IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-02140-COA

PATRICK WILLIAM COX **APPELLANT**

VERSUS

STATE OF MISSISSIPPI **APPELLEE**

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF ON THE MERITS BY THE APPELLANT

Oral Argument will be sought

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Patrick William Cox v. State of Mississippi

Cause No. 2008-KA-02140-COA

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

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So certified, this the 19th day of February, 2010.

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Patrick William Cox v. State of Mississippi

2008-KA-02140-COA-

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. The trial court erred in giving Instruction S-4 and denying Instructions D-6 and D-7, which were a proper statement of law existing in 2006. Instruction S-4, concerning an essential element of the offense of forcible rape, was based on a 2007 legislative amendment to the definition of "sexual intercourse," thereby impermissibly subjecting Mr. Cox to an *ex post facto* law in violation of ART. I, SEC. 9-10, U.S. CONST.

II. The trial court erred in refusing to suppress rape kits from both Jenna Ross and Mr. Cox as both kits were incomplete and crucial evidence was lost by police. Furthermore, the record demonstrates substantial contradiction among law enforcement officers responsible for ensuring proper chain of custody, raising serious questions of tampering or contamination.

III. The trial court erred in admitting testimony by a social worker under MISSISSIPPI RULE OF EVIDENCE 803(4); the testimony was inadmissible hearsay as the witness clearly testified she was not a diagnostician, nor did she seek to provide immediate treatment to Ross.

IV. The quality of the evidence adduced at trial lacks both sufficiency and the necessary weight to support the verdict of the jury, particularly in view of the prejudicial errors this record demonstrates.

V. The trial court erred in barring Mr. Cox from introducing the fact that Jenna Ross filed a premises liability lawsuit against owners of the gas station at which the alleged kidnapping occurred as it was evidence of bias.

STATEMENT OF THE CASE

A. Disposition of the Proceedings Below

Patrick William Cox was indicted in Cause No 07-0615 (1); (2); (3) in connection with the alleged kidnapping, carjacking and forcible rape of Jenna Ross on November 11, 2006 by a Hinds County grand jury, all in violation of MISS. CODE ANN. §§ 97-3-65; 97-3-1 and 97-3-53 (1972). CP 5.

Mr. Cox came on for trial by a jury of his peers on September 22, 2007 and on September 29, 2008, he was found guilty on all three counts. T. 1346; CP 81. Upon conviction, he was sentenced to twenty-eight (28) years on Count 1 (rape); fifteen (15) years on Count 2 (carjacking) and thirty (30) years on Count 3 (kidnapping), all to be served consecutively in the custody of the Mississippi Department of Corrections. T. 1353-1354; CP 82-87; RE 7-12. Mr. Cox was 42 years old at the time of his conviction.

Upon pursuit of post-trial motions, all of which were denied, Mr. Cox filed notice of appeal of his conviction, which has been assigned to this honorable Court. CP 132; 134.

B. STATEMENT OF THE FACTS

The critical question on the convoluted facts of this case are whether a carjacking, a kidnapping and a forcible rape ever occurred on the night of November 11, 2006 beginning at the Sunrise Food Mart on Highway 18 South.

Two facts make the allegations of Jenna Ross virtually impossible: First and foremost, the most sensitive DNA testing available found *no* evidence of the DNA of Mr. Cox *inside* Ross, a requirement of the statute at the time these events occurred. T. 1009; MISS. CODE ANN. § 97-3-65 (Supp. 1998).

Second, while Jenna Ross insists she was kidnapped about 11 PM, forced into her own car and then taken to a deserted side road and raped, this Court must consider that the first report

of her alleged abduction came about 10:30 to 10:35 PM through Marie Wright, close friend of Ross in Vicksburg, who said she received a call from Ross screaming over her cellular telephone, "take me back to the store on 18. You can keep the truck. Please, just don't hurt me. I have three kids." T. 249-250. Wright testified, without rebuttal, that she called 911 in Vicksburg only to be transferred to the Hinds County Sheriff's Department in Raymond. T. 250. Jackson police received the first radio dispatch at 10:40 PM that night - *more than ten minutes before Ross testified the alleged abduction occurred.* (Officer Taafe Hughes [T. 262; 294]; Officer Keith Dowd [185]; Det. Kimberly Brown [T. 1202-1203]). A Sunrise Food Mart surveillance tape with an automatic time and day stamp shows Ross making a cash purchase at 10:52 PM Nov. 11, 2006. *(Exhibit 24).* After the alleged kidnapping, Ross testified that her first surreptitious call with her cell phone was to 911, another fact unassailably refuted by Lt. Mary Riddley of the Jackson Police Department 911 center. Lt. Riddley testified that automated 911 records show *no* call ever received that night from the cell phone of Ross; the first 911 call of which there is a record was from Gregory Young, recorded at 2316 Nov.11, 2006, or 11:16 PM., nearly a half an hour *after* police were first dispatched on the call. T. 373; *Exhibit 12.*

The Chase

Shortly before 11 PM on the night of November 11, 2006, Jenna Ross was late for work and low on gas. T. 1038; 1079. Ross, who worked an 11 PM shift at Mississippi State Hospital at Whitfield was traveling north on Highway 18; she had just dropped off two of her three children with a sitter in Utica and she testified she telephoned her supervisor to say she would be late. T. 1036. Ross then whipped around to Highway 18 South, bypassing a large, well-lit gas station at Wal-Mart, before she stopped at the Sunrise Food Mart. T. 1036; 1039; 1084. Ross testified she made the unwieldy detour because Sunrise gas was cheaper. T. 1084.

Ross testified she pulled in Pump No. 2 as all the other bays were full. T. 1042; 1088; 1092. A video culled from store surveillance cameras shows Ross entering the store and making a cash purchase at 10:52-10:53 PM. T. 890; *Exhibit 24.* As she fueled her car, Ross testified an unknown black man approached and asked her for a screwdriver. Ross replied she did not have one, yet the man kept edging closer; Ross testified she was hemmed in by the rubber gas hose snaking into her car and the man, with nowhere else to go. T. 1091. The man then told her to get in her car and threatened to kill her if she did not comply; he made a clicking noise with something in his pocket, although she admitted she never saw a gun and no gun was ever found. T. 1042; 1075. Ross climbed into her car, then into the back cargo area of her vehicle, screaming she said, as the unknown man, whom she later identified as Patrick Cox, climbed in behind her and took off with the gas nozzle still attached to the car. T. 1045; 1070. However, Sunrise worker Naresh Kumar testified that at the same time, he was a car or two away, chatting with a customer and never saw a pump on the ground and heard no one screaming T. 1222. Store cashier LaQuisha Harris had a full view of the fuel bays from the front window and saw no such altercation; the station pumps were also equipped with automatic alarms which would have gone off had the car driven off still attached to the pump. T. 1233. No alarms went off that night. T. 877. Det. Holly Haywood testified she went by the next morning and pointed out to owner Ravinder Sherma a gas nozzle on the ground, of which Sherma said he was unaware. T. 1213.

Ross testified that she begged the man to return to the gas station, but he said nothing. She then remembered she had her cell phone, which she pulled out and dialed 911. Testimony at trial, however, from Lt. Mary Riddley, chief of the JPD 911 call center, said the automated system had no record of a call from the cell phone registered to Ross. T.373; *Exhibit 12.* Ross also testified that she tried to reach Marie Wright. (T. 1049). When no help materialized, Ross testified she then telephoned Gregory Young, father of one of her three children. T. 1051. Ross

testified she did not speak to Young directly, but kept the telephone line to his home open, demanding to be returned to the store, pleading to be spared because of her three young children and identifying landmarks along the way. Ross testified that she had child locks engaged on all the back seat and cargo area doors, so could not escape. T.1050; 1052.

Young testified that he telephoned 911, and while the record is unclear as to which officer arrived first, Jackson Police Officer Taafe Hughes testified she responded to a dispatch call at 10:40 PM to the Alta Woods Terrace home of Young's mother – oddly enough, some fifteen minutes before the alleged carjacking and kidnapping occurred. T. 262 At 10:42 PM, Officer Hughes met a distraught Young outside the home, holding a cordless home telephone; the two went inside so that Hughes could monitor the telephone call. T. 264. Also responding was Officer Keith Dowd, who arrived shortly after Hughes and who briefly listened in on the telephone call. T.180; 185-186. Dowd testified he thought he recognized from statements by Ross where she might be located, so he left to try and find her. T. 182. On the way, Dowd testified he radioed other precinct officers to assist in trying to track down the gold Chevy Equinox. T. 183.

Meanwhile, Ross testified that her assailant stopped the car in a dark neighborhood that to her, appeared abandoned. T.1055. He demanded she come into the front seat and to remove her clothing. T.1056. Ross told the jury she "tussled," screamed and tried to resist her attacker; she told him she was HIV positive and he said he was HIV positive. T. 1058. As she continued to resist, he told her he would put two bullets in her head and finally wrapped a car cell phone charger around her neck to try to strangle her into submission. T 1060. A physical examination just hours later, however, found no evidence of such a strangulation attempt. T. 428. At this point, Ross said she complied and after licking her neck and breast, the man raped her. T.1058; 1059.

Officers were still attempting to locate Ross; Hughes remained on the telephone at the home of Gregory Young and Dowd had mobilized a group of officers searching for the Equinox. T. 183; 275. Finally, Hughes lost the connection to the cell phone of Ross and could not restore it; Ross later testified that the man found the cell phone and smashed it to prevent further calls.T. 276; 1061. While they were parked on the roadside, Ross testified she noticed a white Chevrolet Lumina pass by; distracted, the man tried to start her car to drive off, during which Ross testified she bolted from the front seat and at first sought help from the driver of the white car. T.1064. Ross realized, however, clad only in socks and a shirt pushed up to her neck that the Lumina driver might present a more dangerous option, so she ran across Highway 49 and into the BP gas station then run by Willie Harris. T. 1065.

Harris testified he was closing up when he looked up to see a virtually nude woman banging at the front glass. T.302; 303. His employee let her in, Harris took her to the back room, gave her a large garbage bag for covering and called 911. T. 303. Hughes immediately notified Young when she received word that Ross was at the gas station and took Young with her to the gas station, while Dowd and fellow officers continued to search for her car and the alleged assailant.

Officers came upon her car at the corner of Red Oak Circle and Gary Drive off Highway 49. T. 728-729. Officer Malcolm Macon testified that as they shined a light, they saw an unidentifiable figure run from the car. T.729; 731. Within moments, Dowd arrived and telephoned for help from Deputy Jon Cooley, who at that time worked with a blood hound named Stella. T. 194; 313. Upon arrival, Cooley testified he rubbed a cloth against areas in the Equinox the assailant might have touched then gave it to Stella to scent. T. 317. Almost immediately, the dog headed north, police testified. T.195. Cooley led the way, while other officers remained in the rear; eventually, they came to a house and what appeared to be a

concrete fence surrounding several abandoned cars. T. 196; 325; 733. Stella went to one vehicle and sat down. T.326. Police approached and found Mr. Cox inside, who although he tried to appear sleep, was sweating profusely and panting. T.198; 737. Officers then went to each of the vehicles and in all rounded up three other men sleeping in abandoned vehicles. T. 739.

Dowd testified all four of the men were given warnings required under *Miranda v. Arizona* there on the scene. T. 200-201. Dowd had a digital video camera that he used to take photographs of all four men, including Mr. Cox. T 202. The photograph of Mr. Cox, however, is by far the most clear and well- lit. *Exhibit No. 1-4;* T. 205. Pictures of the other men were illuminated by pole lights and stem lights from police cars. T. 226. While other officers remained on the scene with the four men, Dowd took the camera to the University Medical Center, where Ross had been taken by ambulance for treatment. T. 202. There, Dowd gave the camera to Detective Kimberly Brown, who had been dispatched to the hospital to investigate a suspected sexual assault. T. 202.

Brown testified that she took the camera in to Ross; Ross identified Mr. Cox as her assailant as soon as she saw his photograph. T. 855

The hospital

Once at the hospital, Ross was interviewed by Martha Pentecost, a social worker, and Patty Welch, a registered nurse, for a patient history. T. 384; 416; *Exhibit 13.* Pentecost, who repeatedly testified she was not there to diagnose or treat, but solely to take note of the demeanor of Ross and determine a desire for follow-up counseling, was present for a session during which it appears both she and Welch questioned Ross about the events of the evening. T. 381; 386-387; 404.

Welch identified herself as a SANE nurse – Sexual Assault Nurse Examiner – a certification awarded by the International Association of Forensic Nurses after training and

testing. T. 413. In fact, Welch was *not* a certified SANE; she did not even take the examination until nearly two years later, the week prior to the trial of this cause. T.459; 460; 477. Upon cross-examination, Welch said the designation was a 'job distinction' rather than a certification. T. 459. Nevertheless, it was Welch who conducted the collection of evidence from the person of Ross and it was Welch who performed the internal examination and took both external (in the neck and breast area) and internal swabs from Ross for the rape kit. T. 467; 468; 471. *Exhibit 11.*

According to the testimony of Welch and Pentecost, Ross told them she was raped by an unknown black man who told her he was HIV positive and threatened to kill her. T. 398; 400; 417. Ross also said that her assailant choked her with a cell phone charger cord, yet neither Welch nor any other medical personnel documented any bruising or other sign that Ross had been choked with a cord. See *Exhibit 11* [diagram of injuries] *Exhibit 13* [medical records]. Welch testified that she found no obvious internal injury of Ross, (T. 473), but did note bruising to the arms and blood about the mouth, which Ross told Welch occurred during her physical struggle with the assailant. T. 424. Dr. Grace Santa Teresa, one of the physicians, testified a yeast infection could also account for the redness, but no test was done. T. 428; 432; 540.

Meanwhile, as Ross underwent examination, police on the scene brought Mr. Cox to UMC after Ross had identified him.T. 210; 746. Officer Dowd testified he again informed Mr. Cox of his rights under *Miranda v. Arizona,* and that Mr. Cox thereafter wrote out a short statement, witnessed by Officer Dowd and Det. Brown. T. 218. Mr. Cox agreed to take a suspect rape kit examination to prove he did not have sex with Ross. T. 218-219.

Garrett Whiddon, a UMC emergency room nurse, conducted the rape kit collection of evidence from the clothing and person of Mr. Cox. T. 487-488. *See also Exhibit 7.* The kit included oral swabs and a blood sample, as well as hair, to develop a DNA profile of Mr. Cox. T. 494-495. This was the first rape kit Whiddon had ever performed. Whiddon collected the wind

suit Mr. Cox wore, placed it into one of two rape kit envelopes and sealed them with his signature, noting there were *two* envelopes. T. 496. The outer envelope also shows that Officer Reginald Craft signed for both envelopes, although the envelope containing the clothing of Mr. Ross and other evidence collected as he disrobed were never found. T. 502. Whiddon testified he did not recall giving the two-envelope kit to Craft; he thought he locked the evidence in a hospital refrigerator. T. 511.

The matter of the missing envelopes arose again when it came to collection of evidence from the examination Welch performed of Ross.

Welch vehemently insisted that she collected all required evidence into *three* envelopes, yet evidence shows only *one* envelope admitted into evidence. *See Exhibits 11; 14* [rape kit of Ross and manila envelope containing hospital report]. Welch testified she had three envelopes, including two that held the garbage bag Ross wore upon admission, her top and socks.T. 447. Upon cross-examination, Welch was forced to admit the rape kit of Ross was not only missing two envelopes of clothing, but also missing a completed summary page, including the identity of one taking history, performing examination and listing all persons present during the examination. T. 475. Nevertheless, Welch, insisted that she "never" failed to include evidence required for the rape kit and that she turned over all three envelopes – including socks, trash bag and blouse – to a policeman. T. 463- 466.

Testimony regarding chain of custody of the two rape kits, particularly in view of the loss of at least three envelopes of missing evidence - including all clothing worn by Ross and Mr. Cox - is completely contradictory.

Officer Dowd testified he picked up from Whiddon the rape kit done on Mr. Cox and that he did NOT receive a second envelope, only one; T. 221-222; 233.

Officer Reginald Craft testified he received the rape kit done of *Ross* from nurse Welch. Craft testified he picked up one envelope, transported it to Precinct 1, logged into evidence and locked it in evidence refrigerator. T. 353-354. *See Exhibit 11.*

Welch testified she personally handed all three envelopes to the officer who collected the rape kit on Ross. She testified she could not remember to whom she handed the three evidence envelopes. T. 465.

Contrary to his testimony, Reginald Craft received the rape kit of *Mr. Cox* from nurse Whiddon, as demonstrated by the signature of Craft on one of the envelopes. T. 500. The second, now missing envelope contained the dark blue windsuit Mr. Cox wore at arrest. T. 501.

Detective Kimberly Brown testified that Officer Dowd took the rape kit of Mr. Cox, while Craft collected the rape kit done of Ross. T. 865.

The records that did survive show only that Reginald Craft received the rape kit of Mr. Cox from nurse Whiddon. T. 500. No written record shows Dowd received the rape kit of Ross – with two of its three envelopes missing – from nurse Welch, although Welch clearly testified the receiving officer must sign for everything he receives. T. 463.

The DNA testing

Latanya Thomas, Jackson Police Department crime laboratory analyst, conducted a preliminary analysis on the vulvar, vaginal and rectal swabs taken from Ross early morning of November 12, 2006, all of which tested negative for the presence of semen. T. 675. Thomas testified she received only one envelope on Ross and one envelope on Mr. Cox. T. 677.

The swabs were then sent to the Mississippi Crime Laboratory, which at the time contracted with another laboratory to do DNA analysis. T. 625. A black hat with a hair recovered from the Equinox vehicle, several other hairs and the dried secretion swabs as well as blood samples from both Cox and Ross were sent to a laboratory in 2007 then known as Reliagene. T.

625. Gina Pineda of Reliagene, now known as Orchid, testified that their tests showed the dried secretion swabs contained a mixture of DNA from both Ross and Mr. Cox. The hair in the hat was confirmed to contain the DNA of Mr. Cox, although the hat recovered from the vehicle (T. 552) was not the one Deputy Cooley vividly remembered Mr. Cox wore when officers found him – black with purple flames. T. 336; 338; 340.

The prosecutor at that point then contacted Scales Biological Laboratory in Brandon, to see if more sensitive and modern testing could show a DNA profile connecting Mr. Cox to the crime. T. 677.

Testimony again becomes very contradictory; the prosecution ultimately confessed to the court there was a break in the chain of custody. T. 909.

Kenny Lewis, an investigator with the Office of the Hinds County District Attorney, took the stand to testify he took the rape kits from Mr. Cox and Ross to Scales on separate occasions in order to determine whether testing would show a "Y" DNA chromosome on swabs taken from Ross from perhaps a skin cell, rather than semen or sperm. T. 690-692; 950.

The morning after Lewis' testimony, however, defense counsel sought again to suppress evidence from both rape kits due to a review of earlier provided discovery materials which showed Wayne Monroe, not Kenny Lewis, took the rape kit of Ross to Scales Laboratory. *See Exhibit 25.* Monroe testified that when he first received the rape kit of Ross, which he kept in his office, it was sealed up. T. 934. After he retrieved from Scales, it had been opened several times. T. 934. An evidence submission form showed Lewis brought the rape kit of Mr. Cox to Scales on august 22, 2008. T. 950; 951 *See Exhibit 27.*

Katherine Moyse of Scales laboratory, analyzed the material from the rape kits and testified that female DNA on vaginal swabs can sometimes 'mask' any male DNA present. T.955. The "Y" chromosome test, a very sensitive and more modern test, looks only for DNA on

a "Y" or male chromosome, she testified. T. 956. Moyse said there was a match between the Y chromosome found on the vulvar swabs taken from outside the vagina of Ross and the DNA of Mr. Cox and no match found with the vaginal swab of Ross. T. 970; 1009. Moyse acknowledged, however, that she could not tell the source of the male "Y" chromosome; it could have been a finger, male blood or saliva. T. 1015.

Defense DNA expert John Wages testified, however, that the "Y" chromosome could also have been produced by the male hormones left in the reproductive tract of Ross, who had had an abortion just four weeks prior to November 11, 2006. T. 1132; 1133. Further, Wages testified that tests such as Scales conducted is a multi-step process and each step offers great opportunity for contamination or cross-contamination. T. 1139-1140. Both rape kits had been examined numerous times by several entities – the Jackson Police Department, Reliagene/Orchid and Scales. Finally, Wages also testified that skin cells, known as epithelial cells, could be transferred from one person to another and possibly wind up in the folds of tissue outside the vagina through rubbing of private parts. T. 1151. While Wages admitted he could not exclude Mr. Cox as the contributor of the "Y" chromosome, he insisted that other possibilities existed that explained the presence of his "Y" chromosome on the vaginal swab. T. 1151-1152. Moyse, in turn, testified that DNA of Mr. Cox included a very rare allele that was not used in the statistical analysis because of its rarity. When the presence of this very rare allele is factored in the DNA analysis, the chance of its occurrence is one in 700 trillion. T. 1192.

SUMMARY OF THE ARGUMENT

The trial court essentially subjected Mr. Cox to a constitutionally impermissible *ex post facto* law when it instructed the jury on an essential element of the crime of forcible rape based on a statute amended a year *after* the events of Nov. 11, 2006. The U.S. Constitution forbids such laws and Mississippi case law requires that one be tried by the law as it existed at the time of the alleged crime. Alternatively, Mr. Cox argues that the trial court substantively amended the indictment by jury instruction, which is not permitted under Mississippi law.

Mr. Cox also argues that he more than raised a reasonable inference of tampering or contamination in the rape kits taken that night and that it was prejudicial error to deny the *Motion to Suppress* before trial and then during trial, when testimony showed so much of the evidence missing. The internal swabs from which DNA was drawn and analyzed were the only link to show vaginal penetration of Ms. Ross; this took three laboratories and more than two years. It was an abuse of discretion and enormously prejudicial to Mr. Cox to deny the *Motion to Suppress* after the broken chain of custody was documented in testimony.

Further, Mr. Cox contends it was prejudicial to permit social worker Martha Pentecost to testify; she was by her own admission not a diagnostician. The treating physician referred to reliance on the notes of the examining nurse. The trial court abused its discretion in permitting her testimony under MISS.R.EVID. 803(4). The trial court also erred by refusing to permit the jury to hear that Ross had filed a civil suit against the Sunrise Food Mart; this fact demonstrated bias and a motive to lie.

Finally, Mr. Cox argues the evidence was both insufficient and lacked proper weight to support the verdict of the jury. The inability to prove vaginal penetration and the inconsistent timing of events as shown by official police dispatches and automated 911 records, as well as store surveillance cameras, prove that events did not occur as Ms. Ross alleged.

ARGUMENT

I. The trial court erred in giving Instruction S-4 and denying Instructions D-6 and D-7, which were a proper statement of law existing in 2006. Instruction S-4, concerning an essential element of the offense of forcible rape, was based on a 2007 legislative amendment to the definition of "sexual intercourse," thereby impermissibly subjecting Mr. Cox to an ex post facto law in violation of ART. I, SEC. 9-10, U.S. CONST.

On November 11, 2006, the date these events were alleged to have occurred, the forcible rape statute under which Patrick William Cox was charged and indicted contained the following definition of sexual intercourse sufficient to complete the crime. MISS. CODE ANN. § 97-3-65(6) (1972) "For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female."

The Mississippi Legislature in 2007 amended MISS. CODE ANN. § 97-3-65(6) to define sexual intercourse this way: "For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female."

The standard of review when appellate courts consider issues involving jury instructions is well-established. Jury instructions must be read as a whole to determine if the instructions were proper. Jury instructions must fairly announce the law of the case and not create an injustice against the defendant. This rule is summed up as follows: "In other words, if all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." *Davis v. State*, 18 So.3d 842, 847 (¶14) (Miss. 2009) [internal citations omitted]. The Court in *Davis* goes on to recite the familiar discretionary standard which guide

trial judges in evaluating jury instructions: "The court may refuse an instruction *which incorrectly states the law*, is covered fairly elsewhere in the instructions or is *without foundation in the evidence.*" *Id.*, (¶ 15).

In the case now before this honorable Court, Mr. Cox respectfully submits that the trial court abused its inherent discretion when it gave Instruction S-4 which used a later version of the statute under which he was indicted, thus violating the right of Mr. Cox to be free of *ex post facto* laws. Art. I, Sec. 9-10, U.S. Const. Alternatively, Mr. Cox argues that the trial court substantively amended the statute by jury instruction, which this Court does not permit.

In *Butler v. State*, 608 So.2d 314 (Miss. 1992), the Mississippi Supreme Court reversed the capital murder conviction of Sabrina Butler in connection with the child abuse death of her son. It did so in part because the trial court instructed the jury based on an amended version of the statute, not the law as it stood when the disputed events took place. While the Court ruled Butler was procedurally barred from raising her *ex post facto* claim due to failure to object at trial, the Court held "on retrial she is entitled to have the jury instructed according to the statute [sic] as it read at the time of the commission of the offense." *Id.,* at 321.

Mississippi case law has long frowned on efforts to instruct the jury based on a later amended statute. In *Barton v. State*, 47 So. 521 (Miss. 1908), the Court held that no indictment may be had under a statute for an offense committed before the statute was a law. In *Britton v. State*, 101 Miss. 584; 58 So. 530 (1912), the Court considered an *ex post facto* claim regarding an illegal liquor sale conviction. The issue was enhanced penalties for *subsequent* offenses, not the offense which Britton appealed. The Court held that a crime committed before a change is made in a criminal law is prosecuted under the law as it stood before the change. 53 So. 530 at 531.

What is an ex post facto law? The United States Supreme Court, still somewhat in its infancy and fresh with the memory of British *ex post facto* law, answered the question definitively in *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386 (1798). At issue was the Connecticut Legislature's passage of a law which set aside a probate court decree to give the losing litigant, Caleb Bull, the right of appeal. Calder appealed to the United States Supreme Court, alleging that the Connecticut enactment amounted to an *ex post facto* law in violation of the nascent U.S. Constitution. The Supreme Court held it was not, but Justice Chase went on to explain what an *ex post facto law* is. "Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. *Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Id.*, at 390. [emphasis added]. Further, the Court in *Calder v. Bull* held that the doctrine of *ex post facto* law applies exclusively to penal or criminal statutes. *Id.*, at 391.

Turning to the evidence in this record, clearly, then the State would be hard put to prove forcible rape under the definition of sexual intercourse as existed on Nov. 11, 2006, for no fewer than three different DNA tests, including one of the most sensitive and sophisticated tests currently available, could *not* detect the presence of DNA from Mr. Cox in the vagina of Jenna Ross. T. 1009. Only the vulvar sample, collected from outside the vagina, produced the "Y" profile chromosome. T. 1009. Physical examination on Nov. 12, 2006 showed some vaginal redness, but no obvious injury. T. 473; 539. Further, the attending emergency physician testified other sources could account for the vaginal redness, such as a yeast infection. T. 540.

The prosecution at trial argued that case law concerned sexual battery of a child, dealt with under a wholly different statute, equated sexual battery with rape and that therefore, the amended definition of sexual intercourse applied. Respectfully, Mr. Cox was not charged with sexual battery of a child; he was indicted for forcible rape of an adult female, Jenna Ross. CP 5. The DNA evidence failed to show his penis penetrated her vagina, a requirement of the statute in 2006. T. 1009. Mr. Cox would submit that the trial court abused its discretion and violated his fundamental right to be free of the application of *ex post facto* law when it granted the following instruction submitted by the state. T. 1295 RE 23.

Instruction S-4

> The Court instructs the jury that in order to sustain a conviction for the offense of forcible rape, that sexual intercourse must be proved beyond a reasonable doubt. That is that some penetration of the sexual organ of the female by the sexual organ of the male must be proved. However, it need not be full penetration. Proof of the slightest penetration of the sexual organ of the female by the sexual organ of the male is proof of sexual intercourse. It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia by the male sex organ is sufficient. CP 96; T. 1257.

The court also abused its discretion when it denied Instructions D-6 and D-7, submitted by Mr. Cox and which tracked the statute then in effect. T. 1295; RE 23

Instruction D-6

> The Court instructs the jury that in order to find the defendant guilty of rape under the statue [sic] for which is charged, the jury must find that Patrick William Cox engaged in forcible sexual intercourse with the complainant and that sexual intercourse is defined by law as:
>
> "a joining of the sexual organs of a male and female human being in which the penis of the mail is inserted into the vagina of the female." CP 76.

Instruction D-7

> The Court instructs the jury that if the jury does not find that "the penis of the [sic] Patrick Cox was inserted into the vagina of the

> [sic] Jenna Ross" beyond a reasonable doubt then the jury must find that Patrick William Cox is **NOT GUILTY** of forcible sexual intercourse. CP 73.

Alternatively, Mr. Cox would argue the trial court committed reversible error because by granting Instruction S-4, the judge substantively amended the indictment as returned by the grand jury of Hinds County, Mississippi. *Rushing v. State*, 753 So.2d 1136 (Miss.Ct.App. 2000) (Court reversed aggravated assault conviction because the indictment did not allege use of a deadly weapon; trial court substantively amended indictment by instructing the jury on aggravated assault with a deadly weapon).

Therefore, Mr. Cox respectfully asks this honorable Court to reverse and remand this cause for a new trial due to failure to instruct the jury on the law as it existed at the time.

II. The trial court erred in refusing to suppress rape kits from both Jenna Ross and Mr. Cox as both kits were incomplete and crucial evidence was lost by police. Furthermore, the record demonstrates substantial contradiction among law enforcement officers responsible for ensuring proper chain of custody, raising serious questions of tampering or contamination.

The left hand knew not what the right hand was doing.

When reviewing the testimony regarding the loss of critical evidence and the broken chain of custody on the rape kits collected from both Mr. Cox and Ross, one can only conclude that this case demonstrates like no other that literally, the left hand had no idea what the right hand was doing. Consequently, potentially critical evidence was lost and the prosecutor was forced to acknowledge in open court a breach in the chain of custody for the rape kits. T. 909.

Any challenge to a ruling admitting or excluding evidence that requires reversal must show prejudice to the fundamental right of a party to a fair trial, so long as a proper objection was lodged at trial. MISSISSIPPI RULE OF EVIDENCE 103(a). The rulings of the trial court are reviewed under an "abuse of discretion" standard and when the trial court employs the incorrect

legal standard or, as is the case here, ignores the appropriate legal standard, this Court traditionally employs a *de novo* review. *Delashmit v. State*, 991 So.2d 1215 (Miss. 2008). Central to any ruling on admission of evidence is whether or not it is relevant to the critical issue, for if it is irrelevant, the rules of evidence exclude it. MISS.R.EVID. 402.

Mr. Cox challenges here, as he did at trial, the admission into evidence the rape kits of both Jenna Ross and Mr. Cox and denial of his *Motion to Suppress* when substantial problems regarding chain of custody were adduced throughout trial. RE 14; 19; 20; T. 67; 923; 971. Evaluation of the chain of custody, or the progression of the possession of physical evidence, is one avenue by which trial judges exercise their inherent gate-keeping function and exclude evidence that is not genuine or authentic. MISS.R.EVID. 901. For if the evidence is not genuine or lacks "evidence sufficient to support a finding that the matter in question is what its proponent claims" then the disputed evidence is irrelevant and is excluded. MISS.R.EVID. 901(a); 402. "This Court has held that the test of whether there has been a proper showing of the chain of possession of evidence is whether there is *any indication or reasonable inference of probable tampering* with the evidence or *substitution* of the evidence." *White v. State*, 722 So.2d 1242, 1244 (¶ 12) (Miss. 1998). The principles of MISS.R.EVID 901, a virtual mirror of its federal counterpart, "apply also to establishing the chain of custody of an exhibit." *U.S. v. Jardina*, 747 F.2d 945, 951 (5th Cir., 1984).

Turning to the facts of this case, Patty Welch, an RN who was not, as advertised, a Sexual Assault Nurse Examiner (SANE), collected the rape kit of Jenna Ross at the University of Mississippi Medical Center (UMC). T. 460. Welch testified unequivocally that she handed over *three* evidence envelopes containing internal swabs, the socks, top and trash bag Ross wore and other items required by the rape kit instructions. T. 463.

Nurse Garrett Whiddon performed the rape kit on Mr. Cox. T. 488. Whiddon testified, without rebuttal, that he handed over *two* envelopes to police, including one containing the clothing Mr. Cox wore at arrest. Upon his arrival at the Hinds County Detention Center, Mr. Cox was clad only in a hospital gown. T. 1116.

Consider the following testimony from police regarding the journey of the rape kit and missing clothing to the police evidence locker:

- Under oath, Officer Keith Dowd testified that he picked up from Whiddon the suspect rape kit, Exhibit 7. T. 221-222; upon cross-examination, Dowd said he did not receive a second envelope or bag of clothing. T. 233. Dowd did not verify his signature on the rape kit chain of custody form.

- Officer Reginald Craft of Precinct 1 testified he received from Nurse "Walsh" (Welch) the rape kit done on Ross. T. 353-354.

- Nurse Welch identifies the Exhibit 11, the rape kit of Ross and testifies vehemently that the envelopes were sequentially numbered, one of three, two of three and three of three. T. 429; 447; 463. Welch does not remember to whom she gave the three envelopes, but each envelope has a form for chain of custody, which apparently was left blank. T. 464-466.

- Nurse Whiddon identifies Exhibit 7, the rape kit of Cox, and Reginald Craft as the policeman who signed for the rape kit envelope and the bag containing clothing of Mr. Cox. T. 500-503.

- Detective Kimberly Brown testified that Officer Dowd took the rape kit of Mr. Cox, while Officer Craft took the rape kit of Jenna Ross. T. 865.

- Latanya Thomas, JPD forensic analyst, received only two envelopes – Exhibits 7 and 11 – as the total rape kit for Ross and Mr. Cox. T. 677.

After two chemical examinations, by the JPD crime laboratory and Reliagene, failed to establish DNA evidence linking Mr. Cox to the alleged rape, the prosecutor forwarded the evidence – which sat in an investigator's office for an unknown period of time – to Scales Biological Laboratory for the more sophisticated and sensitive testing of vulvar and vaginal swabs. T. 926. Nevertheless, defense expert John Wages testified as to the potential for

contamination on a microscopic scale that could result in a positive DNA match when, in fact, there was none. T. 1141; 1143.

Under oath, both Kenny Lewis and Wayne Monroe, investigators with the Hinds County District Attorney's office, testified each took first the rape kit for Ross, then the rape kit for Mr. Cox to Scales Biological Laboratory. T. 689; 918; 920. Lewis even testified on cross-examination that the rape kit of Ross felt cold, as though it came out of a refrigerator. T. 693. When defense counsel discovered that it was Monroe, not Lewis, who took the rape kit of Ross to the Scales laboratory, the prosecution admitted there was a break in custody. T. 896; 909. Evidence submission forms from Scales show Monroe brought the rape kit of Ross to Scales. *Exhibit 25*. Lewis brought the rape kit of Mr. Cox to Scales. T. 950; *Exhibit 27*.

When considering the facts and the irreconcilable testimony concerning the custody of both rape kits, the loss of potentially exculpatory clothing for both Mr. Cox and Ms. Ross, Mr. Cox submits he more than met his burden to produce evidence of a broken chain of custody (i.e., tampering) as required *Hemphill v. State*, 566 So.2d 207, 208 (Miss. 1990). Clearly then the trial court had before it overwhelming evidence that *at best* raised a substantial inference of tampering with the rape kits and the missing-in-action clothing and at *worst* a potential fraud on the court.

Just as clearly, Mr. Cox submits to this honorable Court that this record plainly demonstrates an abuse in judicial discretion meriting reversal in admission of the rape kits. The prejudice to Mr. Cox in admission of the rape kits cannot be overstated as it was DNA testing from samples in the rape kit that linked him to the alleged rape. Therefore, under the authority of *Doby v. State,* 532 So.2d 584, 588 (Miss. 1988), Mr. Cox respectfully urges reversal of this cause, with instructions to suppress obviously suspect evidence.

III. The trial court erred in admitting testimony by a social worker under MISSISSIPPI RULE OF EVIDENCE 803(4); the testimony was inadmissible hearsay as the witness clearly testified she was not a diagnostician, nor did she seek to provide immediate treatment to Ross.

The trial court erred in admitting the testimony of Martha Pentecost, UMC social worker under MISS.R.EVID. 803(4). T. 396; RE 17. While Mr. Cox recognizes the exception, the problem is that Pentecost by her own admission is not a diagnostician. T. 404. Pentecost testified her presence there was to "calm" the patient and to ask the patient if follow-up counseling was desired. T. 381; 383. The treating physician, Dr. Grace Ellen Santa Teresa, testified that she relied upon information collected by the *nurse* in diagnosing and treating Ms. Ross. T. 525; 538.

The vast majority of cases dealing with this exception involve children who may tell non-medical personnel the identity of an abuser or that the child is being abused or both. Defense counsel was able to locate one case dealing with an adult rape victim in similar circumstances, *Madere v. State*, 794 So.2d 200 (Miss. 2001), in which the defendant challenged as inadmissible hearsay a statement to the nurse, "I thought he was going to kill me." *Id.*, at 213, (¶38). The nurse was the one who took the initial history and collected a rape kit when Elizabeth Medina went to the hospital emergency room after her attack. The Mississippi Supreme Court held the statement was properly admitted as an exception to the hearsay rule under both MISS.R.EVID. 803(4) and 803(2) as an excited utterance, for Medina was hysterical when brought to the emergency room. *Id.*, at 214 (¶¶ 43-44).

Madere is quite distinct from the facts of this case. "In order to allow hearsay under M.R.E. 803(4), the declarant's motive in making the statement must be consistent with the purposes of promoting treatment and the content of the statement must be such as is reasonably relied on by a physician in treatment. *Id.*, at 213 (¶40) [internal citations omitted]. While counsel for Mr. Cox disagrees that the statement, "I thought he was going to kill me," qualifies as one

consistent with the purposes of promoting treatment or that a physician would rely upon such statement for treatment, the statements to *Pentecost*, although part of the medical record, were explicitly *not* relied upon by the treating physician as demonstrated by her testimony. The only reason that the prosecutor could have had for calling Pentecost was for cumulative purposes and to prejudice the jury against Mr. Cox.

In *United States v. Williamson*, 26 M.J. 115 (1988), the military court, using federal evidentiary rules like our own, reversed the molestation conviction of Williamson based on the impermissible statements by the maternal grandfather identifying Williamson, the natural father, as the abuser of his child. The maternal grandfather, who at the time was seeking custody of the child, made the statements to a social worker. The court held that two conditions must be met before such statements may be admitted, virtually reciting the rule and Advisory Committee comments. First, the statement must be made for purposes of medical diagnosis or treatment and second, that the patient must make the statement "with some expectation of receiving medical benefit from the medical diagnosis or treatment that is being sought." *Id.* Since that was not the case here; Pentecost did not diagnose or offer treatment, beyond asking whether Ross wanted follow-up counseling. Mr. Cox submits that is insufficient to shoe horn her testimony through this exception. As Mr. Cox noted above, the vast majority of reported cases dealing with this exception involve children, some very, very young, and most hold that identification of the perpetrator or diagnosis of the abuse is certainly necessary to treatment of a child.

This record does not present those facts and it was simply error to admit the testimony of Pentecost. Further, as a matter of policy, to so broaden the rule to drain the vitality from the ban against the use of hearsay.

IV. The quality of the evidence adduced at trial lacks both sufficiency and the necessary weight to support the verdict of the jury, particularly in view of the prejudicial errors this record demonstrates.

Sufficiency

At the close of the prosecution's case and at the close of all evidence, Mr. Cox sought a directed verdict from the trial court, which was denied. T. 1110; 1253; RE 20; 21. Mr. Cox renewed his challenge to the sufficiency of the evidence in his motion for a new trial, which was denied. CP 113-1132; RE 13.

In evaluation of whether the evidence is sufficient to sustain a conviction, "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that *every element of the offense existed*; and where the evidence fails to meet this test, it is insufficient to support a conviction." *Dilworth v. State*, 909 So.2d 731, 736; ¶ 17 (Miss. 2005) (internal citations omitted). The evidence is reviewed in the light most favorable to the prosecution "to determine whether a rational juror could have concluded *beyond a reasonable doubt* that all elements of the crime were satisfied. The proper remedy for insufficient evidence is for the Court to reverse and render." *Johnson v. State*, 2008-KA-01176-COA (¶ 14) (Nov. 3, 2009), citing *Readus v. State,* 997 So.2d 941, 944(¶ 13) (Miss.Ct.App.2008) (internal citation omitted) (emphasis in original).

In the case at bar, the record shows clearly that the state could not prove vaginal penetration of Ms. Ross by Mr. Cox under the statute as it existed on Nov. 11, 2006. T. 1009. On that date, vaginal penetration by a penis was an essential element of the crime of forcible rape. In *any* light, the evidence simply failed to prove beyond a reasonable doubt that Mr. Cox forcibly raped Jenna Ross.

The prosecution also failed to show that he kidnapped her and carjacked her Chevrolet Equinox. Why? The timing of events and the fact that Jackson police received the first radio

dispatch at 10:40 PM that night - *more than ten minutes before Ross testified the alleged abduction occurred.* (Officer Taafe Hughes [T. 262; 294]; Officer Keith Dowd [185]; Det. Kimberly Brown [T. 1202-1203]). The Jackson 911 center received no frantic call as Ross testified; Lt. Mary Riddley of the Jackson Police Department 911 Call Center categorically refuted that testimony. T. 373; 1047. Apparently, it was the 10:30 to 10:35 PM telephone call of the friend of Ms. Ross, Marie Wright, to 911 in Vicksburg that Ross was being abducted and raped that set events in motion – nearly a half hour before Ross alleged they occurred. T. 250.

Finally, there is the fact that Ross pulled up to gas her car at a station that was in the *opposite* direction of her work; a station that required her to pass a large, well-lit station at Wal-Mart on Highway 18. T. 1083. Every pump, except Pump No. 2, was full. T. 1041. Sunrise worker Naresh Kumar was chatting with a customer at most two car lengths away. T. 1222. Store clerk LaQuisha Harris had a full view of Pump 2 and noticed nothing out of the ordinary; neither Kumar nor Harris had any recollection of a car pulling off with the gas nozzle still attached. T. 1230; 1237 Finally, a store alarm system keyed to the pumps, to prevent drive-offs, never went off, as it should have in such an instance. T. 877.

Therefore, Mr. Cox respectfully argues that reviewing the evidence in the light most favorable to the prosecution, the record fails to show beyond a reasonable doubt forcible rape of Ms. Ross by Mr. Cox and fails to show beyond a reasonable doubt, based on the chronology of events as established by official records and consistent witness testimony, that a kidnapping and carjacking occurred.

Weight

Alternatively, Mr. Cox challenges the weight of the evidence. When reviewing whether the verdict is against the overwhelming weight of the evidence, this Court sits as a hypothetical "thirteenth juror;" reversal may be had only when a verdict "is so contrary to the overwhelming

weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Lamar v. State,* 983 So.2d 364, 367(¶ 5) (Miss.Ct.App.2008) (citing *Bush v. State,* 895 So.2d 836, 844(¶ 18) (Miss.2005)). When an appellate court disagrees with the verdict of the jury, the proper remedy is to grant a new trial. *Id.* (internal citation omitted).

Mr. Cox preserved his challenge to the weight of the evidence in his *Motion for a New Trial or in the alternative, Judgment Notwithstanding the Verdict.* CP 113-1131. The brief recitation of facts discussed above and demonstrated by this record do not support the version of events as alleged by Jenna Ross. Mr. Cox argues that to permit this conviction to stand on the convictions of carjacking and kidnapping would be to sanction an unconscionable justice.

Therefore, Mr. Cox most humbly asks this honorable Court to reverse his conviction and remand for a new trial.

V. The honorable trial Court committed reversible error when it granted the *motion in limine* of the prosecution to bar any mention of a civil suit the complainant currently had pending against Sunrise Food Mart regarding the incident. By preventing Mr. Cox from showing bias of Jenna Ross, the trial court thus violated confrontation and fair trial rights secured to Mr. Cox under the federal and state constitutions.

The fact that complainant Jenna Ross had a civil lawsuit pending against Sunrise Food Mart in connection with the November 11, 2006 incident was the subject of a *motion in limine* filed by the prosecution in order to bar mention of the suit before jurors. RE 15; T. 79. This was prejudicial error. "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." MISS.R.EVID. 616.

Thus, it was an abuse of discretion in *Sanders v. State*, 352 So.2d 822 (1977) for the judge to deny the defendant the right to cross-examine a prosecution witness as to his bias against Sanders. Sanders had previously served as a deputy sheriff and arrested the state witness

on a drug charge. This Court held that such evidence was material on the question of the motive of the witness to testify against the defendant in that case. *Sanders*, at 824. It was error in *Bennett v. State*, 757 So.2d 1074 (Miss. App. 2000), for the judge to exclude the testimony of the defendant's mother to testify as to the identity of the individual in a videotape of a controlled drug buy. The defense of the defendant, her son, was that of mistaken identity. Questions of bias, this Court held, go to the weight the jury should give the testimony. The mother was subject to impeachment under M.R.E. 616. *Bennett*, at 1077. In *Smith v. State*, 733 So.2d 793, 801-802 (Miss. 1999), this Court reversed a capital murder conviction for the failure of the trial court to permit full cross examination of a prosecution witness. "[T]he right of confrontation and 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." *Id.*, citing *Horne v. State*, 487 So.2d 213, at 216 (Miss. 1986) (*additional citations omitted).*

The analysis here is most simple. What weight would the jury have given to the testimony of Ross if they were aware of her pending civil suit against Sunrise? Surely, any hope of recompense to Ross through the civil suit would be substantially diminished by a jury verdict acquitting Mr. Cox. The relevance, however, of such evidence is crystal clear; particularly when analyzed under MISS.R.EVID. 616, a rule which basically reaffirms "the common law use of impeachment by bias, prejudice or interest." *Comment*, MISS.R.EVID. 616. Further, the trial court acts within its inherent gate-keeping function to instruct the jury on what use they may make of the testimony in order to fairly weigh the credibility of the individual who is giving testimony.

It was an abuse of discretion prejudicial to the right of Mr. Cox to confrontation and a fair and impartial trial under the federal and state constitutions to deny him the right to fully cross-

examine Ross about the lawsuit he filed and reveal to the jury his interest, bias and motive for testifying against Mr. Cox. This error, particularly when coupled with errors mentioned elsewhere in this appeal, deprived Mr. Mr. Cox of his fundamental right to a fair and impartial trial.

CONCLUSION

For the foregoing reasons and supporting authority recited here, Mr. Cox respectfully requests this Court reverse his convictions and remand this cause for a new trial, conducted consistent with court rules and minimum protections as decreed by the United States and Mississippi constitutions.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be delivered via hand delivery a true and correct copy of the foregoing *Brief on the Merits by Appellant*, to the following:

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