleging sexual acts on a minor. Within the testimony of two witnesses of the State's case-in-chief, the State and trial court realized and acknowledged that venue for Count II was improper and the following colloquy was had in this matter:

> The Court: Does the State concede that the Carolina Community where David's house is located is located in Itawamba County?
>
> Mr. Farris: We do ma'am.
>
> The Court: Gentlemen, I am of the opinion that the ABC's of putting on the criminal indictment is to prove venue, and even though those other alleged crimes in Itawamba County might speak to identity of the same person, it being the defendant, it might speak to the defendant's propensity for lustful purposes toward a particular victim, I *still think you've got to prove venue. And in this case it's admitted by the State that David's house is not in Itawamba County*...My ruling is that the State cannot go

forward to prove any wrongdoing that occurred in Itawamba County, with the understanding this defendant is likely to face charges in Itawamba County.

(T. II 249-251) (emphasis added)

At this point, the trial court had a procedural, constitutional and statutory duty to dismiss Count II immediately because of the court's lack of venue to prosecute the Appellant for acts allegedly committed outside of its jurisdiction. However, the trial court, even in view of its ruling set out hereinabove, forsook this responsibility to dismiss the count for lack of jurisdiction upon hearing further argument from the prosecution, then changed her ruling, adopting the State's "re-characterization" of the improperly admitted, highly prejudicial evidence and testimony resulting from the erroneously included count in the indictment:

Mr. Farris: *But venue is not the argument, ma'am.* He's trying to keep out evidence of other crimes, other wrong-doings, and the State says that they are so – we say they are so intertwined.

The Court: I understand your argument, Mr. Farris, and I'm going to refrain from making that ruling now *based upon your suggestion of reconsideration*...Now, let's say this. The reason that the State argues that it should be admissible has to do with the exception to the rule that you're showing that testimony for purposes of opportunity, motive, intent, knowledge, identity, or lack of mistake. *It's got to come in that way.*

(T. II 254-255) (emphasis added)

Instead of minimizing the prejudicial effect of the testimony by immediately

sustaining the defense motion to dismiss the void count over which it had no venue or jurisdiction, the trial judge compounded this error by accepting the prosecution's argument of "re-characterizing" the evidence and by declaring the improper testimony as admissible ***M.R.E. 404(b)*** evidence. The trial court committed fatal error by allowing the prosecution to continue to present this "mis-characterized evidence as to this entire indictment, instead of immediately dismissing Count II and considering a mistrial as to Count I. The decision by the trial court to give an untimely directed verdict at the end of the State's case only served to further taint the jury as to Count I with incompetent evidence by ruling:

> The Court: I'm assuring you, Mr. Bristow, that when you make that motion for a directed verdict as to the Itawamba County acts, it will be granted.
>
> Mr. Bristow: Your Honor, I'm asking this Court *at this moment* to prohibit the State from eliciting any further testimony or evidence about any acts of abuse at the Carolina Community residence. Those are out – and I understand the State's position, but these are out of the jurisdiction of Lee County. And if he's facing charges to come, so be it, but they're *bolstering* their case on the Lee County allegations by bringing up Itawamba allegations.
>
> The Court: I looked at the indictment, and the indictment, of course, is a two-count indictment that's addressing the acts versus the location. I mean, the indictment is filed in Lee County. I'm going to withhold – I'm not going to make a determination at this time. *I'm going to hear this testimony.*

(T. II 253) (emphasis added).

The trial court refused this defense motion to foreclose this error and futilely attempted to minimize the bolstering, prejudicial, and injurious effect of the testimony continuously admitted, over the objections from the Appellant, by simply giving a verbal cautionary instruction to the jury. (T. II, 276) Although "[t]he jury is presumed to follow the instructions of the trial court," ***Davis v. State***, 660 So. 2d 1228, 1253 (Miss. 1995), the instruction was ineffectual to undo the damage already done by the incompetent testimony, nor did it serve to prevent further damage done when the State was allowed to continue to present this illegal evidence. However, this presumption concerning the jury's consideration of improper evidence is rebuttable, and since the trial court's actions were obviously not authorized by any statute, rule of court, or case precedent, it amounted to clear error as to the entire case. The Mississippi Supreme Court has acknowledged that "[i]ncompetent evidence, *inflammatory in character*, when presented to the jury carries with it a *presumption* that it was harmful." ***Kolberg v. State***, 829 So. 2d 29, 81 (Miss. 2002) (emphasis added) (citing ***Tudor v. State***, 299 So. 2d 682 (Miss. 1974)). And when such immaterial, highly prejudicial, and irrelevant evidence is placed before a jury, it naturally calls into question the integrity of the accused's conviction in this case in Count I and the fairness, legitimacy and impartiality of the jury's verdict. After the State's second of five witnesses in its case-in-chief, lack of venue was conceded to the trial court by the prosecution. However, because of the claim by the prosecution of the incompetent evidence as "other bad acts" and the trial court's adoption of the "re-characterization" of this highly prejudicial testimony, the effect of the court's error was to knowingly proceed without jurisdiction in Count II, and give the

State the unhindered authority to continue to present highly prejudicial evidence before the jury.

The cautionary instruction given *sua sponte* by the trial court simply told the jury that the evidence heard or that would be heard regarding "David's" house (in Itawamba County) was to be used for "the sole purpose of showing motive, opportunity, intent, knowledge, identity or plan between the this defendant and this victim," and not in determining Appellant's guilt or innocence. (T. II 276). However, the testimony elicited by the State from the remaining witnesses sidestepped this instruction by admitting the testimony without ascertaining if the alleged acts actually occurred at David's house. Consequently, without knowledge of where any of the alleged incidents actually occurred, the jury could not have been clear about which incidents were admissible for these "limited purposes" and which incidents were to be considered for the guilt or innocence of the Appellant. The following lines of testimony, heard after the trial judge's fatal error as to the jurisdiction of the court, illustrates this point:

> Ms. Brown: What are some of the things that she has talked to you about what her daddy did to her?
>
> Glenda Gray: That he has stuck his finger in her vagina, has put his penis in her mouth and white stuff come out. She would wash her mouth out every time he done it. Let's see. Using the faucet when she was taking a bath one night, she would use the faucet as measuring it this way of how long and then hold her fingers up to say how big.

Ms. Brown: When she was talking about different rooms that it happened in, would she say differentiating the houses which rooms in which house, or how would she talk about that?

Glenda Gray: Sometimes she would. *The way I take it, it happened in both houses.*

(T. II 280-281) (emphasis added).

Mr. Farris: Okay. Dr. Koranek, would you tell the jury what [Jane[2]] has told you about Scott Caldwell?

Dr. Koranek: With regard to sexual abuse?

Mr. Farris: Yes ma'am., with regard to sexual abuse.

Dr. Koranek: She has told me that he had her perform oral sex on him..[a]nd that he performed oral sex on her.

Mr. Farris: And did she happen to tell you where she lived at the time that this occurred?

Dr. Koranek: *No, she didn't.*

(T. III 333-334) (emphasis added).

There was no recollection of which house any of the alleged events had occurred; therefore, the jury did not know for which purpose these alleged acts were to be used and considered in their deliberations. Further adding to the confusion, even though the indictment covered only one count of digital penetration and one count of fellatio, the jury was also allowed to hear testimony of alleged cunnilingus and sex with no indication of

[2]A fictitious name has been substituted.

where this act allegedly took place.

This is the exactly the type of evidence and testimony which the Mississippi Supreme Court has consistently held "carries a presumption that it was harmful." ***Tudor v. State***, 299 So. 2d 682, 685 (Miss.1974) The Court unequivocally stated that "[t]he question of guilt or innocence of the crime charged should be received by the jury unhampered by any suggestion or insinuation of any former crime or misconduct that would prejudice jurors." ***Id.*** Here, the trial court erred in allowing incompetent evidence that was highly inflammatory and inherently prejudicial. "There are other felonies so *facially prejudicial* that in almost all instances prejudice outweighs probative value. Child molestation is one such felony." ***Hopkins v. State***, 639 So. 2d 1247 (Miss. 1993) (Justice Banks, concurring opinion) (emphasis added). Any alleged acts of sexual abuse on a child are so inflammatory that its admission should always be considered harmful to an accused's right to a fair and impartial jury. The trial court's ruling on the venue and jurisdiction issue guaranteed that the jury would be inflamed with bias, passion, and prejudice against the Appellant to the extent that a fair trial would be impossible on the count brought in Lee County.

When incompetent, inflammatory evidence is injected into a trial, the courts will reverse unless "it *can be said with confidence* that the inflammatory material had no harmful effect upon the jury." ***Tudor***, *supra*, at 685 (emphasis added) (citing ***Coleman v. State***, 23 So. 2d 404 (Miss. 1945)). Here, it cannot be said with any assurance that the inflammatory material did not have a harmful effect on the jury's verdict in Count I of this case. Nor can it be said with any confidence that the error was harmless, since the State's case rested solely

on the testimony of the accuser and the ***M.R.E. 803(25)*** testimony that only served to repeat, not to corroborate, what the child had told others. For example, the evidence presented was so confusing such that the trial judge was unable to keep the incidents separated:

> The Court: And more so clear on page 107, line 27 when again she is asked about finger in the vagina and she says, *That didn't happen at that house.* And that house was the line before that was speaking if David's house. I think the testimony is pretty clear that...
>
> Mr. Farris: Wayne's house, Your Honor.
>
> The Court: *When she was saying it didn't happen at that house, she was – the line before was speaking of David's house. Excuse me. Uncle Wayne's house.*
>
> Mr. Farris: Yes, ma'am.
>
> The Court: You're correct.

(T. III 355-56)

If the trial judge is this confused about in which house an incident supposedly took place, then it can be reasonably inferred that the jury was just as confused, if not more, about which incidents were supposed to have occurred in Lee County or Itawamba County. Furthermore, it is completely inferential that when other incidents of sexual abuse were presented and considered as substantive evidence of guilt without any indication of where such alleged abuse occurred, the Appellant was unfairly prejudiced because the jury is put in the position to find guilt based on alleged acts for which he was not properly charged. After Count II was finally dismissed by the trial judge at the end of the State's case-in-chief,

the Appellant was then only accused of the one count left in the indictment, charging fellatio. However, the entire testimony brought before and considered by the jury also accused him of sexual penetration (T. III 313-314), digital penetration (T. II 280-281), and cunnilingus (T. III 333-334) of this child. It can not be said with any confidence that this inflammatory evidence was considered only for "other bad acts" and did not unfairly prejudice the jury in its quick conviction of the Appellant as to Count I.

One of the components of fundamental fairness in our nation's jurisprudence is that the accused not be subjected to improperly brought testimony that is highly inflammatory and inherently prejudicial in a charge that is void on the face of the indictment. The trial court here untimely granted a directed verdict for a count for which it *knew* the court lacked jurisdictional authority to hear and allowed the prosecution to present evidence that could in no way be characterized as admissible under the circumstances of this case. It is obvious from the record that the State, in its rush to judgment in this case, realized after the testimony had begun that they brought Count II in the wrong county's venue and that the trial court had no jurisdiction over this charge. When it became clear that the judge was about to *sua sponte* dismiss the void count, the State quickly attempted to "re-characterize" this illegal count to the trial judge as being admissible under ***M.R.E. 404(b)***. The trial court, in allowing this illegal evidence to be "mis-characterized" as properly presented "other bad acts" evidence deprived Appellant of his constitutional guarantees under the ***Sixth*** and ***Fourteenth Amendments of the United States Constitution*** and ***Article 3, Section 26 of the Mississippi Constitution***. Therefore, the Appellant would respectfully assert to this honorable Court that

the combination of violations of basic constitutional protections, procedural rights, and state venue statutes cannot amount to "harmless" error, and hereby requests that the jury's verdict be set aside, the case be reversed, and remanded to the trial court with proper instructions for a new trial.

ISSUE TWO:

A.
WHETHER IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE TESTIMONY ABOUT PRIOR SEXUAL ABUSE BY THE CHILD AND THE PERPETRATORS UNDER *M.R.E. 412*, WHICH WOULD HAVE SUPPORTED THE DEFENSE THEORY THAT SOMEONE ELSE HAD COMMITTED SEXUAL ABUSE ON THE CHILD, AND THAT WAS THE REASON FOR HER FALSE ACCUSATION AGAINST HER STEPFATHER AND HER KNOWLEDGE OF SEXUAL TERMINOLOGY.

The trial judge made two pre-trial rulings, set out hereinbelow, concerning the admission and the exclusion of testimony that encompass claims of error in both the State's case and in the defense case, which so intertwined that the Appellant would respectfully present them to this honorable Court as "**ISSUE TWO A.**" and "**ISSUE TWO B.**" The Court reviews the rulings of the trial court admitting or excluding evidence for abuse of discretion. ***Aguilar v. State***, 955 So. 2d 386, 392 (Miss. Ct. App. 2006) (citing ***Ladnier v. State***, 878 So. 2d 926, 933 (Miss. 2004). An error in the admission or exclusion of evidence is not grounds for reversal unless the error affected a substantial right of a party. ***Id.***; ***M.R.E. 103(a)***. ***Mississippi Rule of Evidence 412(a)*** provides that reputation or opinion evidence about past sexual behavior of an alleged sexual offense victim is inadmissible. ***M.R.E. 412(b)*** provides that evidence of a victim's past sexual behavior other than reputation or

opinion evidence is inadmissible unless the evidence is 412(b)(1) Admitted in accordance with subdivisions (c)(1) (c)(2) hereof and is constitutionally required to be admitted; or:

> 412(b)(2): Admitted in accordance with subdivision (c) hereof and is evidence of (A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen, pregnancy, disease, or injury; or (B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which a sexual offense is alleged; or (C) False allegations of past sexual offenses made by the alleged victim at any time prior to trial.

M.R.E. 412(b)(2)(A)-(C).

Additionally, 412(C) states that:

> (1) If the accused wishes to offer evidence of specific instances of the victim's past sexual behavior under subdivision (b), the accused must make a written motion, with a written offer of proof, not later than fifteen days before the scheduled trial date. However, the court may permit the motion to be made at a later time, including during the trial, if the court determines that the issue to which the evidence relates has newly arisen in the case, or if the court determines that the evidence is newly discovered and could not have been obtained earlier in the exercise of due diligence. (2) if the court determines that the offer of proof contains evidence described in subdivision (b), then the court must hold a hearing in chambers to determine if the evidence is admissible. (3) If the court concludes that the evidence is admissible to the extent that an order of the court specifies the evidence that may be offered and the areas in which the victim may be cross-examined.

M.R.E. 412 is designed to prevent the introduction of irrelevant evidence of the victim's past sexual behavior to confuse and inflame the jury into trying the victim rather than the defendant. ***Hughes v. State***, 735 So. 2d 238, 273 (Miss. 1999). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ***Herrington v. State***, 690 So. 2d 1132, 1136 (Miss. 1997); ***M.R.E. 401.***

First, although the ***M.R.E. 412*** issue did not come up until trial, and the defense failed to file a timely motion of his intent to introduce this evidence under 412(c), [illegible] failed to file a motion to strike on the basis of untimeliness at the pre-trial hearing or the trial itself. Thus, the State waived its objection. *Herrington v. State*, 690 So. 2d 1132, 1137 (Miss. 1997). for real?

In *Herrington*, a twelve-year-old girl, "M.S.," alleged that her stepfather, David Herrington, pushed her down and raped her. 690 So. 2d 1132 (Miss. 1997) M.S. testified at trial that she was a virgin. ***Id.*** M.S. was examined by a doctor who found lacerations, that were determined to likely be from forced penetration. ***Id.*** The Court excluded proffered testimony by the defense that M.S. had engaged in sexual acts that caused bleeding after the time M.S. accused Herrington had raped her. ***Id.*** The Court ruled that it was error not to permit the defendant to prove he was not the source of the injury. ***Herrington v. State***, 690 So. 2d 1132, 1137 (Miss. 1997). While the dates of the alleged events are not the same, the court states that "the rape shield" rule's protections are inapplicable "where 'the act offered in explanation was not a prior separate incident but an alternative account of the events of that evening offered to counter the prosecution's medical testimony." ***Id.*** at 1135 (citing ***Commonwealth v. Majorana***, 470 A.2d 80, 85 (Pa. 1983)). The Court goes on to say that the prejudice suffered by the defendant is a result of his inability to counter the argument that the prosecution made. ***Id.*** at 1136. In reversing, the court stated that the trial court's ruling, in effect, prevented the defendant from putting on a defense amounting to anything more than a general denial of the charges. ***Id.*** at 1137.

In this case, the Appellant was also prevented from putting on any defense other than simply a general denial. Not allowing Jane or the perpetrators of her previous sexual abuse to testify left the defendant with no evidence to support his theory of defense, and he was therefore left to simply say he did not do it. While the molestation of the boys occurred during a separate time and in another location, it is linked to him and the accusation against him. It was critical to explore the possibility of a young child being confused as to who molested her or her basis of knowledge regarding sexual things, but it could also have been used to question the child's motives for possibly making a false accusation against the Appellant. Instead, the only evidence allowed was the vague statements of a few hearsay witnesses that simply said she could distinguish between who did what, and the defense was given no opportunity to properly cross-examine the child as to the events. The judge, in effect, allowed only that which the prosecution was willing to let the jury hear, instead of the whole story.

While the case law that allows testimony of prior sexual acts as an exception to ***M.R.E. 412*** involves actual visible physical evidence so that the testimony is allowed in to show that there was another source of injury, this case differs. *See* ***Amacker v. State***, 676 So. 2d 909 (Miss. 1996) (***M.R.E. 412*** did not apply; conflicting evidence of who actually caused the injury, vaginal lacerations, was outside the scope of the rape shield rule, under ***M.R.E. 412(d)***) and ***Herrington v. State***, 690 So. 2d 1132 (Miss. 1997). In this case, there is no medical testimony, and the only evidence against Mr. Caldwell is the testimony of the child. However, the Appellant argues that the injury in this case is trauma from sexual abuse.

The Appellant further argues that it was imperative, that testimony of the prior sexual abuse to Jane should have been admitted to prove that the injury of trauma from sexual abuse did not come from the Appellant. Instead it came from his sons who previously molested Jane. That previous molestation left Jane hurt, confused, and angry about what happened to her, and it was because of that she lashed out at the Appellant and accused him of being the person who abused her. Therefore, ***M.R.E. 412*** should not have applied to bar testimony regarding prior sexual abuse because there was a need for it to show that the source of injury was someone other than the Appellant.

The Appellant would also argue that if the ***M.R.E. 412(b)(2)(B)*** exception does not apply, then ***M.R.E. 412(b)(1)*** should apply. In ***Aguilar v. State***, the defendant admitted that the evidence did not fit any of the three categories enumerated in ***M.R.E. 412(b)(2)*** but he instead argued under ***M.R.E. 412(b)(1)*** provision it was "constitutionally required to be admitted," and the trial court's limitation of his cross-examination of K.P. about her past sexual behavior violated his fundamental constitutional right to impeach K.P.'s credibility. ***Aguilar***, 955 So. 2d 386, 393 (Miss. Ct. App. 2006). The Court however upheld Aguilar's conviction because he failed to comply with subsections (c)(1) and (c)(2), and therefore there was no error in the court's limitation of Aguilar's cross-examination. ***Id.*** In the Appellant's case, not only was he denied the right to question Jane about the prior sexual abuse in an attempt to show that she blamed the Appellant for allowing it to happen, his Sixth Amendment right to confront the witness was also violated when the prosecution later presented testimony about the prior abuse through an ***M.R.E. 803(25)*** rebuttal witness.

Further, not allowing the Appellant to call the perpetrators or Jane, effectively denied them the right to present evidence to support his defense theory.

Further, the policy reasons behind the "rape-shield" rule clearly do not apply to the facts of this case. ***M.R.E. 412*** is designed to prevent the introduction of irrelevant evidence of the victim's past sexual behavior to confuse and inflame the jury into trying the victim rather than the defendant. ***Hughes v. State***, 735 So. 2d 238, 273 (Miss. 1999). In this case, the evidence is far from irrelevant, and there is no way it could be used to inflame the jury in to trying to victim rather than the defendant. While it would be used to show that the victim may have been confused and lashed out at the defendant, it would not be used for the purpose of making the jury look badly on the defendant. When the defense attorney argued that it was also important to show that there was another way Jane could have knowledge of sexual terms, the judge denied the request and stated:

> I think it would be the same as asking a 26-year-old female on the stand what prior sexual knowledge she has. Well, we could – certainly she could testify that she's had sexual relations with others prior to taking the stand, but is that relevant to prove that the defendant committed the rape or the sexual batter in that incident? No, I don't think so.

(T. II. 190)

The Appellant would argue that it is completely relevant and material under ***M.R.E. 401*** to attempt to prove that he did not molest Jane by offering this testimony. This factual situation is <u>not</u> the same as on involving a 26-year-old woman, as the trial court stated. One

would expect a 26-year-old woman to have prior sexual experience or knowledge, which would be irrelevant as to a present charge under the underlying. However, one would not expect a child to have the same knowledge, and it is very relevant to present evidence of the source of any prior knowledge. Therefore, the Appellant respectfully requests this Court to find that the trial judge abused her discretion in limiting the defense's case in this way, thereby reversing and remanding this case with proper instructions for a new trial.

B.

WAS IT ERROR TO THEN ADMIT HEARSAY REBUTTAL TESTIMONY UNDER *M.R.E. 803(25)*, THE "TENDER YEARS" DOCTRINE, REGARDING THAT ALLEGED PRIOR ABUSE WHEN THE CHILD WAS AVAILABLE AND CAPABLE TO GIVE SUCH TESTIMONY HERSELF, GIVING THE DEFENSE AN OPPORTUNITY TO CROSS-EXAMINE ON AN ISSUE THAT WAS PREVIOUSLY FORECLOSED BY THE TRIAL COURT.

Further prejudicing the Appellant's ability to adequately defend himself in this highly charged case, the trial judge allowed the hearsay testimony of an ***M.R.E. 803(25)*** prosecution witness on rebuttal to testify to matters previously excluded in the rulings by the trial judge referenced in **ISSUE TWO A**, as set out hereinabove. As stated above, the Court reviews the admission or exclusion of evidence for abuse of discretion. Under the Mississippi Rules of Evidence, ***M.R.E. 801(c)*** states "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Hearsay is not admissible except as provided by law." ***M.R.E. 802.*** In ***Crawford v. Washington***, 541 U.S. 36 (2004), the United States Supreme Court held that:

> Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to

> out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." ***3 Wigmore § 1397, at 101***; accord, ***Dutton v. Evans***, 400 U.S. 74, 94, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

Id. at 50-51 (emphasis added); *see also,* ***Fraizier v. State***, 907 So. 2d 985 (¶36) (Miss. Ct. App. 2005).

In applying the tenets of ***Crawford*** in ***Fraizier***, the Court of Appeals of Mississippi stated:

> Justice Scalia, writing for the majority, opined that the history of the Confrontation Clause supported two principles: that the Confrontation Clause was focused primarily on testimonial hearsay and, second, that the Constitutional Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless that witness was unavailable to testify and the defendant had a prior opportunity to cross-examine that witness. ***Crawford***, 124 S. Ct. at 1365. As a result, Crawford distinguishes testimonial hearsay from non-testimonial hearsay. Put another way, testimonial hearsay must be exposed to confrontation by way of cross-examination prior to reaching admissible status, while non-testimonial hearsay does not trigger the need for confrontation to be admissible. Thus, our application of Crawford to the present facts depends upon a determination of whether the evidence admitted is "testimonial."

Id. at ¶39.

The way the ***M.R.E. 803(25)*** issue came about in this case, was on rebuttal by the prosecution. Instead of also presenting Jane in rebuttal, as requested by the defense, the prosecution used an 803(25) witness that denied the defendant a proper cross-examination because the witnesses knowledge was very limited. (T. III. 398)

Because in this case Jane testified at trial, this issue turns on whether the "time, content, and circumstances of the statement" provide substantial indicia of reliability. ***Golden v. State***, 2008 Miss. App. LEXIS 91, *15 (Miss. Ct. App. 2008). In ***Golden***, the

Court refused to address the defendant's claim that allowing a video tape of a forensic interview and the testimony of the forensic interviewer only served to bolster the testimony of the child witness. ***Golden v. State***, 2008 Miss. App. LEXIS 91, *15 (Miss. Ct. App. 2008). Although a new issue under 803(25), the Court denied the claim because the defendant failed to object on "bolstering" grounds at the trial level, so he was therefore procedurally barred from bringing it up on appeal. ***Id.*** The Court then went into a standard 803(25) analysis to determine whether the forensic interviewer and the videotape were properly admitted. ***Id.*** The Court found that they were admissible, especially since the child had testified at trial. ***Id.*** The Court did note however that "in so holding, we acknowledge that, in a criminal case, the defendant's Sixth Amendment right to confrontation must be respected. To this end, we note that Sally testified at trial; therefore, Golden's right to confront Sally was not violated." ***Id.*** (citing ***Smith v. State***, 925 So. 2d 825, 837 (Miss. 2006); ***Elkins v. State***, 918 So. 2d 828, 832 (Miss. Ct. App. 2005).

In our case, however, the Appellant's right to confront Jane was violated. While she did testify at trial, and was subject to cross-examination by the defense, she was not questioned about the prior sexual abuse because the judge barred the defense from doing so. (T. II. 190-192, R.E. 19-22, 25) Further, when the issue was brought up at trial, the defense no longer had an opportunity to cross-examine Jane, even though they requested that she be put on the stand. (T. III. 395-399)

In ***Williams v. State***, 970 So. 2d 727 (Miss. Ct. App. 2007), a video-tape of a forensic interview of Jane, the child accuser in a sexual abuse case, was admitted as testimonial

evidence, and the defendant claimed that his Sixth Amendment right to confront the witness about the video was violated because he did not get the opportunity to cross-examine the child about the video. The Court held that testimonial hearsay must be subjected to cross-examination before it may be admissible, and because the defendant did not get to cross-examine Jane prior to admission of the videotape, it was error. ***Id.*** at ¶23. The court found it to be harmless error, however, because "the defendant was allowed to cross-examine Jane later during his case-in-chief, and had the opportunity to question Jane about her statements on the videotape and in general." *Id.*

In the Appellant's trial he was barred from cross-examining the child about any of the prior sexual abuse between Jane and Mr. Caldwell's stepsons.(T. II 192) The prosecution did not call a witness that directly addressed that issue in its case-in-chief, but presented a rebuttal witness at the end of trial to testify as to these matters. (T. III 392) Further, they did not call Jane herself to testify, and the judge refused the defense's request to have the child testify so that she could be properly crossed about the incidents. (T. III. 398, R.E. 30-32) The defense was denied the opportunity, at any point during the trial, from properly cross-examining Jane about the prior sexual abuse, and therefore, the defendant was denied his Sixth Amendment right to confront the witness. Although, an 803(25) witness testified as an exception to the hearsay rule, it was impossible for the defense to properly cross-examine the witness because she only had limited knowledge of the prior abuse, whereas the child could have answered more specific questions.

M.R.E. 803(25) already gives the prosecution a huge advantage over the defense.

They are allowed to parade a barrage of witnesses up to the stand, who all testify to basically the same thing over and over. When the child is clear, articulate, and well spoken, as in this case, the 803(25) witnesses only serve to "bolster" the child's testimony. Further, by putting the child on the stand in rebuttal, the prosecution avoids any ***Crawford*** Confrontation Clause violation, and the State uses trial tactics to limit the defense's opportunity to properly cross-examine the child based on any of the testimony that the 803(25) witnesses may have given. The prosecution will put the child on the stand first, instead of after the 803(25) witnesses testify. This trial tactic does two things: (1) It creates a repetitive, "bolstering" effect of the child's testimony that the jury just heard, and (2) It puts the defense in an awkward position to have to recall the child witness if there is anything further that came up during the 803(25) witness's testimony that they would like to cross-examine the child about. It is well known among defense attorneys that recalling a child witness for purposes of cross-examination can make the defense attorney appear to "bully" the child, and the jury view defense counsel, and ultimately the defendant, in a bad light. As a result, the defense is put in a difficult position to cross-examine a child witness from the beginning, but they still do have the opportunity to cross-examine and re-call the child during the defense case. In this case, however, with respect to the issue of prior sexual abuse, the defense was refused an opportunity to cross-examine the child about the prior sexual abuse she suffered at the hands of her step-brothers in any detail. In fact, the judge specifically barred asking the child about the abuse, and would not allow the defense to call the perpetrators of the abuse in their case.(T. II 192) Any testimony alluding to the prior abuse was very limited, and detailed testimony was not given

about the incident until the prosecution called a rebuttal witness. (T. III. 392). At this point, the defense had rested, and the defense was not able to recall the child witness if they needed to cross-examine her about the testimony brought out in rebuttal. The defense specifically requested that the trial court order the prosecution to call Jane as a rebuttal witness. (T. III. 398). The judge however, ruled that ***M.R.E. 803(25)*** still applied and the witness was sufficient to testify to the incident.(T. III. 399, R.E. 32). The Appellant argues that this is contrary to the spirit, letter, and policy of the rule. ***M.R.E. 803(25)*** witnesses are only allowed without the child testifying if the child is "unavailable" and if other requirements of reliability are met. ***M.R.E. 803(25).*** In this case, the child was clearly available at all times, but did not testify during rebuttal. Even though she did testify in the State's case-in-chief, she was not "available" to the defense for cross-examination after the prosecution presented new testimony concerning the prior abuse during rebuttal. The restrictions of 803(25), that require that a child must testify, or if the child is unavailable, there must be corroborating evidence, should apply equally to the State's rebuttal case, as it does in their case-in-chief. There was no corroborating evidence of the child's claims presented, therefore the child should have testified. Therefore, the 803(25) witness' rebuttal testimony should not have been allowed absent complying with the requirements of the rule, and the admission of such testimony violated the Appellant's right to confront the witness. The Appellant respectfully requests that this honorable court reverse the trial court, and remand this case with proper instructions.

ISSUE THREE:

WHETHER, GIVING ALL REASONABLE INFERENCES TO THE JURY'S VERDICT, THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL BASED ON THE WEIGHT OF THE EVIDENCE, GIVEN THAT THE ONLY EVIDENCE AGAINST THE DEFENDANT WAS IMPROPER HEARSAY THAT ONLY SERVED TO BOLSTER A NINE-YEAR OLD CHILD'S INCONSISTENT TESTIMONY.

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

> A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify

> acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

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

This case is like a playing card. If you look at it on it's face, it seems substantial, but turn it on its side and its true weakness is revealed. While the uncorroborated accusation of the alleged victim is enough to establish a *prima facie* case, that is all that the State presented as evidence of guilt against Mr. Caldwell. When you take out all of the irrelevant, illegal, and highly prejudicial testimony regarding the alleged acts that occurred in Itawamba County, and all of the testimony of the State's ***M.R.E. 803(25)*** witnesses, which only served to repeat and bolster the child's testimony, all that is left of the State's case is the accusation of the child. The relevant, admissible testimony of the child herself, was that the Appellant forced her to perform fellatio in their home on three separate occasions; once in the

Appellant's bedroom, once in the bathroom, and once in the living room, all while her mother was at work. (T. II. 231). Her story changes a bit to her counselor, Dr. Koranek. Inconsistent with Jane's testimony, Jane's counselor testified that Jane told her the abuse occurred in the kitchen, bathroom, and her bed. (T. III. 345). Further inconsistencies in Jane's testimony were that she claimed that never called a penis a "winkle" or a "winkie" (T. II. 225), but her grandmother (T. II., 288) and the forensic interviewer (T. II. 317) both heard Jane use the term. Additionally, whereas Jane is very clear that no alleged sexual abuse by her step-father occurred the day before she accused him (T. II. 122), her grandmother (T. II. 286) and the police investigator (T. II. 296) both claimed differently. Jane also denied touching other children sexually when her counselor questioned her about it after Jane's grandmother had already told the counselor that Jane and her sister had been acting out sexual encounters together. (T. III. 343) These inconsistencies in the State's uncorroborated case also implicate whether the evidence was legally sufficient to withstand the motion for directed verdict, peremptory instruction, and J.N.O.V. As a general rule, this Court has recognized that "the uncorroborated testimony of the alleged victim alone may be sufficient for a conviction, but only when that testimony is not discredited or contradicted by other credible evidence." ***Taylor v. State***, 836 So. 2d 774, 777 (Miss. Ct. App. 2003). Here, the inconsistencies, confusion, and the inflamed nature of the charges brought against the Appellant raise serious doubts about whether the State's case, given all favorable, reasonable inferences, made out a prima facie case of sexual battery. *See* ***Dilworth***, *supra*, 909 So.2d at 737-38.

The accusation is countered by the testimony of the Appellant, the child's mother, and

the Appellant's nephew. Mr. Caldwell clearly stated that he did not sexually abuse his stepdaughter, and he feared that her accusations against him were spurned by his lack of action regarding the abuse that had already occurred against Jane by the appellant's two sons. (T. III. 365-370) The Appellant also testified that Jane would threaten him and his wife if she did not get what she wanted. (T. III. 375) The child's own mother, the one whom Jane told about the sexual abuse from the Appellant's sons, testified that she never saw nor did she believe that any sexual abuse was committed by the Appellant against Jane. (T. III. 375) Additionally, the defense produced a witness that stated he was at the Appellant's home where the alleged acts occurred everyday during the time that Jane claims the abuse occurred, and he never saw anything improper. (T. III. 386) According to testimony, the mother worked from 2:00 p.m. or 3:00 p.m. until 11:30 p.m. or 12: 30 (T. III. 373 & 379), and Mr. Caldwell's nephew was there from 4:00 p.m. to about 1:00 a.m. everyday. (T. III 386) The prosecution was unable to put on any evidence to rebut or impeach this testimony, and in a last ditch effort to overcome this testimony, the prosecutor in closing arguments told the jury that they should not believe the witness because he was "lying." (T. III. 439) Further, because of all the testimony allowed in about prior alleged acts that occurred at a different house, this testimony was significantly weakened in the eyes of the jury who would understandably be having problems distinguishing where which acts were allegedly committed.

The jury was improperly persuaded by irrelevant, repetitive, and bolstering testimony that was improperly presented by the prosecution in it's case-in-chief. It was impossible for

the jury to simply disregard, as instructed by the trial judge, the mountain of irrelevant, immaterial, and highly prejudicial testimonial evidence as to the count that allegedly occurred in Itawamba County, for which the court clearly had no jurisdiction to hear. Additionally, the jury was allowed to hear a police investigator repeatedly make the unsubstantiated, conclusatory claim that it was "obvious that Scott was lying" before the trial court once again instructed them to disregard the improper testimony. (T. III. 302) Finally, the jury was clearly influenced by the prosecutor's inappropriate remarks when he said:

> There ain't a soul in this courtroom believed Jason Caldwell was at that house every day, every day from 4:00. to 1:00 in the morning except maybe Jason Caldwell. Didn't Happen. That's a lie. Y'all get to decide who's telling a lie and who's telling the truth. That's a lie. So view his testimony as it is. Okay?

(T. III. 439)

The jury was clearly incapable of "disregarding" the large amount of improperly presented information as instructed, and they were wrongly influenced as to his opinion of the credibility of witnesses by the prosecutor. Had the jury truly looked at the evidence without an inflamed prejudice against Scott Caldwell, the fictional "reasonable, fair-minded" juror could have only found the Appellant "not guilty." The defense clearly overcame the accusation of the child witness, which was all the state had when everything else is stripped away. For these reasons, the trial court should have set aside the guilty verdict of the jury as to the charged count of the indictment in this case, and, as a result, this honorable Court should reverse and remand this case to the lower court with proper instructions for a new

trial. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be held to be legally insufficient, the case reversed, this matter rendered, and the Appellant discharged from custody, as set out hereinabove.

CONCLUSION

This was a trial beset with substantive, constitutional and procedural errors that served only to inflame the bias, passions, and prejudices of the jury against the Appellant for one of the most horrifying crimes imaginable. The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a single count on a charge of sexual battery, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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MISSISSIPPI DEPARTMENT OF CORRECTIONS
Parchman, Mississippi

This the 2nd day of April, 2008.

Phillip W. Broadhead, MSB #4560
Certifying Attorney