IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009 - KA - 00796 - COA and
NO. 2009-KA-00797-COA

TYSHUNNA COOPER ROSS **APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

Tyshunna Cooper Ross, Appellant;

Boty McDonald, Esq., trial attorney;

Martha Brown, Justin M. Taylor, Leslie Lee, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

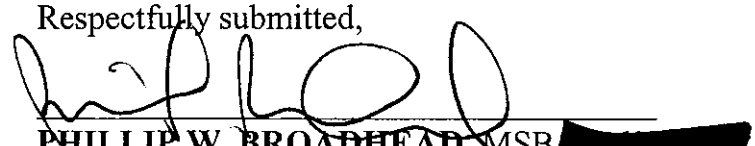
Michael Guest, Esq., District Attorney, **Jacqueline L. Purnell, Esq.,** Assistant District Attorney, Office of the District Attorney;

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

Honorable Samac Richardson, presiding Circuit Court Judge; and

Madison Police Department, investigating/arresting agency.

Respectfully submitted,



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STATEMENT OF INCARCERATION

Tyshunna Cooper Ross is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

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

STATEMENT IN SUPPORT OF ORAL ARGUMENT

As this case is extremely fact-intensive, the Appellant, through counsel, respectfully would request this Court to grant oral argument, to present the conflicts in the rulings of the trial court that she alleges are based on erroneous testimony and evidence presented at trial.

STATEMENT OF THE CASE

Guests around the swimming pool at a fourth of July cook-out in the affluent community of Madison, Mississippi, could not have imagined that scandal would soon touch their host's family, and most especially A.B., the eldest son. Because of his actions, he would be merely sent away to military school, beyond the reach of local gossip. (T. II. 161-2) Yet a woman's reputation and freedom, indeed her very life, would be lost because of events that he claimed had taken place later in the day in his upstairs bedroom. By the summer of 2007, A.B. had moved beyond innocence, and into mischief that led to the mandatory, eighteen year

prison sentence that the Appellant in this case is now serving, day-for-day.

At twelve, A.B. had already acquired the taste for alcohol by raiding his parents' liquor cabinet, (T. II. 155), and could distinguish between being "just sort of drunk" and "plastered. (T. II. 101) He watched pornography on the Internet, (T. II. 135-36), and carried a condom in his wallet, (T. II. 87, 176), an article that appears in the following narrative as a symbol of his misplaced, adolescent libido. (T. II. 131-3) He was audacious enough to offer money to comely, thirty-seven year old Tyshunna Ross (hereinafter "Shunna"), whom A.B. knew because he had previously "dated" one of her daughters, (T. II. 78), asking her to buy alcohol for him. (T. II. 85, 97) He claimed that he saw her every two to three weeks at soccer games and "out and about," that they "stayed friends," (T. II. 78, 113), perhaps because she accepted to purchase beer. (T. II. 78, 96)

Shunna was locked out of her house on the third of July and allegedly sent a text message to A.B. inviting him to come and "hang out" in her carport. (T. II. 79) The version of the events he gave to the police is inconsistent with his trial testimony, but A.B. walked over to meet her, accompanied by either one or two fourteen-year olds. (T. II. 80, 99) It is undisputed fact that they drank shots of vodka provided by Shunna, while discussing where she could spend the night, (T. II. 80, 99-100, 183), and then accompanied her, suitcases in tow, into the woods running between the subdivisions of Madison. (T. II. 184) It is at this point that A.B.'s version of the events first diverges from that of Shunna, who later admitted to police that she had given alcohol to minors. (T. II. 197)

A.B., however, told police on the ninth of July that both he and his friend, C.D., had

kissed Shunna and fondled her breasts in the woods. (T. II. 90, 103, 184, 195) They searched at their parents' nearby houses for a tent in which she could pass the night, but returned to the woods with only a chair. (T. II. 103) Sometime between 6:00 and 6:30 p.m., they finally snuck Shunna through a window into C.D.'s bedroom, where she remained for several hours until she realized that she had no choice but to call Carter Sessions, a man with whom she had an abusive relationship, to come and pick her up. (T. II. 81, 106-7) A.B., who had the house staked out, was intimidated when Sessions arrived and spoke menacingly to him. (T. II. 81, 108)

When A.B. got home that evening, he took advantage of his parents being outside on the back patio by inviting C.D. and two girls to come over, then foreshadowed things to come by sneaking them up the stairs to his bedroom. (T. II. 110-12) When Brittain Wharton, the mother of A.B., became suspicious and picked the lock on his door around 11:00 p.m., she discovered sexual activity in her son's bedroom; A.B. was in his bed with one girl and C.D. in the recliner with the other. (T. II. 111, 174) The following day, on the fourth of July, A.B., apparently undaunted, sent Shunna a text message around noon, and gallantly extended to her the hospitality of his bedroom that night, in order to "[help] out an old friend," as he testified later at trial, when she allegedly told him that she still had no place to stay. (T. II. 82, 115) Later, after watching the fireworks at Freedom Park, Shunna called A.B. to alert him when she was only five minutes away. (T. II. 115-16) Martin McRae observed him waiting for her on the street, as he dropped her off near the Wharton residence around 8:30 p.m. (T. II. 180)

A.B. testified that he had no ulterior motive, no "sexual or intimate" intention while accompanying Shunna to his bedroom but nevertheless had her wait outside the laundry room, and then in the garage, while he made sure the coast was clear before walking her up the back stairs. (T. II. 84, 119) Shunna drank one beer from the 20-pack that he had taken that afternoon from the back porch while his parents were preoccupied with their departing guests, (T. II. 117-8, 121-2), then they simply sat on the floor watching television for while, (T. II. 85, 120), until A.B. expressed that he was tired and they went to bed, where they lay facing in opposite directions, fully clothed. (T. II. 122)

Shunna later corroborated A.B.'s story, except that she insisted that no sexual contact of any kind ever took place between them. (T. II. 197) The following version of events, beginning with the allegation that Shunna kissed and touched A.B. under his clothes while lying in bed, A.B. first told to police on the thirteenth of July, after he reported having sexual intercourse to his mother. (T. II. 86-7) During his audio taped interview with police that afternoon, (Exh. 1), he could not remember whether the "hand job" that he had alleged earlier in the day had taken place before or after intercourse. (T. II. 157) Probably because his mother had discovered him with a girl the previous night, A.B. testified at trial that he told Shunna to get on the floor. He was concerned about the bed squeaking. (T. II. 87) He couldn't remember who kissed who first, (T. II. 131), only that "intimacy grew" to the point that Shunna nodded approval when he reached for a condom conveniently hidden under his wallet, near the bed. (T. II. 87, 133, 135-6) He gave different versions of penetration, one in which Shunna had to guide him because he "couldn't find the vaginal hole," and another

in which he had no difficulty "mov[ing] around till [he] found the hole." (T. II. 156-7, 141) During this supposed first sexual encounter of his life, Shunna, a mother of three, presumably whispered the "f" word into A.B.'s ear. (T. II. 140) He testified that he could not get the condom to flush down the toilet after orgasm, so he discarded it in the trash can in his room on the way back to bed, (T. II. 142), the very same trash can into which he testified that he was careful not to place Shunna's beer bottle, for fear that it would be discovered by Wharton. (T. II. 158)

Wharton again picked the lock and discovered them around midnight. (T. II. 143) The women knew one other, (T. II. 72, 162-63), but Wharton did not initially recognize Shunna, who dove under the covers, managing to hide everything but her hair. (T. II. 144) Wharton exclaimed to A.B., "I can't believe that you're doing this again." (T. II. 89) He followed his mother downstairs, explaining that there had been no intercourse, a version of the events that he maintained for over a week in his interviews with the police and at the Children's Advocacy Center (hereinafter " CAC"). Wharton later testified that A.B. had called up the steps to tell Shunna that it was okay for her to come down, (T. II. 166), contradicting A.B.'s. testimony under oath that they had gone back upstairs together, where Wharton had recognized Shunna for the first time. (T. II. 145) In either event, the women were entirely civil to each another. They smoked a cigarette together on the back patio, (T. II. 145-46), then Wharton, who didn't want to drive Shunna home because she had been drinking, even offered to let her stay overnight in the guest bedroom. (T. II. 168) Shunna, however, phoned her room-mate, who picked her up around two the next morning. (T. II. 168)

The Wharton family left Madison on the fifth and returned on the eighth of July. (T. II. 169) C.D.'s mother phoned Wharton the next day, on the ninth, informing her that she had found out that Shunna had given alcohol to their sons on the third of July. (T. II. 170, 182) That same day, A.B. and C.D. were interviewed by Dennis Davenport at the Madison Police Department. (T. II. 170) The original complaint, contributing to juvenile delinquence by the issuing of alcohol, was a misdemeanor. (T. II. 182) Wharton, however, gave police a condom wrapper found in A.B.'s room. She later testified at trial that her housekeeper, who "knew about the lady [having been] up in [A.B.'s] bedroom," had given her two condom wrappers that she had found there. (T. II. 172) Wharton admitted that she gave one wrapper to the police, without disclosing the fact that a second one had also been found in A.B.'s room, after A.B. indicated "which one was his," judging by the markings on the package. (T. II. 173, 176) Cross-examined at trial about this wrapper given to the police, A.B. responded, "I gave it to her," speaking of his mother, (T. II. 150), then stated, "I either gave it to her or she found it in my room." (T. II. 150) It was not until the defense counsel "refreshed" A.B.'s memory, just before the trial judge interrupted the line of questioning, that he recalled, "that's it...the maid did find it." (T. II. 151) Defense counsel did not request that the contents of the bench conference called by the trial judge be preserved on the record. Afterwards, as the trial recommenced after a recess, and defense cross-examination about the wrapper briefly resumed, A.B. admitted that his mother had given one of the condom wrappers to the police on the ninth of July, before he ever indicated to her that he had sexual intercourse with Shunna. (T. II. 151)

It was not until the thirteenth of July that Wharton contacted the police to report that A.B. had told her that he had intercourse with Shunna. A.B. later testified at trial that his mother had incessantly "hounded" him until he finally experienced a "meltdown, [or] emotional breakdown," (T. II. 92, 155), and "broke down and start[ed] to cry," saying, "yes, mom, it [sex] did [occur]." (T. II. 92) Despite the fact that he had maintained that there had been no sexual intercourse for over a week, Davenport, accompanied by Mike McGee of the Rankin Sheriff's Department, went first to the Wharton residence to take a statement from A.B. and Wharton, (T. II. 92, 171, 186), and then later conducted an official audio-taped interview at the police station on the thirteenth. (T. II. 188; Exh. S-1) No physical evidence corroborated his statement, however, A.B. again contradicted himself about a towel on which he at first claimed that Shunna had "wiped herself" after intercourse, and then alleged that she hadn't used it, instead he had "wipe[d] [his] hands off, after [he] stuck [them] in her, on her vagina." The towel had "disappeared" by the time he and his mother thought to look for it. (T. II. 158-9)

Despite the fact that A.B. repeatedly changed his version of the events, which did not even include the allegation of sexual intercourse until the thirteenth of July, the State nevertheless premised its entire case upon his uncorroborated testimony. (T. III. 155) He told police on the ninth of July that both he and C.D. had kissed Shunna in the woods, (T. II. 149-50), but then admitted at trial that he alone had physical contact with her. (T. II. 149-50) During the interview at the CAC on the twelfth of July, A.B. again altered his version of the events, adding that he and Shunna had fondled one another in the woods, (T. II. 153), but he

continued to deny that sexual intercourse had taken place. (T. II. 92, 170, 186) He testified for the first time at trial that a third teenager had been present in the woods on July the third. (T. III. 101) He openly contradicted himself, testifying that he and Shunna had begun kissing while sitting on the floor, (T. III. 86), yet had gotten into bed with the intention to sleep. (T. III. 129) He attempted to explain to Davenport on the ninth of July that he had opened the wrapper only to play with the condom, to try to figure out how it worked, (T. II 190), then stated at trial that he knew all about condoms from watching pornography on the Internet. (T. II 135-6) Cross-examined about where he got the condom, A.B. stammered that he "had gotten it from a guy that [he] didn't even know." (T. III 87)

Although the lesser charge of contributing to juvenile delinquency was dismissed, Shunna spent almost nine months in jail from the time of her arrest on July 18, 2007, (T. II. 189, 192), following the issuing of a warrant after Wharton contacted the authorities, having decided that something improper had occurred in her son's bedroom, until she was finally indicted for gratification of lust by the Madison County Grand Jury on April 9, 2008. (CP. 5, RE. 12-13) Then, over a year after the alleged incident in A.B.'s room, on July 7, 2008, she was further indicted for sexual battery. (CP. 5, RE. 12A-13A) After her arrest, Shunna explained her presence in his bedroom on the fourth of July when she told McGee that she had been hiding at the Wharton home out of pure fear, where she thought that Carter Sessions would not find her. (T. II. 197-8)

The two charges in the separate indictments returned against her by the Rankin County Grand Jury were consolidated and tried together. The Court denied both the defense's motion

for a directed verdict and motion for a verdict JNOV, or alternatively, a new trial. (C.P. 46, 48) Shunna was found guilty by a unanimous jury, and convicted of gratification of lust and sexual battery, for which she received respective prison terms of fifteen and forty years, to be served consecutively. (CP. 50, RE.16-19) Her sentence was corrected to eighteen years in the custody of the Mississippi Department of Corrections, to be served day-for-day, followed by a supervised release period of five years. (CP. 51, RE. 16-19) Additionally, she was forced to register as a sex offender.

Aggrieved by both verdict and sentence, the Appellant perfected this appeal on May 15, 2009. (C.P. 55, RE. 23)

SUMMARY OF THE ARGUMENT

This case addresses an episode in the life of a weak and emotionally vulnerable woman, frightened of her abusive boyfriend, who exercised poor judgment and fell prey to a spoiled, opportunistic adolescent. A.B. systematically changed his version of the events in order to vilify Shunna, wrecking his own credibility and her life in the process. In the end, she was found guilty of crimes that were not proven by credible evidence beyond a reasonable doubt, and was given a heavy term of imprisonment by the trial judge, while her accuser went free without consequences for his actions.

A.B. changed his version of the events several times and continually contradicted his own as well as his mother's sworn testimony. One, among the numerous inconsistencies in the prosecution's case, stands out as particularly flagrant: A.B. had two girls in his room on

July 3, 2007, the night before the alleged incident with Shunna, and two condom wrappers were found there sometime between the fifth and the ninth of July. No reasonable juror could have found Shunna guilty beyond a reasonable doubt based upon the weight of such evidence. Although clearly untrustworthy, A.B.'s uncorroborated allegations against Shunna went virtually unchallenged by the defense, during an investigation and trial characterized by a clear presumption of guilt.

Additionally, the State failed to carry its burden to establish a legally sufficient case. No corroborating evidence existed to indicate that the alleged touching and penetration ever took place. Since adolescents typically lie to protect their interests, especially when encouraged to do so by their parents, it is logical to infer that these necessary elements of the crimes charged never, in fact, occurred. Shunna, a mother of three, who candidly admitted that she had provided minors with alcohol, had nothing in her past to suggest that she was capable of sexual crimes.

Additionally, but for the insufficient performance of defense counsel, the Appellant probably would not have been convicted at all. Defense counsel made no pre-trial motions *in limine* or to suppress, called no witness on behalf of the defense, failed to make a single objection at any point in the proceedings, and allowed witnesses to offer inconsistent and contradictory evidence without effective challenge through impeachment. He failed to adequately preserve the trial record for appeal purposes and to incorporate key points of the trial testimony into his final argument, most notably, when he did not demonstrate to the jury the intentional suppression of evidence by the key witness's mother that would probably have

changed the outcome of the trial. He also offered no alternative jury instructions on behalf of the defense for the trial court's consideration.

These errors committed by defense counsel were compounded by the trial judge's clear violation of ***Mississippi Rule of Evidence 611***, by cutting off a crucial line of cross-examination of the complaining witness. His interference with defense cross-examination resulted in the stifling of a critical line of questioning of the complaining witness that deprived the Appellant of her constitutional rights to the due process of law and a fundamentally fair trial, as well as to fully confront and cross-examine the witnesses brought against her. This injustice was compounded by the cutting off of testimony that, if left to properly continue, would have revealed the contradictions and lies infecting the entire process. For the above reasons, this honorable Court should reverse and render the case, thereby discharging the Appellant from custody or, in the alternative, it should reverse and remand these cases to the lower court with proper instructions for a new trial on the merits.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION FOR NEW TRIAL SINCE THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE CONSISTENT, PLAUSIBLE EVIDENCE PRESENTED AT TRIAL, OR, IN THE ALTERNATIVE, IN ITS FAILURE TO GRANT THE APPELLANT'S MOTION FOR A DIRECTED VERDICT (J.N.O.V.) BECAUSE THE CONTRADICTORY EVIDENCE PRESENTED AT TRIAL WAS LEGALLY INSUFFICIENT EVEN TO MAKE OUT A *PRIMA FACIE* CASE.

Depriving a woman, who exercised poor judgement, of eighteen years of her life because of the lies and contradictions of an adolescent, represents a serious miscarriage of justice. Shunna was convicted even though A.B. blatantly changed his story during the police investigation, at the Child Advocacy Center (CAC), and even several times during his trial testimony. He even openly admitted that he had lied several times to his mother, the police, and to the CAC agents. No reasonable juror could have possibly convicted Shunna based on the weight and worth of such mendacious evidence, which consisted of numerous outright lies. The State also failed to establish a legally sufficient *prima facie* case and no reasonable, fair-minded juror could have found the Appellant guilty of every element of the crimes charged based on the contradictory, implausible, and self-impeached testimony presented by the State. Recognizing that the weight and the legal sufficiency of the evidence are distinctly separate issues, the Appellant would present both in this single Argument section. The standard of review in these matters is abuse of discretion by the trial judge.

A. *The trial court erred in not granting the Appellant's motion for new trial since the verdict of the jury was against the overwhelming weight and worth of the evidence presented at trial.*

In ***Bush v. State,*** 895 So.2d 836 (Miss. 2005), the Mississippi Supreme Court clarified the standard of review for determining whether a jury verdict is against the overwhelming weight of the evidence. ***Id.*** at 844. If the Court, sitting as the "thirteenth juror" and weighing the evidence "in the light most favorable to the verdict," should find that upholding a jury verdict would result in an unconscionable injustice, it should not hesitate to exercise its authority to reverse and remand a case for a new trial. ***Id.*** In ***Dubose v. State***, 320 So.2d 773

(Miss. 1975), the Court held that a victim's uncorroborated testimony may be evidence, the weight of which is legally sufficient to support a verdict of guilty; but then qualified that guilt. at least for rape, may be premised on uncorroborated testimony of the prosecuting witness only if "the testimony is not discredited *or* contradicted by other credible evidence." ***Id.*** at 774; *see* also, ***Parramore v. State***, 5 So.3d 1074, 1077 (Miss. 2009) (emphasis added). A guilty verdict should not be allowed to stand should the sole witness' testimony be discredited or contradicted. ***Id***. Although Shunna admitted that she provided alcohol to minors, the only evidence against her in these sexual charges was the uncorroborated testimony of an adolescent, who changed his story so often that not even he could keep it straight before and during trial. Viewing this evidence, even in the light most favorable to the jury's verdict, the Appellant respectfully submits that her convictions in these charges were based exclusively on uncorroborated, contradictory, implausible, and discredited testimony of A.B. and his mother, the prosecution's complaining witnesses, which was substantially impeached by their own words and actions before and during the course of the trial, and that to allow this verdict to stand would sanction an unconscionable injustice.

A.B. contradicted himself continually from the beginning of this series of confused events, and even testified for the first time at trial that he and two other teenagers had been with Shunna on the third of July, (T. III. 99), after telling police, during the investigation, that he and only one friend were with her in the carport and woods. (T. III. 190) A.B. initially alleged that both he and C.D. had fondled Shunna's breasts in the woods, but later admitted at trial that he alone had touched her, and that he had lied about C.D. so he would not be "the

only one to get in trouble." (T. III. 149-50) He could not remember whether he had touched Shunna's breasts on the first or second trip to the woods, (T. III. 104), and got his story mixed up, speaking of the third of July, when he initially stated that he had gone to his bedroom that night and fallen asleep, (T. III. 109), before remembering that he had invited another one of his friends, C.D., to come over to his house, along with two girls, whom he snuck up the stairs to his room. (T. III. 109-10) After claiming that they had only talked and kissed in his bedroom (T. III. 111), A.B. later admitted that he had been in bed with one of the girls, the same bed that allegedly squeaked so badly that he supposedly had to get down on the floor with Shunna the following night. (T. III. 111)

During the investigation, A.B. told police that nothing of a sexual nature had occurred while Shunna was in his room. (T. III. 151) He maintained that intercourse did not occur at the CAC interview on the twelfth of July (T. III. 152), even admitting during cross-examination that fondling, condoms, and sex had not even been mentioned by him during this interview. (T. III. 154) A. B. testified that it was not until the thirteenth of July that he first alleged that he had sexual intercourse with Shunna (T. III. 155), and only after being prompted numerous times by his mother, who interrogated him about whether sexual intercourse had occurred, that he "finally" reported it to her. (T. III. 155)

A.B. testified at trial that he brought Shunna to his bedroom on the fourth of July because she did not have anywhere else to stay. (T. III. 115) He testified that they got into the bed intending simply to go to sleep. (T. III. 129) Questioned about the details of the alleged sexual intercourse, A.B. testified that he told Shunna to get on the floor because his bed

squeaked (T. III 136), that her scrub bottoms and his pajama bottoms were both pulled down to the knees, (T. III 137-38), and that despite the fact that his kneecaps were touching the floor at about the level of her thighs, her legs were up, behind his back; he even reiterated that Shunna's scrub bottoms had been around her knees. (T. III 139) A.B. testified that after his mother discovered them in bed, (T. III 143), he had accompanied her downstairs, explaining, "you don't understand," and that they went back upstairs to his bedroom together to "confront" Shunna. (T. III 144) A.B.'s mother, however, testified that she did not go back upstairs, but rather that A.B. called up the stairs, then went part way up to bring Shunna down. (T. III 167)

When A.B. was questioned about the condom wrapper given to the police, he testified that he gave it to "her," referring to his mother. (T. III 150) He then changed this story to say, "I either gave it to her, or she found it in my room." (T. III 150) It was not until the defense attorney asked whether it had been the maid who supposedly found the wrapper that A.B. got his story straight. (T. III 150) What he did not reveal in his testimony, however, was that the maid found not one but two condom wrappers, (T. II. 175), but Wharton chose to give only one to the police. When questioned about other physical evidence, A.B. mentioned a towel, allegedly used by Shunna, that he and his mother had attempted unsuccessfully to locate to give to police. (T. III 158) Then he again contradicted himself, admitting that it had not been Shunna who used the towel; he then said he wiped his hands on it, after touching her. (T. III 158)

The Court is required to view the evidence in the light most favorable to the verdict, and also bears the responsibility as the "thirteenth juror," to determine whether the weight and

worth of the complaining witness's testimony is "discredited *or* contradicted" by other credible evidence, so that allowing the verdict to stand would sanction an unconscionable injustice. ***Bush*** at 844. Additionally, Wharton testified that her maid had given her two empty condom packages, (T. III 175), but that A.B. claimed only one as his, without offering an explanation of what the other wrapper was doing in his room. (T. III. 176) Davenport confirmed that Wharton gave him only one condom wrapper, without making him aware that another had been found and was in her possession. (T. III 191) It can be reasonably inferred that both condom wrappers were probably opened and used on the night of July the third, when A.B. admitted that he was in his room with C.D. and two girls. (T. I. 109-10) The Appellant respectfully contends that this key contradiction, by "other credible evidence," represents precisely the mendacious nature of the uncorroborated testimony presented in these cases by the prosecution. A.B. not only lied, but mislead everyone involved on numerous occasions and shaded his testimony at trial in an attempt to conform his answers to what was expected of him by his mother, the police, the CAC, and the prosecution. To allow this verdict to stand, in the face of the prevarications, inconsistences, and contradictions told by this adolescent, would sanction exactly the sort of unconscionable injustice that the ***Bush*** court sought to prevent.

His web of lies began to be spun during the initial police investigation when he suggested that only three, instead of four people were in the carport and woods on the third of July, and fabricated the lie that both he and C.D. had fondled Shunna's breasts. He also admitted having lied at the CAC (T. III. 153), and finally started up a completely different

story by reporting to his mother that intercourse had taken place after all. In the end, he was finally caught, despite every effort to keep all of the stories he had told straight, in his own web of deceit when during his cross-examination, he misunderstood the question, and allowed the defense attorney to stumble, seemingly accidently, onto a line of questioning that began to unravel some of the key inconsistencies and contradictions present in the investigation and trial.

This Court has held that the uncontradicted testimony of a victim may be sufficient to find guilt only if it is not contradicted by other credible evidence. ***Parramore***, *supra*, 5 So.3d at 1077. There is nothing but blatant contradiction upon contradiction in A.B.'s uncorroborated testimony, and the Appellant respectfully submits that the evidence, when viewed in its totality, in the light most favorable to the jury's verdict, does not rise to the level of proof of guilt by credible evidence beyond a reasonable doubt that Shunna Ross did anything other than exercise very poor judgment, in a time of crisis and great personal confusion. As this honorable Court well knows,

> [a] reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Bush, *supra*, at 844 (citations and footnotes omitted) (emphasis added).

To allow this verdict to stand, based exclusively on testimony consisting of a haphazardly contrived set of allegations, would represent an unconscionable injustice at the

core of our criminal justice system. The Appellant urges this honorable Court that in order to uphold this verdict, it must find one of the many varying stories promulgated by A.B. to be the truth. But this begs the question: Which story is the truth? The overwhelming weight of the evidence presented at trial is grossly contradictory to the verdict rendered by this jury. Based on the numerous lies, half-truths, concealments, and contradictions, no reasonable, fair-minded juror could have possibly found Shunna anything but "not guilty." Therefore, the Appellant respectfully asks that this Court fulfill its role as the "thirteenth juror," in order to correct this unconscionable injustice perpetuated against her, and use its authority to reverse the verdicts of the jury as well as the sentences handed down by the trial judge, and remand this case to the lower court with proper instructions for a new trial.

B. *The inconsistent and blatantly contradictory evidence at trial was legally insufficient even to establish a prima facie case against the Appellant.*

Because of the mendacious nature of the State's case was so legally insufficient, it should never have even been presented to a jury for their consideration. The Appellant respectfully asserts that this honorable Court should reverse and render these cases based on the legally insufficient evidence through this testimony presented at trial in their case-in-chief.

As the Court stated in ***Bush***, *supra,* and also in ***Dilworth v. State***, 909 So.2d 731 (Miss. 2005), the evidence presented by the State of Mississippi in its case-in-chief must show that a crime has been committed beyond a reasonable doubt and that every element of the offense is present, given the circumstances. ***Id.*** at 736. "[S]hould the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant, on any

element of the offense, with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render." ***Id.*** (emphasis added). An appellate court, after reviewing the evidence in the light most favorable to the prosecution's case, is left to decide the question "whether any reasonable trier-of-fact could have found each and every essential element of the crime was proven by credible evidence beyond a reasonable doubt?" ***Id.***

The Appellant respectfully submits that no reasonable juror could have found the requisite measure of guilt beyond a reasonable doubt on the proof as to each and every essential element of the charges in the State's case-in-chief, even considering any inferences that might be drawn from the highly suspicious, ever-changing, and blatantly contradictory evidence and testimony. "Inferences are factual conclusions that can fairly and rationally be drawn or deduced from other facts." ***29 Am. Jur. 2d Evidence, § 199.*** (emphasis added). This definition of the kind and quality of an "inference" is markedly different from that of a "presumption," which has two distinct sub-types: "a permissive presumption is one that leaves the finder of facts free to accept, or to reject, the suggested presumption, whereas a presumption that is mandatory obliges the fact finder, who must presume certain facts, and is not free to reject the proffered presumption." ***Id.*** (emphasis added). It is the contention of the Appellant that the only conclusion that can "rationally be drawn or deduced" from the facts in this case is that the State's complaining witnesses, A. B. and his mother, either lied, shaded the truth, or actively concealed physical evidence crucial to the police investigation.

The only evidence submitted by the prosecution was the uncorroborated, implausible,

contradictory and unbelievable testimony of an adolescent who admitted that he lied on several different occasions during the investigation and during trial. Without repeating each and every instance of contradiction and inconsistency as set out in detail hereinabove in the State's case-in-chief or further citing to A.B.'s admission of repeated lying or shading of the truth to suit the moment, it is obvious that these and the other contradictions and inconsistencies, point to the conclusion that no reasonable juror could have found this testimony to be credible evidence constituting proof of guilt beyond a reasonable doubt as to each and every element of the offenses charged. The State, through its key witnesses utterly failed to meet its burden of proof by producing reliably credible facts in evidence from which factual conclusions could "fairly and rationally be drawn or deduced," and, therefore, did not provide an inferential basis for legally sufficient evidence to enable even a single reasonable juror to find guilt beyond a reasonable doubt. Because no reasonable juror could have possibly found the testimony credible enough to find guilt beyond a reasonable doubt as to any of the element of proof in the charges brought in the indictments in these cases, the Appellant respectfully asks that the verdict of the jury and the sentence handed down by the trial judge be reversed and these cases rendered by this honorable Court, thereby discharging the Appellant from the custody of the Mississippi Department of Corrections.

ISSUE TWO:

WHETHER DEFENSE COUNSEL'S PERFORMANCE AT TRIAL AMOUNTED TO INEFFECTIVE ASSISTANCE BY THE FAILURE TO MAKE ANY PRE-TRIAL MOTION, CALL ANY WITNESSES, OFFER ANY OBJECTIONS DURING TRIAL OR TO EVEN ATTEMPT TO LINK UP KEY INCONSISTENCIES IN HIS SUMMATION, AS COMPOUNDED BY THE

JUDGE'S CLEAR VIOLATION OF MRE 611, THROUGH INTERFERENCE WITH DEFENSE CROSS-EXAMINATION OF THE COMPLAINING WITNESS AND STIFLING OF A CRUCIAL LINE OF QUESTIONING THAT DEPRIVED THE APPELLANT OF HER CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL, AS WELL AS TO FULLY CONFRONT AND CROSS-EXAMINE WITNESSES BROUGHT AGAINST HER, UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

The defense counsel, in representing the Appellant at trial in both of these cases before the Court, filed no pre-trial motions, failed to make a single objection at any point in the proceedings, called no witnesses on her behalf, allowed witnesses to offer inconsistent evidence at trial without an effective attempt at impeachment, offered the trial court no alternate jury instructions, and generally failed to put on a defense case at all. Shunna's legal representative did not incorporate the flagrant inconsistencies in key trial testimony presented by the prosecution into his final argument *or* attempt to demonstrate to the jury the intentional withholding of physical evidence by the complaining witness' mother, both of which would have probably affected the outcome of the trial. (T. II. 150, 172-73) The Appellant respectfully asserts that the sum total of these omissions amounted to an effective failure of the adversarial process that is the key to our criminal justice system's reliability.

The Appellant respectfully contends that counsel's errors were only compounded when the trial judge abused the discretion granted to the court under ***Mississippi Rule of Evidence (MRE) 611(a)*** to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." ***MRE 611(a)***. The judge peremptorily cut the defense counsel off, after he had stumbled, accidently, onto the defense's only significant line of

cross-examination of the key witness, concerning the empty condom wrapper(s) presumably found by the Wharton maid (A.B. testified about only one of the two wrappers found in his bedroom, the one that his mother gave to the authorities as evidence against Shunna). (T. II. 150-51, RE. 24-25) Even when the trial judge inappropriately and peremptorily called him to the bench (without the interposition of an objection from the prosecution) for an "off-the-record" conference, defense counsel still did not make an objection, offer of proof, or even make the simple request that the court reporter take down and preserve the colloquy with the trial court for the record. After this "off-the-record" discussion with the trial court, defense counsel apparently decided to defer to the trial judge's unrecorded instructions, when he chose to move on to another topic rather than to continue to continue to pursue the line of cross-examination about the condom wrappers found in A.B.'s bedroom. (T. II 150-151, RE. 24-25)

The Appellant respectfully contends that the trial judge inappropriately interjected himself into the proceedings, interfered with defense cross-examination, and stifled a crucial line of questioning of the complaining witness which, if left to continue, would have revealed the concealment of the second condom wrapper. Defense counsel clearly abandoned the adversarial responsibility to put the prosecution to its proof required by the ***Sixth Amendment to the United States Constitution*** to make the proceedings "effective for the ascertainment of the truth," when he did not take exception to the call for a bench conference absent an objection from the prosecution and when he failed to request that it be included in the record. *See generally*, ***MRE 611(a)(1)***. The Appellant respectfully contends that such failure of defense counsel amounted to ineffective assistance of defense counsel as a response to

interference by the trial court, depriving the Appellant of her rights to due process of law and a fundamentally fair trial, as well as to fully confront and cross-examine the witnesses brought against her, as guaranteed under the ***Fifth, Sixth, and Fourteenth Amendments to the United States Constitution*** and ***Article 3, § 26 of the Mississippi Constitution***.

Both the police investigation and the trial relied exclusively on the accuser's ever-changing story and inconsistent and contradictory testimony, which went virtually unchallenged by the defense in what amounts to a failure of the adversarial system in these charges. *See generally,* ***U.S. v. Cronic***, 466 U.S. 648 (1984) (holding that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."). Defense counsel, obviously intimidated by the colloquy during the bench conference, epitomized ineffective assistance when he abruptly forsook the line of questioning concerning the condom wrapper found in A.B.'s bedroom, thereby aiding in the quelling of testimony favorable to the Appellant's innocence. The cumulative nature of all of the errors set out hereinabove, enhanced by the trial judge's interference in cross-examination, led to an effective failure of the adversarial system in these two cases brought against the Appellant.

The ***Sixth Amendment*** provides in pertinent part that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." ***U.S. Const. amend. VI.*** This constitutional entitlement is not just to the appointment of a lawyer, but to the effective assistance of counsel. In ***Strickland v. Washington***, 466 U.S. 668 (1984), the United States Supreme Court set forth that counsel's effectiveness is to be assessed by a

reviewing court following a two-pronged test, which was adopted by our state Supreme Court in ***Stringer v. State***, 454 So.2d 468 (Miss. 1984). Under the first prong, in order to rebut the presumption in favor of counsel's performance having fallen within the wide range of professionally acceptable conduct, it must be established that his performance is deficient, one falling below a general, objective standard of reasonable professional conduct. ***Strickland*** at 686; *see also*, **Vielee *v. State***, 653 So.2d 920, 922 (Miss. 1995). The second prong is met only if the deficient performance is shown to have "prejudiced" the accused. ***Id.*** There must be a reasonable probability, one sufficient to undermine confidence in the result of the proceedings, that but for counsel's unprofessional errors, the outcome of the trial would have been different. ***Conner v. State***, 684 So.2d 608, 610 (Miss. 1996).

The ***Strickland*** court recognized that the Constitution does not guarantee "errorless" counsel, and that the actions of counsel are usually informed, strategic choices based properly on information supplied by the defendant. ***Strickland***, *supra*, at 686. In addition to the presumption in favor of counsel's performance as having risen to the level of reasonable competence, counsel's actions are also presumably strategic in nature rather than negligent. ***Handley v. State***, 574 So.2d 671, 684 (Miss. 1990). Courts will not generally second guess defense counsel's tactical decisions or trial strategy. ***Strickland*** at 686; *see also,* ***Marshall v. State***, 759 So.2d 511, 513 (Miss. Ct. App. 2000). In ***Powell v. State***, 536 So.2d 13 (Miss. 2003), the Court found the decision to file pre-trial motions to fall squarely within the ambit of trial strategy. ***Id.*** at 16 (holding the fact that defense counsel did not file a motion that might have produced a gun insufficient to raise a claim of ineffective assistance, where the

defendant produced no evidence to overcome the presumption that not filing a discovery motion was part of his attorney's trial strategy). Neither does the failure to call witnesses, standing alone, demonstrate ineffective assistance of counsel. ***McGee v. State***, 744 So.2d 379, 381 (Miss. Ct. App. 1999) (declining to reach the issue on appeal, without prejudice, where the defendant did not suggest witnesses who could have been but were not called in his defense, and did not indicate what exculpatory evidence these uncalled witnesses might have produced). Additionally, in ***Hall v. State***, 735 So.2d 1124 (Miss. Ct. App. 1999), the Court held trial counsel's alleged failure to put on a defense insufficient, where the defendant did not cite any authority to support his claim of ineffective assistance, and admitted that his counsel had a trial strategy. ***Id.*** at 1127. But in ***Bigner v. State***, 822 So.2d 342 (Miss. Ct. App. 2002), this honorable Court reversed and remanded the defendant's conviction for rape and sexual battery, even though it found defense counsel's choices to file *certain* motions, call *certain* witnesses, and ask *certain* questions to be strategic in nature. ***Id.*** at 350. The ***Strickland*** test is to be applied to the totality of the circumstances of each case to determine if the defendant has been deprived of a fair trial. ***Strickland***, *supra*, at 686. The complete failure of Bigner's defense counsel to file any motions, call any witnesses, enter any evidence crucial to the defense and to make necessary objections during the trial is *not* protected under the trial strategy exception to ineffective assistance of counsel. ***Bigner***, *supra*, at 350.

The process of interviewing potential witnesses and issuing subpoenas to insure favorable testimony is a large part of the individual investigation of trial counsel in a criminal case. ***Bigner*** at 350. Neither counsel for Bigner, not counsel for the Appellant in these cases,

called any witnesses, but rather relied exclusively on the State's witnesses and evidence to make out a "defense case." ***Id.*** (*citing* ***State v. Tokman,*** 564 So.2d 1339, 1342-3 (Miss. 1990)). In both of these cases, defense counsels failed to make pre-trial motions. The records of both cases are replete with testimony about supplying minors with alcohol, a crime for which neither Bigner nor the Appellant were indicted. This Court held Bigner's counsel to be in serious error for failing to object to such testimony throughout the trial. ***Id.*** at 352. Additionally, a failure to give jury instructions gives rise to ineffective assistance of counsel since a defendant is entitled to present his theory of defense. ***Id.*** at 350 (citing ***Yarbrough v. State***, 529 So.2d 659, 662 (Miss. 1988)). Individual errors may combine to make up reversible error if their cumulative effect deprives the defendant of a fundamentally fair trial. ***Ross v. State***, 954 So.2d 968, 101 (Miss. 2007) (quoting ***Byrom v. State***, 863 So.2d 836, 847 (Miss. 2003))

The lack of appropriate responsibility in this case that led to the virtual failure of the adversarial system can be traced up the ladder to the senior, presiding judge. The accused in a criminal trial has a fundamental right, implicit in the confrontation clauses of the United States and the Mississippi constitutions, to cross-examine witnesses brought against her. ***Sayles v. State***, 552 So.2d 1383 (Miss. 1989). The United States Supreme Court recognized that reasonable latitude allowed the cross-examiner, even if he is unable to state to the court what facts cross-examination might develop, is the essence of a fair trial. *See generally*, ***Alford v. United States***, 282 U.S. 687 (1931). Although a judge is given the discretion to order the presentation of evidence under ***Mississippi Rule of Evidence 611(a)***, our state has

traditionally afforded defense counsel wide latitude in cross-examination. ***Nalls v. State***, 651 So.2d 1074, 1076 (Miss. 1995). The right to confrontation extends to and includes the right to fully cross-examine a witness on every material point that would have bearing on his credibility, and the weight and worth of his testimony. ***Horne v. State***, 487 So.2d 213 (Miss. 1985) (*citing* ***Myers v. State***, 296 So.2d 695 (Miss. 1974)). The Appellant respectfully contends that it was completely improper under the circumstances for the trial judge to cut off cross-examination, summon defense counsel to the bench, and require a conference outside the hearing of the jury. This inappropriate stifling of the defense's cross-examination confused the jury, taking power and emphasis away from a critical line of questioning that, if left to continue, would have exposed testimony indicating that the complaining witness's mother deliberately suppressed evidence for the purpose of incriminating Shunna.

Prior to the judge's interruption, A.B. made statements contradicting his mother's trial testimony about how the condom wrapper came to be in her possession. (T. II 150) He acknowledged, as the line of questioning briefly resumed following the bench conference, that Wharton had made the existence of the wrapper known to the police on the ninth of July, before he ever reported intimacy with Shunna. (T. II 151) Wharton presented the police with only one condom wrapper, in an attempt to conceal the fact that not one, but two wrappers were found in A.B.'s bedroom. (T. II 191) In ***Miskelley v. State***, 480 So.2d 1104 (Miss.1985), the defendant's murder conviction was reversed and remanded for a new trial because the lower court unduly restricted cross-examination and impeachment of the credibility of such a crucial witness. The Appellant respectfully asserts that defense counsel should have

eventually objected to the judge's interruption, made an offer of proof if overruled and demanded that the record be preserved at every stage of the bench conference. Defense counsel also negligently failed to connect up this testimony central to the prosecution's theory of the case, when he did not demonstrate in his final argument to the jury that key physical evidence (the second condom wrapper found in A.B.'s bedroom) was intentionally suppressed from the police in order to implicate Shunna in these trumped-up charges.

In ***Cabello v. State***, 524 So.2d 313 (Miss. 1988), the Court held that a judgement nevertheless stands, even if counsel's conduct in a particular case is found to be professionally unreasonable, "if the error had no effect on the judgement." ***Id.*** at 315. There must be a reasonable probability that the deficient performance prejudiced the outcome of the trial, which would have been different had the lawyer's conduct conformed to an objective standard of reasonable professional conduct. A.B.'s mother offered police one of two condom wrappers found in her son's bedroom in an attempt to detract from the implication that both condoms were probably used on the third of July, the night before the alleged sexual battery, when she picked the lock and discovered A.B. and C.D., a witness unfortunately not called by the defense, engaged in sexual activity with two girls. If the fact finder had been allowed to hear the rest of the line of questioning cut off by the judge, or had been made aware of its implication, the result of the trial would have been different. If only one juror had experienced a reasonable doubt of Shunna's guilt after a persuasive final argument of the importance of the probable use of both of the condoms in A.B.'s room on the night <u>prior</u> to the alleged sexual battery, the outcome of the case would have certainly been different.

The Appellant respectfully submits that all of defense counsel's errors and omissions, when viewed in their totality, violate even the most basic measure of effective assistance in the extremely serious charges and the heavy term of imprisonment that she was facing in the two indictments issued in this case. The trial judge ordered that sentencing take place on February 2, 2009. (CP. 45, RE. 14) The Madison County Clerk of Court was informed by letter of the same date that representation of the Appellant herein had been inexplicably reassigned by the trial judge to another attorney. It is not surprising, under these circumstances, that there was no request for a sentencing hearing and no mitigating were witnesses called on the Appellant's behalf. Such cumulatively and conspicuously deficient performance, coupled with the probability of a much different outcome had defense counsel put forth at least some defense on her behalf, satisfies the requirements for a finding of ineffective assistance of counsel as recognized in this state:

> The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). A defendant must demonstrate that his counsel's performance was deficient and that the deficiency prejudiced the defense of the case. ***Id.*** at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." ***Stringer v. State***, 454 So.2d 468, 477 (Miss. 1984) (*citing* ***Strickland***, 466 U.S. at 687).

Jackson v. State, 860 So.2d 653 (¶19) (Miss. 2003) (emphasis added).

It is no crime to exercise poor judgment. There is no meaningful proof that Shunna did anything more than this. It is fundamentally unjust that the adolescent who was so pivotally

involved in this case has been implicated only in terms of his diminished credibility, while the Appellant's reputation, freedom and life have been so thoroughly compromised. Defense counsel breached his duty to diligently defend her with the knowledge and skill of a reasonably competent attorney. The cumulative effect of his professional errors, as compounded by the actions of the trial judge, amounts to the ineffective assistance of counsel that undermined confidence in the outcome of the trial. The Appellant respectfully requests that her conviction be reversed and remanded to the lower court with instructions for a new trial on the merits.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court with instructions for a new trial on the merits. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody. The claims of error in this case are brought by the Appellant under ***Article 3, Section 26 of the Mississippi Constitution*** and also the ***Fifth, Sixth, and Fourteenth Amendments to the United States Constitution***. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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This the 16th day of November, 2009.

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