IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-KA-0847-COA

BENJAMIN ROBERSON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

**BRIEF OF APPELLANT**

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**CERTIFICATE OF INTERESTED PERSONS**

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

1. State of Mississippi
2. Benjamin Roberson

THIS 30th day of November, 2009.

Respectfully submitted,

BENJAMIN ROBERSON

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Washington County, Mississippi where Benjamin Roberson was convicted of sexual battery under Miss. Code Ann. § 97-3-95 (2) (1972) after a jury trial conducted May 7-8, 2009.[1] The Honorable Richard A. Smith, Circuit Judge, presided. Roberson was sentenced to twenty-five (25) years, with five (5) years suspended, and is presently incarcerated with the Mississippi Department of Corrections.

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Miss. Code Ann. § 97-3-95 (2) (1972) A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

## FACTS

R. P. was a fourteen year old girl in June of 2007, living in Greenville. [T. 215, 299-301]. She snuck out of her house in the early morning hours of Monday, June 18, 2007 to visit a boy friend. *Id.* Her mother, Shiela Bracy, discovered R. P. missing about 4:00 a. m. *Id.* Ms. Bracy called the police. [*Id.*, T. 204-05].

Greenville Officer Benjamin Roberson responded to the call. [T. 216, 396-97]. After he spoke with Ms. Bracy, Roberson, Ms. Bracy and her 15 year old son, drove in two vehicles to look for R. P. in the area in which she was suspected to have gone. [T. 217, 240, 397].

As they drove, they spotted R. P. riding her bike in the rain on the side of the road. [T. 217-18, 230, 234, 300, 397]. Ms. Bracy immediately got out of her van and scolded the girl. [T. 218]. Then Ms. Bracy asked Roberson to take R. P. into custody to be dealt with by the Washington County Youth Court. [T. 218, 314, 397]. There had been ongoing problems with R. P. lying to her mother and running away and she was on probation. [T. 234, 238; Ex. Folder p. 30; Ex. S-1].

Roberson took the girl into custody, and when he got to the city jail, he telephoned the Washington County Youth Court, who instructed Roberson to release R. P. back to her mother. [T. 205, 06, 398-99]. When Roberson returned R. P. to her mother, R. P. ran out the back door. [T. 220, 234, 315, 399-400]. Ms. Bracy flagged Roberson down as he drove off. *Id.* They looked for R. P. again, but could not find her. [T. *Id.*, 221]. Two other officers responded and helped out. *Id.* The three policemen finally left after R. P. could not be located. *Id.*

Later the same morning, Ms. Bracy hid her vehicle at a friend's house so that R. P. would think she was at work and come back home. [T. 221-22, 235]. The ruse worked, R. P. snuck

back home and found her mother waiting inside. [T. 222, 235, 316]. Ms. Bracy whipped R. P. and called the police again to take her into custody. [T. 222-23, 235, 316]. R. P. stayed in the Washington County juvenile jail for about fourteen (14) days and then was transported to Brentwood Behavioral Healthcare of Mississippi in Flowood. [T. 223, 317].

When R. P. was being processed into Brentwood, she was given a routine urine pregnancy test which turned up positive. [T. 188, 223-24, 317]. When she was asked by her mother and nurse about the circumstances, R. P. said the policeman that transported her from the side of the road to the city jail first drove her to a secluded place by the levee where the officer had sexual intercourse with her. [T. 191, 224, 317-18].

The police officer to whom she referred was the appellant, Benjamin Roberson. [T. 200, 216, 303]. The allegation was reported to the Greenville Police Department. [T. 196, 198-99, 227]. A second blood pregnancy test was performed, and it indicated that R. P. was not pregnant after all. [T. 94, 97, 104,191, 323].

Roberson heard of the allegations and called Lt. Dondi Gibbs in the Criminal Investigation Division (CID) of the Greenville Police Department. [T. 48-49, 57, 76, 400]. Roberson asked Gibbs about the charges. *Id.* Gibbs said he could not talk about it just then, but told Roberson he would call back. [T. 49-50, 57, 248-49, 262, 271, 400-01].

Gibbs then spoke with the investigator handling the case, Sgt. Michael Merchant, and they decided to have Roberson come down to the police station for an interview. *Id.* So, Gibbs called Roberson back, and Roberson immediately came to the CID unit, and spoke with Gibbs and Merchant. *Id.* Roberson was accompanied by a woman, later identified as Mika McDaniel, who stayed in the front of the police station during the interview. [ *Id.*, T. 276].

Roberson, Gibbs and Merchant discussed the allegations. Roberson expressed concern about having counsel present for the interview, and for his safety if he were to be incarcerated, and the possibility of probation. [T. 15, 28, 35, 52, 54, 58-61, 68-69, 78, 80, 249-51, 265, 269, 401-03].

The details of what occurred during the conference at the CID were disputed through a motion to suppress. [R. 109-16; T. 7-93]. Roberson, who secretly had a tape recorder at the meeting with Gibbs and Merchant, said that he informed the investigators that, since the allegations were so serious, he wanted an attorney present. [T. 15, 59, 78, 401-02]. The officers said that Roberson only asked if they thought he needed a lawyer and they told Roberson it was up to him. [T. 28, 60].

Roberson's tape was inaudible. [T. 26-27, 79, 402]. During the interview, Roberson was text-messaging Mika McDaniel who was waiting outside. [T. 51, 80, 371, 411, 428].

Roberson said he was promised probation, but the investigators said that, while probation was discussed, no promises were made. [T. 54, 251, 269]. It was generally agreed that the particular nature of Roberson's incarceration was discussed as well. [T. 35, 52, 54, 58, 61, 68-69, 80, 249-51, 265, 402-03 ]. Being a police officer, Roberson would need to be segregated from inmates who might intend harm. *Id.*

Gibbs and Merchant told Roberson they would do what they could to see that Roberson was protected and afforded an opportunity to obtain bond before being held for any length of time in jail. [T. 251, 265]. Roberson said the officers committed to do all they could to get him probation in exchange for giving a statement, but the officers said no such commitments were made. [T. 68-69, 80, 403].

Merchant said Roberson called a lawyer during the interview. [T. 13, 35, 266]. The attorney testified at the suppression hearing that he was contacted by Roberson on the date the interview was given. [T. 45]. Merchant and Gibbs advised that Roberson was not under arrest during the interview. Contrarily, Roberson said he did not feel free to leave. [T. 80, 401]. Roberson said he felt they were going to take him into custody if he did not make a statement. [T. 79, 404].

On the same day as the conference with Roberson, but prior to, Merchant had interviewed R. P. at Brentwood. [T. 206]. Sheila Bracy was present during this meeting, as well as a subsequent interview a couple of weeks later. [T. 227, 241, 243-44, 364]. R. P. made her allegations against Roberson and gave a hand written statement. [T. 190 ; Ex. Folder pp. 34-35; D-1]. So, Merchant had the details of the allegations when speaking with Roberson.

Roberson was read the *Miranda* warnings and ultimately signed a statement admitting intercourse with R. P. after being told to release the girl back to her mother by the Youth Court Judge. [T. 51-54, 67, 251, 254-56, 263, 367, 404; Ex, S3].[2] Roberson was released after the interview, but was arrested later the same day on a warrant the police obtained. [T. 29-30, 255-56, 258, 291-92,]. Roberson was twenty-five (25) years old at the time. [T. 292].

Mika McDaniel, who accompanied Roberson to the police station for his interview, testified that she met Roberson in 2004 or 2005. [T. 283]. They became romantically involved in 2007 for about two and a half months even though Roberson was married, but separated. [T. 274, 279]. In July of 2007, McDaniel said Roberson advised her that a young girl's mother was

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[2] Ref. *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S.Ct. 1602, 1629 (1966).

accusing him of raping the daughter. [T. 275, 278]. Roberson reportedly admitted to McDaniel that he had sex with the girl, but, told McDaniel it was consensual, and he did not know what came over him. *Id.*

Ms. McDaniel said she received text messages from Roberson while he was in the CID unit being interviewed. [T. 276]. One message, according to McDaniel, stated that Roberson was going to make a statement advising the officers of "the truth." *Id.*

McDaniel said that, as of two months before the trial, she was no longer romantically involved with Roberson and that he had reconciled with his wife. [T. 278, 283]. McDaniel testified that she assisted Roberson in his defense of the charges and even went with Roberson to meetings with his defense counsel. [T. 282, 284]. However, after Roberson had reconciled with his wife, and unknown to Roberson, McDaniel gave a statement to the district attorney on July 21, 2008, stating that Roberson admitted having sex with R. P. in the back of his police cruiser. [T. 282, 284].

R. P. testified that, after Roberson took her into custody on that rainy night in June, he took her directly to a secluded spot by a levee near a casino. [T. 304-05, 327]. She said that Roberson got her out of the back seat and placed her in the front passenger seat and told her to pull her pants down, at which time Roberson allegedly fondled her vagina. [T. 306]. R. P. said that, even though she was handcuffed, she was able to pull her pants down, one side at a time. [T. 341-42, 357].

R. P. said that Roberson got her out of the car, and after feeling around on the ground for a dry spot, finding none, leaned her face down over the hood of the police car, and placed his penis in her vagina from behind. [T. 308-11]. According to R. P.'s trial testimony, Roberson

then told R. P. to use water from a rain puddle to clean herself, which she did. [T. 311-13, 342]. Then, R. P. said Roberson took her to the police station, called the Youth Court Judge, then returned her to her mother's house, where she then ran out the back door. [T. 313-15].

Contrary to her trial testimony, in R. P.'s written statement, she stated Roberson had sex with her on the ground instead of the hood of the car. [T. 343-47, 353-54, 359; Ex. Folder pp. 34-35; Ex. D-1]. R. P. testified at trial that she remained handcuffed the whole time, even though she left this detail out of her statement to police. [T. 341-43, 350].

Roberson testified at trial, denying all of the allegations of R. P. [T. 396-99, 422, 424]. Roberson explained that his admissions to police were coerced. [T. 403-04, 408, 413, 418 ].

## SUMMARY OF THE ARGUMENT

Roberson's purported confession should have been suppressed. The trial court erroneously excluded impeachment evidence under Miss. R. Evid. Rule 412. The trial court mishandled Roberson's request to obtain Youth Court records. Alternatively, Roberson's trial counsel was ineffective for not taking necessary steps to have medical and Youth Court records properly admitted. The verdict is not supported by the weight of evidence.

## ARGUMENT

**ISSUE NO. 1: WHETHER ROBERSON'S STATEMENT SHOULD HAVE BEEN SUPPRESSED?**

Roberson testified at his suppression hearing that he informed the police that, since the charges against him were so serious, it would be in his "best interest to have an attorney present" during his discussions with Gibbs and Merchant. [T. 15, 59, 77-78, 401-02]. The officers reported the that Roberson asked them if he needed a lawyer. [T. 15, 59]. Neither officer felt in necessary to stop or suspend the interview and clarify whether Roberson was invoking his right to counsel, even though Roberson stopped to call an attorney. [T. 28, 60.]. Roberson said he was also promised favorable conditions if incarcerated plus probation in exchange for his alleged confession. [T. 35, 52, 54, 58, 61, 68-69, 80, 249-51, 265, 269, 402-03]. The trial court denied Roberson's motion to suppress with a written opinion. [R. 121-23].

*Request for Counsel*

In *Edwards v. Arizona*, 451 U. S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed.2d 378 (1981) the court created a "bright line" rule holding that, "once an accused has requested counsel during the interrogation process, the accused may not be questioned further until the attorney is present, unless the accused voluntarily begins to talk again." 451 U.S. 484-85. This "bright line rule ... prevents overriding a suspect's unequivocal request for counsel by badgering or lesser forms of persistence". *Id.*

In *Jones v. State* , 461 So. 2d 686 (Miss. 1984), the court reminded that:

> When an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the state shoulders a heavy burden to show a knowing and intelligent waiver. [cites omitted] That

burden is proof beyond a reasonable doubt. *Id.*

Here in Roberson's case, not only did he expressly state a desire to have counsel present, he even called a lawyer. This should have been clear indication to Gibbs and Merchant that Roberson was indeed invoking his right to counsel.

"[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Jones,* 461 So. 2d at 699. If a statement is a product of compulsion, it is not voluntary, and fails the two part requirement for admission into evidence. *Id.* at 696. See also *Cox v. State*, 586 So. 2d 761, 763 (Miss.1991).

In *Holland v. State*, 587 So. 2d 848, 856-58 (Miss.1991), Holland urged on appeal that a confession he gave should not have been admitted into evidence because he asked during interrogation "Don't you think I need a lawyer?" The supreme court ruled that Holland's inquiry was an ambiguous invocation of the right to counsel and questioned then "whether the police detective responded ... within constitutional parameters." *Id.* The interrogating officers repeated Holland's right to counsel and that he was not required to talk to them, but the they wanted to hear his side of the events, to which Holland said, "OK", he would talk to them. This was not an overreaching according to the court, rather, a clarification of the ambiguous question. *Id.*

According to *Holland*, "[i]f a defendant makes equivocal or ambiguous utterances which could be interpreted as an invocation [of the right to counsel], then [there should be a] cessation of interrogation except for strictly-limited inquiry for clarification purposes, and, "any subsequent interrogation 'must be limited to attempts to clarify and must not coerce or intimidate the suspect into waiving his rights.'" [Extensive cites omitted.]. "Of utmost import, an interrogator's 'behavior' must not exceed the limits of permissible clarification. Courts have

concluded that determining the propriety of such behavior is essentially a factual issue' that requires 'review under a clearly erroneous standard' ... The 'critical factor' in determining the validity of the government's behavior is 'whether a review of the whole event discloses that the interviewing agent has impinged on the exercise of the suspect's continuing option to cut off the interview.'" *Id.*

Even if Roberson's request for presence of counsel is deemed ambiguous, the interrogating officers, nevertheless, had an obligation to cease questioning and clarify whether Roberson was invoking his right to counsel. As the record shows however, the limited scope of follow-up clarification set out in *Holland* was not followed, as the officers here had no intention to clarify, nor were they even aware of the obligation to clarify. [T. 28, 60.]

*Involuntary via Inducements*

Involuntary confessions are inadmissible. *Carley v. State*, 739 So. 2d 1046, 1500 (Miss. Ct. App. 1999), *Neal v. State*, 451 So. 2d 743, 750 (Miss. 1984), *Morgan v. State*, 681 So. 2d 82, 87 (Miss. 1996), Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3, § 26 of the Mississippi Constitution of 1890. The state has the burden to prove voluntariness of a confession beyond reasonable doubt, and may meet this burden "by offering the testimony of those individuals having knowledge of the facts that the confession was given without threats, coercion, or offer of reward." *Carley*, 739 So. 2d 1500. See also *Haymer v. State*, 613 So. 2d 837, 839 (Miss. 1993); *Kirkland v. State*, 559 So. 2d 1046 (Miss. 1990).

The burden is met and a prima facie case is established with testimony from officers, or persons with knowledge of the facts, that the confession was voluntarily

given free from threats, coercion, or offers of reward. *Cox v. State*, 586 So. 2d 761, 763 (Miss. 1991). In the present case, the state failed to meet its burden. Roberson was given the impression of hope of reward by delay of arrest, safe incarceration and probation.

The standard of review regarding the admissibility of a confession is for the reviewing court to determine under the totality of the circumstances whether the "correct legal standard was applied ..., [whether] manifest error was committed, or [whether] the decision [of the trial court] is contrary to the overwhelming weight of the evidence. *Tyler v. State*, 911 So. 2d 550, 554-56 (Miss. Ct. App. 2005).

Roberson was *Mirandised.* [T. 51-54, 251, 254, 263, 367; Ex. S3]. However, according to *Neal v. State*, *supra*, regardless of the number of times the *Miranda* warnings are given, or how "meticulous", inculpatory statements are not automatically admissible. 451 So. 2d at 753. Even when the trial court record shows the warnings have "been fully and fairly given," the State nevertheless "shoulders a heavy burden to show a knowing and intelligent waiver." *Id.*

In the present case, Roberson was induced into making an involuntary statement, admitting to sexual penetration with a fourteen-year-old, to avoid immediate arrest and being housed with regular inmates. Roberson's statements were a direct *quid pro quo* in exchange for favorable treatment.

In *Abram v. State*, 606 So. 2d 1015, 1031 (Miss. 1992), the court said:

> [w]e have repeatedly condemned the practice whereby law enforcement interrogators, or related third parties, convey to suspects the impression, however slight, that cooperation by the suspect might be of some benefit. See also, *Robinson v. State*, 157 So. 2d 49, 51 (Miss. 1963) and *Layne v. State*, 542 So. 2d 237, 240 (Miss. 1989).

In *Abram*, the Supreme Court reversed based on a confession induced by the

defendant being "confronted with the possibility of mercy or the death penalty" by the sheriff and was given the impression that a confession to a murder would "work to his advantage" and was coaxed to consider the "religious consequences of his actions" and told "that the law would cooperate with Abram if Abram cooperated with the law", plus was reassured that "it would look better" if he cooperated. 606 So. 2d at 1031.

In reversing, the *Abrams* court also stated:

> A confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary. ... [T]he plain fact is that Abram was given hope of leniency, and was confronted with the legal and religious consequences of his refusal to cooperate.

In *Miller v. State*, 243 So. 2d 558 (Miss. 1971), the court ruled a confession involuntary and inadmissible because the defendant was induced by prodding from the sheriff that the defendant would be better off by telling the truth. 243 So. 2d at 559; see also, *Robinson v. State*, 157 So. 2d 49, 51 (Miss. 1963).

Roberson's confession was coerced by the state's circumvention of his rights under 5th, 6th, and 14th Amendments to the U. S. Constitution as well as by Article 3 §26 of the Mississippi Constitution. Evidence of the confession should have been suppressed. If there is "... any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S.Ct. 1602, 1629 (1966).

In *Jones v. State* , 461 So. 2d 686 (Miss. 1984), the court said:

> [w]hen an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the state shoulders a heavy burden to show a knowing and intelligent waiver.

The error here was not harmless. With all of the conflicting testimony from the prosecutrix, a different verdict was likely without Roberson's purported confession. The appellant respectfully requests a new trial.

## ISSUE NO. 2: WHETHER RULE 412 WAS PROPERLY APPLIED?

The state filed a motion *in limine* under Miss. R. Evid. Rule 412 to exclude evidence of unrelated sexual activity of R. P. [R. 126-27].[3] On the other hand, the defense wanted to use limited information that R. P. had made false accusation of sexual offenses and filed a Notice

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Pertinent portions of Miss. R. Evid. 412:

Rule 412. Sex Offense Cases; Relevance of Victim's Past Behavior
(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual offense is not admissible.
(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:
(1) Admitted in accordance with subdivisions (c)(1) and (c)(2) hereof and is constitutionally required to be admitted; or
(2) Admitted in accordance with subdivision (c) hereof and is evidence of ...
(C) False allegations of past sexual offenses made by the alleged victim at any time prior to the trial.
(c)(1) If the person accused of committing a sexual offense intends to offer under subdivision (b) ... evidence of past false allegations made by the alleged victim, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.
(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses including the alleged victim, and offer relevant evidence.

COMMENT

If otherwise admissible, nothing in this rule precludes evidence of past false allegations by the alleged victim of past sexual offenses. "Past false allegations" shall include any such allegations made prior to trial. This provision is intended to protect the defendant's Sixth Amendment rights.

under Rule 412 in order to do this. [T. 94-151; R. 142-45, 152, 154-57]. There was information showing R. P. to have been engaged in sex with another male; and, before she found out she was not pregnant, R. P. told Brentwood counselors that the father of the expected child was someone other than Roberson. [T. 118, 120-21, 351-52].

A charge against the person with whom R. P. was allegedly having sex was presented to a grand jury which did not indictment him. [T. 120-21]. This would tend to support a position of a false report. Nevertheless, the State's objections were all sustained pursuant to Rule 412, and the trial court issued a written ruling sustaining the State's Motion in Limine. [R.121-23].

Defense counsel had discovery copies of the Brentwood records, which also contained conflicts with R. P.'s trial testimony, and counsel was in the process of trying to obtain Youth Court records. [T. 94-151; R. 144-45]. The Youth Court records were apparently not obtained and admission of the Brentwood records was denied, in part, under the trial court's Rule 412 rulings.

The trial court excluded R. P.'s prior false allegation evidence *in limine* for three reasons under Rule 412; first, the trial court ruled that Roberson's Notice was not timely filed within fifteen (15) days before trial, secondly, R. P. was not served with a copy of the Notice; and, thirdly, there was no accompanying offer of proof as required by the rule. [T. 94-151; R. 130]. During the cross-examination of R. P., an objection to confronting her with previous false allegations of sexual misconduct was also sustained. [T. 351-52 ].

It is Roberson's position under this issue that the trial court misapplied Miss. R. Evid. Rule 412. Roberson's counsel substantially complied with the rule requirements, and the state was not prejudiced by any lacking technicalities. Moreover, the trial court had the discretion to

allow the objectionable evidence in the interest of justice.

Here the record shows that defense counsel filed a Rule 412 Notice, a declaration, and two motions for production of Youth Court Records relevant to this issue. [R. 142-45, 154-57]. On May 4, 2009, three days before trial, a Rule 412 Notice of Intent to Use Prior Sexual History was filed. [R. 152, 154-57]. Prior to that on, April 17, 2009, counsel filed a Declaration at the same time as a subpoena request asserting that R. P. had "made unfounded allegations of sexual misconduct against other persons." [R. 142-45].

The Notice contained sufficient information to satisfy the offer of proof requirement specifically stating that R. P. told her mother that she was having sexual relations with another person. [R. 152]. Along with the aforesaid Declaration and Motion to Release Youth Court Records, the Notice, at a minimum, substantially complied with Rule 412. Therefore, the only technicality missing was notice to the victim. The appellant respectfully suggests this requirement was not necessary since the district attorney's office was well aware of Roberson's intent and would have timely notified R. P. and her mother thereby making formal notice superfluous.

Constitutional guarantees of a fair trial do not permit a construction of Rule 412 which deprives a criminal defendant of "a meaningful opportunity to present a complete defense." *Caldwell v. State*, 6 So. 3d 1076, 1080 (¶15) (Miss. 2009), [Citing *California v. Trombetta*, 467 U. S. 479, 485, 104 S. Ct. 2528 (1984)]. Misapplication of Rule 412 which prejudices a defendant from exercising full confrontation rights is reversible error. *Herrington v. State*, 690 So. 2d 1132 (Miss. 1997). Roberson respectfully requests a new trial.

**ISSUE NO. 3: WHETHER THE TRIAL COURT ERRED IN ITS RULING REGARDING YOUTH COURT RECORDS?**

The defense sought to subpoena R. P.'s Youth Court records and filed a motion seeking authority and a separate Declaration stating the purpose of the requested Youth Court subpoena. [R. 142-45]. Defense counsel also asked the circuit court judge to order release of the Youth Court records. [T. 143, 147-48; R. 156-57]. The Youth Court Judge was on the state's witness list. [T. 150].

A separate motion was apparently filed with the Washington County Youth Court and a hearing was scheduled on the same day as Roberson's trial after Roberson was given a two-day continuance by the circuit court. [T. 143]. The record does not reveal a disposition of this request by the Youth Court and no juvenile records are included with the circuit court record of this appeal. The trial court here ruled that it did not have authority to order release of R. P.'s Youth Court records. [T. 143, 147]. However, the Confrontation Clause and compulsory process would have required the Youth Court to release the records. *In re J. E.*, 726 So. 2d 547 (Miss. 1998).

The trial court here should have done more to protect Roberson's rights such as affording defense counsel time to go to Youth Court and obtain authorization to release the records for at least an *in camera* inspection, which was requested by a motion for continuance. [T. 150]. Although the trial court might not have had express authority to order release of R. P.'s Youth Court records, the court should have, nevertheless, communicated to the Youth Court a recommendation to release the records for *in camera* inspection. Roberson requests a new trial.

**ISSUE NO. 4: WHETHER TRIAL COUNSEL WAS INEFFECTIVE?**

Defense counsel waited until four (4) days before trial to send a Rule 412 Notice when the rule calls for fifteen (15) days notice. [T. 117, 140, 145-46, 150-51]. Proper steps to obtain vital Youth Court records were not taken, and records from Brentwood were never subpoenaed. These miscues kept crucial defense evidence from the jury. The prejudice to Roberson was a deprivation of his rights of confrontation under the Sixth and Fourteenth Amendments and Art. 3 §26 of the Mississippi Constitution of 1890.

During cross-examination of R. P., trial counsel sought to have R. P.'s Brentwood records introduced, particularly portions showing conflicting statements she made and a possible false report of the father of the child she thought she was having. [T. 354; Ex. Folder pp. 36-40; Ex. D-2 (Ident.)]. The state's objection was sustained for lack of authentification under Miss. R. Evid. Rule 901. *Id.* Later, after the trial, counsel asked again to have R. P.'s Brentwood records introduced, and again, the state's objection was sustained for lack of an evidentiary foundation. [T. 389, 394-95].

The Brentwood records were an invaluable cross-examination tools. They contained conflicting details of the alleged sexual encounter, identification of the purported father, and prior false sexual accusations of family members. [T. 390-392; Ex. D-4 (Ident.)]. Defense counsel had had discovery copies of the records for several months, but never had a *subpoena duces tecum* issued for them. *Id.*

Roberson asserts, in the alternative to other arguments, that his trial counsel was ineffective for failing to timely file and notice an appropriate Rule 412 motion in compliance

with all the procedures thereof. Moreover, trial counsel was ineffective for failing to take necessary steps for the obtaining and introduction of Brentwood records. [T. 389- 94]. The Brentwood records were easily obtainable under Miss. Code Ann. §§41-9-103, 107, 109 (1972) which allows for introduction of medical records under sworn certification with a properly served *subpoena duces tecum.*

Likewise, R. P.'s Youth Court Records were obtainable by timely application for, at least, an *in camera* inspection by the circuit court. In *In re J. E.*, 726 So. 2d 547 (Miss. 1998), a youth court's refusal to disclose juvenile court records to a defendant facing indictment in relation thereto was reversed as a denial of confrontation and compulsory process rights. *Id.*

Roberson's ineffective counsel argument is analogous to a claim of ineffective counsel arising from the exclusion of defense evidence due to trial counsel's failure to follow discovery rules. In *Ransom v. State*, 919 So. 2d 887 (Miss. 2005), the trial court excluded non-disclosed alibi defense witnesses, and, on appeal, Ransom claimed that trial court abused its discretion as the sanction was too harsh violating his Sixth Amendment right to compulsory process.

The *Ransom* court recognized that the "benchmark for judging any claim of ineffectiveness 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." 919 So. 2d 889. (Citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)). Under the two-pronged test of *Strickland,* adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So. 2d 468, 476 (Miss. 1984), a defendant "must prove under the totality of the circumstances, that (1) his attorney's performance was defective and (2) such deficiency

deprived the defendant of a fair trial." 919 So. 2d 889-90 . There is a "strong, but rebuttable presumption that the attorney's conduct fell within the wide range of reasonable professional assistance." *Id.*

The defendant must also establish "that there is a reasonable probability that but for his attorney's errors, he would have received a different result in the trial court." *Id.* The actions which fall within "trial strategy" include "failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections" and do not render counsel's actions ineffective. *Id.* Trial counsel's "performance as a whole [must fall] below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial" *Id.*

Ransom claimed that his trial counsel did not fulfill the simple process of reciprocal discovery under the rules of the court. Ransom claimed, similarly to counsel here, that his counsel was dilatory in waiting until the morning of the trial to comply with discovery requirements, thus meeting *Strickland's* first prong.

However, the *Ransom* court decided that the second *Strickland* prong was not proven because Ransom's alibi was weak and there was "strong opposing" evidence. *Id.* The *Ransom* court said that trial counsel's performance was not "error free", but the non-disclosed evidence which was suppressed was not so material that there was a resulting "undermined confidence [in the] outcome" of the trial. *Id.*

Ransom is different from Roberson's case when considering prejudice. Ransom's alibi witnesses were all family and their testimony inconsistent. *Id.* Here the state's case depended

on the contradictory statements of a fourteen year old troubled run-a-way, a flimsy confession, and a scorned woman. In *Ransom* there were two eyewitnesses who identified Ransom. Here, there were none, and there was no physical evidence either. [T. 210, 212].

Roberson's case is more like *Payton v. State,* 708 So. 2d 559, 560-64 (Miss. 1998), where the court found that defense counsel's failure to investigate rendered the representation constitutionally ineffective. Payton's counsel basically did not make any effort to interview easily available witnesses nor investigate physical aspects of the case. *Id.* By thus failing, the court found that Payton's counsel did not provide a basic defense. *Id.*

In *Payton,* the case boiled down to the defendant's word against the victim's word. The court found that the lack of investigation "affecting the outcome of the trial by casting doubt on the credibility of the complaining witness". *Id.* Here in Roberson's case, the conviction rest on the unreliable testimony of a young girl with a history of lying and making false sexual allegations. The inability to present this information fully to the jury affected the outcome of the case, just as in *Payton.*

The *Payton* court labeled the investigation there "non-existent." *Id.* Here, because Roberson's trial counsel failed to take steps to have impeachment evidence presented to the jury, the neglect was equal to a non-existent investigation; because, the information of R. P.'s prior false allegations was utterly useless due to procedural neglect and failing to subpoena records. The *Payton* court reversed and the same relief is respectfully requested by Roberson.

When there is claim of ineffective assistance of counsel for failure to adequately investigate, the defense "must state how any additional investigation, such as interviewing

witnesses or investigating facts, would have significantly aided the defense during the course of the trial." *Smith v. State*, 989 So. 2d 973, 980 (¶21) (Miss. Ct. App. 2008),[citing *Triplett v. State*, 840 So. 2d 727, 731(¶ 11) (Miss. Ct. App. 2002)]. See also, *Doss v. State*, --- So.3d ----, (Miss. 2009) (2007-CA-00429-SCT), [Sentence reversed on PCR for failure to investigate mitigating evidence, failure to subpoena medical records.], and *Bennett v. State* 18 So.3d 272, 278-79 (Miss. Ct. App. 2009). ["Failure to object renders defense counsel's performance deficient and satisfies the first prong of Strickland."].

Mississippi does not have an exact case on point regarding failure to follow Rule 412 procedures meeting the first *Strickland* factor. For comparison the Court should look to *Lee v. Lampert* 607 F. Supp. 2d 1204 (D. Or. 2009) where defense counsel was found to be ineffective for, *inter alia*, failing to pursue admission of evidence under Oregon's Rule 412, which resulted in the defendant being "deprived of his Sixth Amendment right to confront the witnesses against him, and of his constitutional right to present a theory of defense." Roberson respectfully suggests the same result is called for here and a new trial granted.

**ISSUE NO. 5: WHETHER THE WEIGHT OF EVIDENCE SUPPORTS THE VERDICT?**

The testimony of the prosecutrix was hopelessly contradictory in this case. First she reported the sexual encounter happened on the ground. [T. 343-47, 353-54, 359; Ex. Folder pp. 34-35; Ex. D-1]. Yet she came to court and stated unequivocally that it occurred against the hood of a car. *Id.* These are not the kind of details which fade with time. They are the kind of

conflicts caused by inability to recall details of fabrications.

Roberson's so-called confession was not proven voluntary. The admissions made during, what was really an informal discussion, were in exchange for a host of promises and hopes of reward. The admissions were made because Roberson thought the punishment was going to be mere probation.

Moreover, Roberson's admissions conflicted with R. P.'s statement on two major points. First, Roberson said the sexual encounter occurred after he was instructed to release R. P. and was on the way back to her house. [T. 256-57, 379]. R. P. said it was on the way to the jail. [T. 191, 224, 317-18; Ex. Folder pp. 34-35; Ex. D-1]. Secondly, Roberson allegedly said the sexual encounter happened inside the police car. [T. 280]. R. P. said first it happened on the ground, but said at trial it happened on the hood of the police car. [T. 343-47, 353-54, 359; Ex. Folder pp. 34-35; Ex. D-1]. These important details reveal Roberson's lack of actual knowledge and his use of sketchy information gathered during his discussions with Gibbs and Merchant.

Sheila Bracy testified that R. P. was returned home by Roberson around 5:45 a. m. [T. 230]. She had previously reported the time to the F. B. I to be around 5:15 a. m. [T. 231]. Ms. Bracy had pending litigation against the City of Greenville at the time of trial seeking damages for the incident. [T. 241].

Mika McDaniel testified out of scorn and jealousy. Ms. McDaniel realizing that her love affair with Roberson was over and that he had finally reconciled with his wife, retaliated against Roberson. Her testimony, therefore, lacks probative reliability.

In this case there was no physical evidence to support the conviction. R. P. was already a

troubled teen with a host of manifested behavioral and emotion problems.

All of these factors tip the scales away from a reliable verdict. There was no physical evidence linking Roberson to the accused event. All told, the weight of reliable evidence does not support the verdict in this case.

The standard is that the court on appeal will not reverse under a weight of the evidence challenge unless, accepting as true the evidence supporting the verdict, the record shows that the jury's verdict "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997). See also, *Boone v. State*, 973 So. 2d 237, 243 (Miss. 2008).

In this case the testimony and physical evidence are, at best, unreliable and insufficient to support the conviction, and a reversal with acquittal is called for. See *Edwards v. State,* 736 So. 2d 475 (Miss. 1999), *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994), and *Guilbeau v. State*, 502 So. 2d 639, 641 (Miss. 1987).

## CONCLUSION

Benjamin Roberson respectfully requests a reversal with rendered acquittal or with remand for a new trial.

Respectfully submitted,
BENJAMIN ROBERSON

By: George T. Holmes

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## CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 30th day of November, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Richard A. Smith, Circuit Judge, P. O. Box 1953 Greenwood, MS 38935, and to Hon. Dwayne Richardson, Dist. Atty., P. O. Box 426, Greenville MS 38702, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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