

reasons set forth above, as well as Applicant's arguments regarding the factual insufficiency of the evidence to support his conviction, Applicant's inability to confront Llamas and cross-examine her on her statements, impeach her credibility and habits, and given, the State's emphasis upon the validity of her testimony and her credibility as a witness in closing arguments before the jury, ("they can't touch her,") one cannot conclude that the trial court's violation of Applicant's constitutional rights to confrontation did not contribute beyond a reasonable doubt to the jury's decision to find him guilty. *Van Arsdall*, 106 S.Ct. at 1435-1436.

This Court must reverse Applicant's judgment of conviction because the error can not be characterized as harmless beyond a reasonable doubt. TEX. R. APP. P. ANN.. 44.2(a) (Vernon Pamph. 2000); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, Applicant prays that the judgment and sentence be reversed. TEX. CODE CRIM. PROC. ANN. art. 44.29(a).

**CLAIM FOR RELIEF NUMBER FORTY**

**THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR BY NOT ALLOWING APPLICANT'S COUNSEL TO PRESENT EVIDENCE THAT SHORTLY BEFORE HER DEATH, COMPLAINANT HAD INSTRUCTED DEE DEE HUGHES, A WITNESS, NOT TO TELL ANYONE THAT COMPLAINANT AND APPELLANT WERE OBSERVED "TOGETHER," IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS TO PRESENT A DEFENSE.**

Darlene Hughes, a.k.a. "Dee Dee," testified that she had known Applicant for approximately 22-23 years. Specifically, Hughes recounted her meeting with Applicant and the complainant in a convenience store prior to complainant's death, that is, after January 1, 1987 and before February 14, 1987. (RR, 24, 221). Hughes conversed with both Applicant and complainant at the convenience store; "[Applicant] was making fun of my weight." (RR, 24, 222).

Upon the State's hearsay objection, and despite counsel's response that this evidence was not hearsay and was "not offered for the truth of the matter," the trial court precluded Hughes from telling the jury that the complainant had instructed her "not to tell anyone that she had seen them [complainant and Applicant] together." (RR, 24, 222).

Applicant's counsel presented a Bill of Exception to the court regarding complainant's instructions to Hughes to keep her secret, not to tell anyone that she had seen complainant and Applicant "together." (RR, 28, 9).

In its closing arguments to the jury at the close of the guilt/innocence phase of trial, the State attacked Applicant's defense of a consensual sexual relationship with the complainant, as follows:

"... It is all about consensual sex. That's what they insinuated all week long, because they ain't got the courage [sic] to be man enough to stand in here and say it to you face-to-face is a different thing. But that's what they have been trying to say all week.

And you know what? If you forget everything else that I say today

besides intent being this quick ... don't forget this point. All of their questions in the whole wide world don't make it evidence.

And all of their questions and all of their hopes and all of his wishes that he could make it evidence that they had a consensual relationship, that he and Michelle [complainant] were more than just friends, all of those questions and insinuations and sort of arguments don't make it evidence because there ain't one shred of evidence in this trial and not one word of testimony from the stand that ever told you she ever so much as gave this man a kiss. Nothing.

Don't you think that if there had been a relationship, a true sexual relationship between this defendant and Michelle Shadbolt, his brothers and sisters would have known about it? Did they bring them in to tell you there was such a thing? Hell, no. Because it didn't exist." (RR, 25, 70,71)

Applicant notes that it is ironic that the State stressed the fact that Applicant's family members did not testify about this "secret" relationship with complainant. First, Applicant was precluded from "explaining" this fact via Hughes' testimony that complainant wanted this relationship kept secret. Second, it is noteworthy that in his testimony, Michael Masters, complainant's brother, stated that he was unaware that complainant and Jack Shadbolt were estranged at the time of her death! (RR 19, 81). Third, the State elicited testimony from Kathy Masters that while complainant had been separated from Jack Shadbolt, Masters believed that complainant had no interest in "dating other men." Lastly, Wedgeworth testified on direct examination that he had interviewed complainant's family regarding her relationship with Applicant. Hughes' testimony could have refuted and explained the State's evidence as well as presented Applicant's defense to the trial court's publication of Applicant's own statement, SX 2, denying a "relationship" with the complainant.

Applicant argues that the trial court committed constitutional error in denying Applicant the right to present a defense by specifically precluding Hughes from telling the jury that upon meeting Applicant and complainant at a convenience store, shortly before her death, complainant had asked her "not to tell anyone that she had seen them together." (RR 24, 222, 224-226). The trial court's actions served to deprive Applicant of the ability to present a defense and infer that Applicant and complainant were friends, had engaged in a consensual sexual "relationship," and that complainant did not want anyone to know about their relationship.

Applicant was precluded from 'explaining' his statement to police, SX 2, in which he said that he and the complainant "were friends." Applicant was unable to present his "state of mind" or defense to the charge of sexual assault of the complainant, "evidenced" with the recovery and identification of semen and DNA attributed to him, that is, to explain the existence of a consensual sexual encounter and "secret" relationship with the complainant. Applicant was precluded from presenting evidence that would have answered the state's argument to the jury negating the existence of a relationship between Applicant and complainant as no family members testified thereto.

The trial court's actions violated Applicant's constitutional rights to due process, specifically, his ability to present a defense. Applicant notes that this error was of constitutional dimension. As it cannot be determined beyond a reasonable doubt that the trial court's error, the denial of Applicant's right to present this defense evidence, did not

contribute to the jury's finding Applicant guilty of capital murder, Applicant asserts that this Court must reverse his judgment of conviction as the error can not be characterized as harmless beyond a reasonable doubt. TEX. R. APP. P. ANN., 44.2(a); **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The United States Constitution guarantees the criminal defendant "a meaningful opportunity to present a complete defense." **Gilmore v. Taylor**, 508 U.S. 333, 343, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993); **Washington v. Texas**, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); **Webb v. Texas**, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); **Crane v. Kentucky**, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); **California v. Trombetta**, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); **Rock v. Arkansas**, 483 U.S. 44, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987); **Chambers v. Mississippi**, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In **Washington v. Texas**, *supra*, 388 U.S. at 19, the Supreme Court described the different ways that a defendant can avail himself of this opportunity. As stated:

"The right to offer the testimony of witnesses, and to compel their attendance if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law."

This principle has been invoked in cases where trial courts have intimidated defense witnesses into silence, **Webb v. Texas**, *supra*, 409 U.S. 95, and where trial courts have

excluded evidence. **Crane v. Kentucky**, *supra*, 476 U.S. 683; **Chambers v. Mississippi**, *supra*, 410 U.S. at 284.

This essential right has been preserved as a critical component of the criminal justice system; while the right is not absolute, and may in appropriate cases bow to other legitimate interests in the trial process, it is to be treated with special care. If that right is denied or diminished, the ultimate integrity of the fact-finding process is called into question, so that the competing interests are to be examined carefully when the defendant's proffered evidence has been excluded. See, **Chambers**, *supra*, 410 U.S. at 295-297, n.8, 93 S.Ct. at 1045-46 (citing **Mattox v. United States**, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339-340, 39 L.Ed. 409 (1895)); **Pointer v. Texas**, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965); **Mancusi v. Stubbs**, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); **Berger v. California**, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

In **Chambers**, *supra*, the Supreme Court invoked the above principle to decide whether the defendant's particular rights of cross-examination had been unfairly denied or limited by the State's "voucher" rule and whether his right to present witnesses in his defense had been unfairly circumscribed by the State's using its hearsay rule to exclude certain proffered defense testimony. Specifically, in **Chambers**, the trial court had applied the hearsay rule to bar the admission of evidence by the defendant in support of his defense that another man had admitted that he had committed the crimes. *Id.* 410 U.S. at 287. The Supreme Court reversed the decision of the trial court and opined that a defendant's right to

call witnesses in one's own behalf is essential to due process. *Id.* at 294.

In addressing the trial court's second exclusion of evidence based upon Mississippi's hearsay rule to refuse Chambers's proffer of three witnesses who would have testified to statements purportedly made by the witness McDonald, shortly after the crime, naming himself as the murderer, the Court recognized that (unlike the voucher rule) the hearsay rule "has long been recognized and respected by virtually every State." However, the recognition that the trial court employed a longstanding and respected rule of evidence to exclude the defense evidence did not insulate the Mississippi trial court's action from the Supreme Court's scrutiny on review. Indeed, because the defendant's constitutional right to present a defense was at issue, the reviewing court undertook to examine closely the competing interests served by the state evidentiary rule, however respected and recognized that rule might be. As stated:

"We conclude that the exclusion of this critical evidence, coupled with (the use of the voucher rule to limit cross examination) denied him a trial in accordance with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court denied Chambers a fair trial." *Id.*, 410 U.S. at 302-303, 93 S.Ct. at 302.

In *Miller v. State, supra*, this Court recognized and applied the constitutional rule of *Chambers v. Mississippi, supra*, which was grounded in the due process guarantee of the Fourteenth Amendment. That right, the Supreme Court said is, in essence, the right to a fair

opportunity to defend against the State's accusations. <sup>24</sup> In **Miller**, 36 S.W.3d at 503, this Court reversed Miller's conviction because the trial court had excluded as irrelevant the evidence she had offered to support her defense of duress. In conducting its analysis the Court began with an extensive discussion of the criminal defendant's constitutional due process right to establish her own defense, then evaluated on an abuse of discretion standard the trial court's reason for excluding the defendant's proffered evidence. Because it decided the threshold issue of relevancy in Miller's favor, this Court did not have to engage in the **Chambers** process of considering the competing interests: the State's interest in enforcing its own evidentiary rule, and the defendant's due process interest in establishing a defense. In Appellant's case, the trial court did not address the relevancy of the proffered evidence - complainant's out-of-court statements to Hughes but precluded the admission of this evidence, per se, on hearsay grounds. <sup>25</sup>

This Court in **Miller**, *supra*, referred to the opinion in **United States v. McClure**, 546

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<sup>20</sup> This Court noted in **Miller** that Texas has upheld a criminal defendant's "Sixth Amendment right to present a defense and present his version of the facts." 36 S.W.3d at 506, n.4, citing **Coleman v. State**, 966 S.W.2d 525, 527-28 (Tex. Crim. App. 1998) (op. on rehearing) (recognizing the defendant's right to compulsory process in order to obtain attendance and testimony of a witness favorable to his defense) and **Norman v. State**, 588 S.W.2d 340, 343 (Tex. Crim. App. 1979) (concluding that the trial court committed constitutional error by not granting the defendant's request for immunity for a state informant in order to compel the informant's testimony in support of his defense).

<sup>21</sup> In Applicant's case, the trial court did not address the relevancy of the proffered evidence - complainant's out-of-court statements to DEE DEE Hughes, but precluded the admission of this evidence on hearsay grounds.

F.2d 670 (5th Cir. 1977) in which the defendant in a drug delivery case sought to prove his duress defense (that he made the delivery because he was afraid of one Carroll, a D.E.A. informant) by calling three other individuals to testify that Carroll had coerced them into selling heroin and had carried a gun in the time shortly after McClure, the defendant, had made the sales. The trial court had excluded McClure's evidence of those events on the ground that they were not relevant because they had happened after the sales.

The Fifth Circuit found the evidence relevant. It had some tendency, as evidence of a "systematic campaign of threats and intimidation" to support a defense of duress. The Court did not consider whether the defense testimony was credible, nor did it say to what degree it was probative. Its tendency to support the defense made it relevant and admissible. Its ultimate weight was for the jury to decide. As stated:

"The defendant's "right to present a vigorous defense required the admission of the proffered testimony," the Fifth Circuit held. "A jury could not properly convict (McClure) absent the opportunity to hear the proffered testimony bearing upon the theory of defense and weigh its credibility along with the other evidence in the case." **United States v. McClure, supra**, 546 F.2d at 673. (emphasis added).

This Court applied the same principles, citing the above language from **McClure**, to find that the proffered testimony in **Miller** was likewise admissible – that its admission was required because, "(a) rational jury could find that this evidence helps to prove" "that Miller's state of mind was one of reasonable fear when she committed the offense. **Miller v. State, supra**, 36 S.W.3d at 508.

In the instant case, Applicant, as the criminal defendants, Chambers, Miller, and

McClure, respectively, had the due process right to a meaningful opportunity to present a complete and vigorous defense, in this case, the right to present testimony concerning complainant's instruction not to tell anyone that Hughes had seen her together with Applicant. The admission of complainant's instruction before the jury would have rebutted the State's claims that there was no evidence of a relationship between Applicant and complainant. In Applicant's case, this defensive evidence would have explained the absence of any statements by Applicant regarding his relationship with the complainant (more than mere friends). This defensive evidence of a secret romantic relationship between Applicant and complainant could also rebut the State's allegations that any sexual activity was not consensual.

The question of harm is one that is answered by the threshold issue of the constitutional right itself; if the evidence the defendant offered is not really part of presenting "a vigorous defense" (*McClure, supra*, 546 F.2d at 673).

Harm is established once the Court makes the decision that the proffered evidence was relevant, that it had some logical bearing upon the theory of defense. As this Court's decision in *Miller* reflects, with its citations to *Chambers v. Mississippi, supra* and *United States v. McClure, supra* the Due Process Clause guarantees the defendant a meaningful opportunity to present a complete and vigorous defense. A reviewing court, in assessing the State's interest in excluding the evidence, must carefully evaluate the competing interests, and must not assess the credibility of the evidence.