CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Richard Ray Timmons, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lester F. Williamson, Jr.
Circuit Court Judge
2104 8th Street
Meridian, MS 39302

Honorable E.J. (Bilbo) Mitchell
District Attorney, District 10
Post Office Box 5172
Meridian, MS 39302

Honorable Jim Hood
Attorney General
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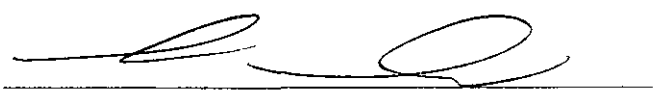
Jackson, MS 39205-0220

This the 9th day of February, 2009.



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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICHARD RAY TIMMONS **APPELLANT**

V. **NO. 2008-KA-0696-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Richard Ray Timmons, Appellant
3. Honorable E.J. (Bilbo) Mitchell, District Attorney
4. Honorable Lester F. Williamson, Jr., Circuit Court Judge

This the 9th day of February, 2009.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT ERRED IN LIMITING THE SCOPE OF THE DEFENDANT'S CROSS-EXAMINATION OF C.L.**

II. **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgment of conviction for one count of statutory rape entered against Richard Ray Timmons following a two-day jury trial held on January 31, 2008 and February 1, 2008, the Honorable Lester F. Williamson, Jr., Circuit Judge, presiding. (C.P. 45, 49-50, Tr. 404, R.E.5, 9-10). He was sentenced to serve a term of twenty (20) years in the custody of the Mississippi Department of Corrections with ten (10) years suspended and five (5) years post-release supervision. (C.P. 63-63,

Tr. 420, R.E. 11-14). Timmons is presently incarcerated in the custody of the Mississippi Department of Corrections and now appeals to this honorable Court for relief.

STATEMENT OF THE FACTS

In the Summer of 2006, Jamie Lawson and his wife, Jerry Lawson, owned a roofing business in Meridian, Mississippi. (Tr. 98). Jamie and Jerry had two daughters: C.L., who was fourteen years old, and Rachael, who was ten. (Tr. 97, 157, 251). On July 16, 2006, the Lawson's hired Timmons to lay shingles for their roofing business. (Tr. 99, 159). On August 8, 2006, Jerry fired Timmons because she believed that he was inappropriately involved with C.L.. (Tr. 100, 137). On August 25, 2006, Jerry took C.L. to the Health Department, where a doctor examined C.L. for pregnancy and sexually transmitted diseases. (Tr. 193, 278). The Health Department notified the police. (Tr. 278).

Timmons was later indicted on four (4) counts of statutory rape, charging that he had sexual intercourse with C.L. on or about each of the following dates: July 30, 2006, August 2, 2006, August 3, 2006, and August 5, 2006. (C.P. 2-5). At the conclusion of trial, the jury returned a verdict of not guilty on Counts II, III, and IV and a verdict of guilty on Count I. (C.P. 45-50, Tr. 403-05, R.E. 5-8). The evidence adduced at trial is discussed in more detail below.

During the time period at issue–July and August 2006–C.L. and Rachael regularly slept in the living room of the Lawson house because there was no air conditioning unit in their bedroom(s), and Rachael was scared of her room. (Tr. 164-66, 200-01, 255). Many nights, C.L.'s friend, Gracee Smiley, also spent the night at the Lawson house in the living room. (Tr. 248).

The Lawsons hired Timmons on July 16, 2006. (Tr. 99, 159). Timmons (32 years old at the time) was a good worker, and immediately became a friend of the Lawson family. (Tr. 99). During Timmons' brief tenure of employment, the Lawsons invited him to their house on several occasions

after work to eat supper, spend the night, and wake up early the next morning to ride to work; Timmons did not own a car. (Tr. 100-03, 133, 164). When he stayed at the Lawson house, Timmons slept on the couch in the living room. (Tr. 100-03, 133, 164).

From July 16, 2006 to July 20, 2006, Timmons spent the night at the Lawsons' once or twice. (Tr. 133, 164). C.L. testified that nothing inappropriate happened between these dates, and her relationship with Timmons was plutonic. (Tr. 161-62, 199-200). From July 20 to July 25 2006, the Lawsons took a trip to Alabama. (Tr. 129). Jerry, Jamie, C.L., and Rachael went on the trip; Timmons did not go. (Tr. 129).

On July 26 or July 27, C.L., Rachael, and Timmons went fishing in a pond on the Lawsons' property. (Tr. 162, 202, 254). Rachael claimed that Timmons "touched [C.L.] in places that she didn't need to be touched" on the fishing trip; however, C.L. testified only that she kissed Timmons, and he called her his girlfriend. (Tr. 162-63, 202, 254). According to C.L., Timmons slept at the Lawsons' that night also. (Tr. 164).

The next day, Timmons, C.L., and Rachael went to pick up Gracee in Jerry's truck. (Tr. 168). According to C.L. and Gracee, Timmons asked Gracee if she wanted to have a threesome. (Tr. 169, 243). However, Gracee testified that Timmons was just kidding. (Tr. 243-44).

The following weekend, the Lawsons–Jamie, Jerry, C.L., and Rachael–took a trip to the casino(s) in Philadelphia, Mississippi; they brought with them Timmons, and his friend, Summer Sullivan, who sometimes babysat Timmons' daughter.[1] (Tr. 130, 170). At the casino, C.L. took a photobooth-type picture with Timmons. (Tr. 131, Ex. S-10). However, Jerry testified that Timmons

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[1] From the record, It appears that Timmons had a daughter with a woman named April. (Tr. 167).

probably took a picture with everybody, possibly even her. (Tr. 131). In any event, the picture of Timmons and C.L. simply depicts two persons in tight quarters smiling at the camera. (See Ex. S-10). The date of the casino trip was not clearly established at trial. Jerry testified that the casino trip took place on July 27, 2006. (Tr. 130). C.L. testified that the casino trip was on July 30, or July 31, 2006. (Tr. 171, 215). A date displayed on the photobooth picture read July 31, 2006. (Tr. 171, 215, Ex-S-10).

Jerry testified that C.L. had a case of "puppy love" for Timmons, and "she didn't want to leave his side." (Tr. 136). Jerry claimed that her "mother's intuition" led her to suspect that C.L. and Timmons were inappropriately involved because he "just seemed too friendly with my daughter." (Tr. 102). According to Jerry, her suspicions were raised when she discovered C.L. and Timmons talking late one night at the Lawson house. (Tr. 104).[2] Jerry asked Timmons what he was doing talking to C.L. at such a late hour, and Timmons explained that he "needed to talk to [C.L.] about his children. He was upset."[3] (Tr. 120-22). C.L. testified to the same topic of conversation. (Tr. 167). According to Jerry, this "late-night talking incident" occurred approximately seven days before Timmons was fired. (Tr. 104,121).

Jerry also testified that, after the late-night talking incident, she found letters that C.L. had supposedly written to Timmons. (Tr. 105). At trial, the State introduced two sets of these letters. (Tr. 189, Ex. S-2, S-3, S-4, S-5, S-6 (set1), and S-7, S-8, S-9 (set2)). Jerry claimed that she found

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2 Jerry also stated that she found Timmons and C.L. talking late at night on more than one occasion. (Tr. 132). To this end, Jerry testified, "Well, I mean, I've seen them by the refrigerator in the middle of the night." (Tr. 132).

3 From the record, it appears that Timmons had at least one child with an ex-wife named April. (Tr. 167).

the first set of letters (Ex. S-2, S-3, S-4, S-5, S-6) in C.L.'s purse. (112-13). She stated that she later found the second set of letters (Ex. S-7, S-8, S-9) in Timmons' room at his mother's house. (Tr. 115).[4] While these letters revealed that C.L. had feelings for Timmons, they did not directly speak of any sexual intercourse between the two. (See Ex. S-10). Perhaps, the most revealing effect of the letters was to expose contradiction and create confusion in the State's evidence.

For instance, Jerry testified that she found the first set of letters (the one's found in C.L.'s purse) on July 18 or July 21, 2006, by searching C.L.'s purse: "I just felt like we needed to look there." (Tr. 112-13). This directly contradicted her testimony that she found the letters after the late-night talking incident, which she twice swore occurred on approximately August 1, 2006. (Compare, Tr. 104, 121 (talking incident on approx. August 1, 2006), 105 (letters found after talking incident), 112-13 (first letters found on July 18, or 21)). Further, C.L. testified that Jerry found these letters at the August 25, 2005 doctor's visit when her purse was knocked off and the letters fell out. (Tr. 187). Jerry later changed her testimony and claimed that she found these letters on August 8, 2006. (Tr. 137). However, this too was contradicted by C.L.'s testimony. (Tr. 187 (Jerry found letters on August 25, 2006)).

Jerry fired Timmons on August 8, 2006. (Tr. 99). On or about that same day, she confronted C.L., and C.L. said that she had sex with Timmons. (Tr. 99, 139). At trial, Jerry claimed that Timmons called her the following two days and confessed his love for C.L. and admitted to acts of oral sex and sexual intercourse with C.L.. (Tr. 100, 123-26, 137-39). Curiously, Jerry, despite

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Jerry claimed that she and Rachael went to Timmons' mother's house to recover one of Rachael's rings that she (Rachael) had asked Timmons to hold for her at work one day. (Tr. 114). Jerry testified that she did not find the ring, but allegedly found more letters (the second set) that C.L. had supposedly written to Timmons. (Tr. 114-15, Ex. S-7, S-8, S-9)

having supposedly obtained a confession from Timmons, did not go to the police or take C.L. to be examined by a doctor until about three weeks later–on August 25, 2006. (Tr. 140-42, 192-93, 275-78).[5] On this day, Jerry took C.L. to the Health Department; the doctor only examined C.L. to for pregnancy and sexually transmitted diseases. (Tr. 193, 278). The Health Department then notified the police. (Tr. 278).

At trial, C.L. testified that she was jealous of Timmons and other girls. (Tr. 215-16). This was patently obvious from C.L.'s letter's. (see Ex. S-2 through S-9). On cross-examination, defense counsel attempted to cross-examine C.L. about deceptive and/or false allegations that she made in a September 2006, statement to police that Timmons was also sleeping with at least two other teenage girls; defense counsel also attempted to question C.L. as to why she did not mention these allegations in an earlier statement to police. (Tr. 215-16). The State objected on the grounds of relevance, and the trial court sustained the objection. (Tr. 216-18, 226-29).

Ultimately, C.L. testified that she had sexual intercourse with Timmons on each day charged in each count, i.e., on July 30, August 2, August 3, and August 5, 2006; she stated that this occurred in the living room of the Lawson's house, and Timmons wore a condom each night except for August 5, 2006. (172-76, 198, 205-212). On direct examination, C.L. testified that Timmons was at the Lawson's house "the whole day" on July 30, 2006, and they had sex "between 11:30 and 1:00 the next morning." (Tr. 205-06). However, on cross-examination, C.L. inconsistently testified that the casino trip (on July 30, 2006) was the first night she had sex with Timmons; and the Lawsons

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When asked what she did during this extended period of delay, Jerry said, "I got all my evidence together before I went to the police." (Tr. 140). When asked what evidence she was getting together, Jerry stated only: "All the letters." (Tr. 140). Recall that, according to Jerry's previous testimony, she had possessed the letters for weeks, even before she fired Timmons. (Tr. 106-113).

(and Timmons) left for the casino around noon and returned later that night. (Tr. 215).

C.L. also testified that she had "sexual relations" with Timmons on August 2, 2006, on the couch in the living room, and Timmons wore a condom on this night also. (Tr. 174, 208, 210). She testified that she and Timmons had sexual intercourse again on August 3, 2006, and Timmons again wore a condom. (Tr. 175-76, 211). C.L. stated that she had sex with Timmons for the last time on August 5, 2006, in the living room, and Timmons did not wear a condom that night. (Tr. 176, 212). According to C.L., the next day Timmons told her that she may be pregnant. (Tr. 193). C.L., also stated that Timmons told her not to tell her parents because "he didn't want to go to jail. (Tr. 177).

Timmons' mother, Robin Doerner, testified in Timmons' defense. She testified that Timmons stayed at her house on July 29, 2006. (Tr. 310-11). She stated that Timmons was in his bed at her house when she woke up on July 30, 2006; he went with to Wal-Mart with her that afternoon or evening; they returned to her house and ate dinner; and he slept the night (on July 30, 2006) at her house. (Tr. 312-13). Doerner testified that Timmons woke up in his bed at her house on July 31, 2006. (Tr. 314). She acknowledged that Timmons went to casino on July 31, and she did not know what time he came in from the casino, but he was at her house when she woke up the following morning. (Tr. 313-15). Doerner went on to testify that Timmons also stayed at her house on August 1, August 2, August 3, August 4, and August 5, 2006 (Tr. 317).

As seen above, the testimony adduced at trial was extremely contradictory and confusing, especially concerning the time line (or dates) of events that allegedly occurred during the period at issue. As a result, the jury submitted the following question to the trial court during deliberation: "Is it permissible for the jury to find statutory rape on one of the dates only and on the other dates not guilty? Then one count of statutory rape? Do you need the date for one count?" (Tr. 400-01). Over defense objection, the trial court sent the following "response" to the jury:

> You have been instructed to render a verdict on each of the four counts. Your verdict may be guilty or not guilty on each count. On each verdict, it is required to specify the count number which will identify the date of the alleged offense. Further explanation is not appropriate. See your previous form of the verdict instruction.

(Tr. 401-03). Less than thirty minutes later, the jury returned a verdict of not guilty on three counts (Counts II, III, IV) and a verdict of guilty on one count (Count I). (C.P. 45-50, Tr. 403-05, R.E. 5-8).

SUMMARY OF THE ARGUMENT

The trial court erred in limiting defense counsel's cross-examination of the State's star witness, C.L.. The trial court prevented defense counsel from putting on evidence that C.L. recklessly made false allegations to police that, at the time she was involved with Timmons, he was having sex with two other teenage girls, and C.L. did not report this to police in a previous statement. This was reversible error, as C.L. was the State's star witness and the prohibited cross-examination directly called into question C.L.'s credibility and bias (jealousy). Consequently, this Court should reverse the judgment of conviction and remand this case for a new trial.

Additionally, the verdict was against the overwhelming weight of the evidence. The evidence adduced at trial was extremely contradictory and hopelessly confusing regarding the dates of the events that allegedly occurred during the time period at issue. Consequently, the jury sent a question to the trial court during deliberation asking if they could find Timmons guilty of only one count and if they needed a date for one count. (Tr. 400-01). Thus, the jury clearly did not believe (or could not make sense of) the State's witnesses' testimony. The jury found Timmons guilty on Count I but not guilty on Counts II, III, and IV, on which the evidence was far less contradictory. Accordingly, allowing the jury's verdict to stand would sanction an unconscionable injustice, and Timmons is entitled to a new trial on Count I.

ARGUMENT

I. THE TRIAL COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF STATE'S WITNESS C.L.

During cross-examination, defense counsel attempted to cross-examine C.L. to show that she made deceiving and/or false allegations in a statement given to police (in September, 2006) that, at the time she and Timmons were allegedly having sex, Timmons was also sleeping with two other teenagers, Moorehead, and Sullivan; defense counsel also attempted to show question C.L. to show that she did not make these allegations to police in an earlier statement (in August). (Tr. 215-16). The State objected on the grounds of relevance; defense counsel argued that matter bore directly on C.L.'s credibility and bias; and the trial court sustained the State's objection stating: "that's not relevant and not appropriate to be considered in this case." (Tr. 216-18, 226-29).[6] As explained below, this violated Timmons' rights under the Confrontation Clause of the Sixth Amendment.

A trial court's decision to exclude evidence is reviewed "under the abuse of discretion standard of review." *Hobgood v. State*, 926 So. 2d 847, 852 (¶11) (Miss. 2006). However, "the discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence." *Cooper v. State*, 628 So. 2d 1371, 1375 (Miss. 1993). Also, "[c]onstitutional issues are reviewed de novo." *Morris v. State*, 963 So. 2d 1170, 1175 (¶15) (Miss. Ct. App. 2007) (citation omitted).

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6 A hearing was later held outside the jury's presence, at which, defense counsel made a proffered to show that C.L. told police that Timmons was sleeping with Libby Moorehead, and Summer Sullivan, and both girls denied the truth of the allegation to police officers. (Tr. 226). Defense counsel argued that cross-examination on this issue bore directly on C.L.'s bias and credibility. (Tr. 226-28). However, the trial court reaffirmed his original decision to sustain the State's objection, on the basis that any evidence as to C.L.'s deceiving and/or recklessly false allegations were not relevant. (Tr. 228-29).

A. The trial court's restriction of cross-examination violated Timmons' Sixth Amendment right of confrontation.

The Confrontation Clause of the Sixth Amendment to the Constitution of the United States and Article 3, Section 26 of the Mississippi Constitution guarantee a criminal defendant the right to cross-examine the witnesses against him or her. *See e.g., Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076 (1965); *Shaffer v. State*, 740 So. 2d 273, 281 (¶27) (Miss. 1998); *Raiford v. State*, 907 So. 2d 998, 1001 (¶8) (Miss. Ct. App. 2005) (citation omitted). This right is also secured under the Mississippi Rules of Evidence. *Suan v. State*, 511 So. 2d 144, 148 (Miss. 1987); *Davis v. State*, 970 So. 2d 164, 167 (¶7) (Miss. Ct. App. 2006). For instance, Mississippi Rule of Evidence 611(b) mandates that "[c]ross-examination *shall not be limited to* the subject matter of the direct examination and *matters affecting the credibility of the witness*." M.R.E. 611(b) (emphasis added).[7] The appellate courts of this State have held that Rule 611(b) "allows wide-open cross-examination so long as the matter probed is relevant." *See e.g., Zoerner v. State*, 725 So. 2d 811, 813 (Miss. 1998) (citing M.R.E. 611(b), cmt); *Kittler v. State*, 830 So. 2d 1258, 1260 (¶8) (Miss. App. 2002).

The right to cross-examination is essential because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105,1110 (1974). Accordingly, an accused is afforded "the right to broad and extensive cross-examination of the witnesses against him." *Caston v. State*, 823 So. 2d 473, 491 (¶50) (Miss. 2002) (quoting *Suan*, 511 So. 2d at148). In this regard, this Court has

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7 In addition to Rule 611(b), our rules of evidence reflect and ensure the right to cross-examination in Rules 607 and 608(b), among others. Rule 607 provides that "the credibility of a witness may be attacked by any party. . . ." M.R.E. 607. Rule 608(b) provides that, in the discretion of the trial court, specific instances of past conduct may be inquired into on cross-examination if probative of the witness's "character for truthfulness or untruthfulness." M.R.E. 608(b).

recently stated: "Wide-open cross-examination of any matter bearing upon the credibility of the witness is allowed, including the possible interest, bias or prejudice of the witness." *Davis*, 970 So. 2d at 167 (¶7). However, this right is not absolute; the trial court has the discretion "to limit cross-examination to relevant matters." *Smith* v. State, 733 So.2d 793, 801 (¶37) (Miss. 1999) (citing *Pace v. State*, 473 So. 2d 167, 169 (Miss. 1985)); *Ellis v. State*, 856 So. 2d 561, 565-66 (¶10) (Miss. Ct. App. 2003) (citing *White v. State*, 532 So. 2d 1207, 1217 (Miss. 1988)).

Prior Mississippi case law establishes that a defendant's right to cross-examination "extends to and includes the right to fully cross examine the witness on every material point relating to the issue to be determined that would have bearing on the credibility of the witness and the weight and worth of his testimony." *Myers v. State*, 296 So. 2d 695, 700 (Miss. 1974); *see also, e.g., Smith v. State*, 733 So. 2d 793, 799-802 (¶37-42) (Miss. 1999) (reversing because defendant "should have been afforded the opportunity to fully cross-examine Joey Cornish on every material point that would have bearing on his credibility which would necessarily include many of his past crimes, drug problems, mental condition, violent behavior . . . ."); *Horne v. State*, 487 So. 2d 213, 215-16 (Miss.1986) (reversing trial court's refusal to allow the defendant to cross-examine the State's narcotics agent witness to show that the agent was so inept at her job that she required special supervision."); *Miskelley v. State*, 480 So. 2d 1104, 1108-13 (Miss. 1985) (ruling that trial court erred in limiting cross-examination of a State's witness concerning her dating/sexual relationships with defendant and the victim); *Valentine v. State*, 396 So. 2d 15, 15-16 (Miss. 1981) (reversing trial court's ruling prohibiting defense from attacking State's witness' credibility/character by cross-examination concerning "anything other than his reputation for truth and veracity. . . .").

In the instant case, the trial court erred in refusing to allow defense counsel to thoroughly cross-examine C.L. regarding her deceptive and/or recklessly false allegations made to police, and

the fact that she did not make these allegations in a prior statement to police as this matter was clearly relevant. Mississippi Rule of Evidence 401, provides that evidence is relevant if it has "*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." M.R.E. 401. The comment to Rule 401 further explains that, in order to be relevant, evidence must merely be "*likely* to affect the *probability* of a fact of consequence in the case." M.R.E. 401 cmt. (emphasis added). **This is an extremely low threshold.** Whether C.L. engaged in deception or recklessly made false allegations in the police report with regards to Moorehead and Sullivan (if believed by the jury), and the fact that she did not make these allegations to police in her initial report, increases the likelihood that she engaged in deception in her allegation that she had sex with Timmons; this is clearly relevant, as it directly bears on C.L.'s truthfulness or untruthfulness and thereby her credibility and believability as a witness. To be sure, the Mississippi Supreme Court, on the subject of relevance and cross-examination, has instructed that "Where there is doubt as to the relevancy of the examination, the scales should weigh in favor of admitting the examination." *Miskelley*, 480 So. 2d at 1111-13. Accordingly, the cross-examination restricted by the trial court in the instant case was relevant and the trial court erred in determining otherwise. As explained below, under United States Supreme Court precedent, this constituted a violation of Timmons' rights under the Confrontation Clause.

In *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, (1986) the United States Supreme Court provided an analytical framework for evaluating whether a trial court's limitation of cross-examination amounts to a violation of the Confrontation Clause. There, the Court explained that the focus must be "on the particular witness, not on the outcome of the entire trial." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435. On this point, the *Van Arsdall* Court held that:

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."

Id. (quoting *Davis*, 415 U.S. at 318, 94 S.Ct., at 1111)). The *Van Arsdall* Court also succinctly restated this test as follows: "[whether a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination." *Id.*

Applying *Van Arsdall* to the facts of the instant case, it becomes clear that Timmons has stated a violation of the Confrontation Clause. Defense counsel was prohibited from pursuing "otherwise appropriate cross-examination." *Id.*[8] Had the jury been exposed to the facts of the prohibited cross-examination (that C.L. recklessly made false allegations in a statement to police and she did not include these in a previous statement), it would certainly have been able to "appropriately draw inferences relating to the reliability of [C.L.]." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435. Stated differently, "a reasonable jury might have received a significantly different impression of [C.L.'s] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination." *Id.*

In sum, it should be stressed C.L. was the State's star witness, and the case essentially turned

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[8] As explained above, Mississippi Rule of Evidence expressly mandates that "[c]ross-examination *shall not be limited to* the subject matter of the direct examination and *matters affecting the credibility of the witness*." M.R.E. 611(b) (emphasis added). Also explained above, Mississippi case law holds that a defendant's right to cross-examination "extends to and includes the right to fully cross examine the witness on every material point relating to the issue to be determined that would have bearing on the credibility of the witness and the weight and worth of his testimony." *See e.g., Myers v. State*, 296 So. 2d 695, 700 (Miss. 1974) (see p. 11 supra for additional citations).

on her believability, The prohibited area of cross-examination was clearly relevant, as it bore directly on her truthfulness, bias, and credibility. It was material to the case and "certainly [bore] on the credibility of [C.L.] and the weight and worth of [her] testimony." *Horne*, 487 So. 2d at 215-16 (quoting *Myers*, 296 So. 2d at 700)). Accordingly, under the above-cited authority, the trial court violated Timmons' Sixth Amendment right to confrontation by limiting C.L.'s cross-examination.

B. The trial court's violation of Timmons' right of confrontation was not harmless.

"[A] violation the Confrontation Clause is subject to 'harmless error' analysis." *Earl v. State*, 672 So. 2d 1240, 1243 (Miss. 1996) (citing *Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431)). "In order for a violation of a constitutional right to be held harmless, this Court must determine that the violation was harmless beyond a reasonable doubt." *Haynes v. State*, 934 So. 2d 983, 991 (31) (Miss. 2006) (citing *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824 (1967)). In Chapman, the United States Supreme Curt adopted the following test for determining whether constitutional error is harmless: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 828.

In *Van Arsdall*, the United States Supreme Court held that when determining whether a trial court's limitation of the defendant's cross-examination of a State's witness amounts to harmless error, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. 673, 685 106 S.Ct. 1431. The Mississippi Supreme Court has held that "even errors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming." *Clark v. State*, 891 So. 2d 136, 142 (¶29) (Miss.

2004) (citing *Riddley v. State*, 777 So. 2d 31, 35 (Miss. 2000)). To the contrary, the United States Supreme Court holds that "[w]hether such an error is harmless in a particular case *depends upon a host of factors*. . . ." *Van Arsdall*, 475 U.S. 673, 685 106 S.Ct. 1431 (emphasis added). These factors include the following:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. Thus, the "weight of the evidence" is but one factor to be considered in determining whether constitutional error is harmless beyond a reasonable doubt.

Applying the *Van Arsdall* factors to the instant case, the trial court's error was not harmless beyond a reasonable doubt. First, C.L.'s testimony was of the upmost importance, as her testimony was the only direct evidence that she and Timmons had sexual intercourse. Where, as here, the defendant is seeking to cross-examine the State's principal witness, his or her right to broad cross-examination is especially important. *See Suan*, 511 So. 2d at 148; *Eason v. State*, 916 So. 2d 557, 563 (¶29) (Miss. App. 2005). Second, there was no other testimony in evidence concerning C.L.'s false allegations and the fact that she did not initially report these allegations. Third, the evidence adduced at trial was very contradictory. Defense was allowed fairly thorough cross-examination of C.L. on other topics, but the prosecution's case was rather weak, as evidenced by the jury's verdict of not guilty on three counts.

In sum, "there is a reasonable possibility that the [prohibited cross-examination of C.L.] might have contributed to [Timmons'] conviction. *Chapman*, 386 U.S. at 23, 87 S.Ct. at 828. Accordingly, the error is not harmless and Timmons is entitled to a new trial.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.*

The evidence adduced at trial was extremely contradictory and hopelessly confusing regarding the dates of the events that allegedly occurred during the time period at issue. This cast doubt on the State's witnesses credibility as well as the ability of the jury to reach a verdict based on the facts. Consequently, the jury sent the question to the trial court during deliberation: "Is it permissible for the jury to find statutory rape on one of the dates only and on the other dates not guilty? Then one count of statutory rape? Do you need the date for one count?" (Tr. 400-01). Ultimately, the jury found Timmons guilty of only Count one, which allegedly occurred on July, 30, 2006. Incredibly, of the four counts charged, the evidence pertaining to Count 1 was the most contradictory and confusing.

There was little testimony as to Counts II, III, and IV. C.L. testified that she had sex with Timmons on each of the dates charged in these counts–August 2, August 3, and August 5, 2006. (Tr. 174-76, 208-12). However, there was very little other testimony as to what occurred on these dates.

However, regarding Count I, alleged to have occurred on July 30, 2006, the evidence was

very conflicting. C.L. first testified that Timmons was at the Lawson's house "the whole day" on July 30, 2006, and they had sex "between 11:30 and 1:00 the next morning." (Tr. 205-06). However, on cross-examination, C.L. testified that the casino trip (on July 30, 2006) was the first night she had sex with Timmons; and the Lawson's (and Timmons) left for the casino around noon and returned later that night. (Tr. 215). Further, Doerner testified that, on July 30, 2006, Timmons spent the whole day with her, stayed at her house that night, and was in his bed at her house when she woke up the next day. (Tr. 312-13).

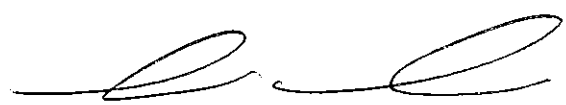
The jury's verdict of guilty on Count I was against the overwhelming weight of the evidence. Of the four counts charged, the evidence pertaining to Count I was the most contradictory and confusing. This Court would sanction an unconscionable injustice if this verdict is allowed to stand. Accordingly, Timmons is entitled to a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed above, 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 this case should be remanded for a new trial on the merits of Count I.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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