

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**BOBBY WAYNE WALLEY**

**APPELLANT**

**VS.**

**NO. 2008-CA-1082**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**BOBBY WAYNE WALLEY**

**APPELLANT**

**vs.**

**CAUSE No. 2008-CA-01082-COA**

**THE STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI**

**STATEMENT OF THE CASE**

This is an appeal against an Order of the Circuit Court of Wayne County, Mississippi in which relief was denied on the prisoner's motion in post - conviction relief.

**STATEMENT OF FACTS**

The prisoner and his wife were indicted in a two - count indictment, which counts alleged that they had committed statutory rape and lustful touching of a child. On 19 June 2006, the prisoner executed a "Petition to Enter Plea of Guilty." In this petition, the prisoner indicated that he wished to enter a plea of guilty to sexual battery. The prisoner stated in this petition that he understood that the district attorney would recommend a fifteen - year "cap" on the sentence to be imposed by the Circuit Court upon the prisoner. ( R. Vol. 1, pp. 15 - 19).

On that same day, the prisoner's wife also executed a "Petition to Enter Plea of Guilty."

In her petition, the prisoner's wife also sought to plead guilty to sexual battery. She understood that the district attorney would recommend a five - year "cap" on such sentence that the Circuit Court would imposed upon her. ( R. Vol. 1, pp. 22 - 27).

The petitions were brought forward for a hearing before the Circuit Court. The court went over the prosecution's agreement with the prisoner, and the prisoner indicated that he understood it and entered no objection to it. The court further indicated that it intended to accept the prosecution's recommendation as to sentencing. ( R. Vol. 1, pp. 36 - 37; 39). The prisoner's wife, who was present at the hearing as well, indicated that she understood the recommendation with respect to her case. ( R. Vol. 1, pp. 38 - 39).

At the conclusion of the plea colloquy, the court accepted the plea and continued the case for sentencing. ( R. Vol. 1, pg. 43).

At the conclusion of the sentencing hearing, the prisoner was sentenced to a term of twenty years imprisonment, with five years suspended, three years on supervised probation, and various monetary penalties. The prisoner's wife was sentenced to a term of twenty years imprisonment, with seventeen years suspended, three years to serve, and three years supervised probation. She was also amerced with various monetary penalties. ( R. Vol. 1, pg. 85).

On 31 May 2007, the prisoner filed a "Motion to Re-sentence pursuant to the Mississippi Uniform Post - Conviction Collateral Relief Act." As grounds for relief, the prisoner alleged that his sentence amounted to cruel and unusual punishment in that he was sentenced to serve a fifteen - year term, whereas his wife was sentenced to serve a three - year term. He further alleged that he was subjected to sex discrimination, allegedly in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. His prayer for relief included a prayer that he be sentenced to the same "to serve" term as his wife had been sentenced. ( R. Vol. 1, pp.

5 - 11).

The Circuit Court denied relief on this motion without an evidentiary hearing in a detailed order. ( R. Vol. 1, pp. 97 - 104).

#### **STATEMENT OF ISSUES**

**1. WAS THE SENTENCE IMPOSED AGAINST THE PRISONER DISPROPORTIONATE?**

**2. DID THE CIRCUIT COURT ENGAGE IN SEX DISCRIMINATION BY IMPOSING A GREATER “TO SERVE” SENTENCE AGAINST THE PRISONER THAN THAT IMPOSED AGAINST HIS CO-DEFENDANT WIFE?**

#### **SUMMARY OF ARGUMENT**

**1. THAT THE FIRST ISSUE IS NOT PROPERLY BEFORE THE COURT; THAT THE SENTENCE IMPOSED AGAINST THE PRISONER WAS NOT DISPROPORTIONATE**

**2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE PRINCIPLES EMANATING FROM *BATSON v. KENTUCKY* AND PROGENY HAVE NO APPLICATION IN NON-JURY SENTENCING PROCEEDINGS**

#### **ARGUMENT**

**1. THAT THE FIRST ISSUE IS NOT PROPERLY BEFORE THE COURT; THAT THE SENTENCE IMPOSED AGAINST THE PRISONER WAS NOT DISPROPORTIONATE**

In considering the two assignments of error brought here, we bear in mind that standard of review applicable to appeals from a denial of relief in post -conviction relief cases. *Sellars v. State*, 963 So.2d 1183 (Miss. Ct. App. 2007).

In the First Assignment of Error, the prisoner claims that his “to serve” sentence was disproportionate in comparison with that imposed against his wife. It is said that the trial court should have conducted a proportionality review pursuant to *Solem v. Helm*, 463 U.S. 277 (1983).

First of all, there was no issue raised at the time of sentencing about the prisoner’s sentence. This being so, the issue could not be raised in post - conviction relief. *Tate v. State*,

961 So.2d 763, 767 (Miss. Ct. App. 2007). The First Assignment of Error is not properly before the Court. Secondly, the prisoner did not in his motion demonstrate what evidence he would produce to establish all of the factors of a proportionality enquiry. Specifically, he utterly failed to indicate how he would establish the length of sentences imposed for sexual battery in other jurisdictions. The only sentence discussed was the prisoner's wife's sentence. This was insufficient to establish the factors of such an enquiry. Nor has the prisoner established that a fifteen - year "to serve" sentence for the felony of sexual battery upon a child is grossly disproportionate to the crime. On the other hand, the Mississippi Supreme Court has held that a thirty-year term for this felony is not disproportionate. *Davis v. State*, 510 So.2d 794 (Miss. 1987).

Even assuming that the First Assignment of Error was before the Court, notwithstanding the foregoing reasons why it is not, there is no merit in it. The prisoner's sentence was well within the limits set for the form of sexual battery he committed. Miss. Code Ann. Section 97-3-101 (Rev. 2006). Where a sentence is within the limits set by statute, it is not a cruel and unusual punishment. *Tate, supra*.

As pointed out by the Circuit Court in its order denying relief on the prisoner's motion, the court accepted the fifteen - year "cap" negotiated by the prisoner and the prosecution. Had the "to serve" provision of the agreement been unacceptable to the prisoner, then he could have refused to agree to that term of the agreement and opted for trial. What is before the Court is in effect an attempt by the prisoner to renege on his agreement. However, he simply cannot have it both ways: He cannot on one hand enter into an agreement, have no objection to it during the plea colloquy and especially during the sentencing hearing, yet be heard to complain of it later in post - conviction relief.

The prisoner appears to suggest that there was an obligation on the part of the Circuit Court to explain why the prisoner was given a lengthier “to serve” sentence. Assuming for argument that there is an obligation in every case on the part of sentencing courts to give reasons for the sentence imposed, the prisoner failed to object to any alleged failure on the part of the trial court to set out its reasons. By having failed to object in a timely fashion, the prisoner waived the issue. *Wells v. State*, 698 So.2d 497, 514 (Miss. 1997)(Any claim is waived by the failure to contemporaneously object).

Nonetheless, the Circuit Court did explain its reasons. It stated that it had reviewed exhibits, and the video apparently made by the prisoner and his wife as they sexually battered the girl, and it considered the testimony that had been presented during the sentencing hearing. The court felt that the sentences it imposed were appropriate in view of what it had seen and heard. (R. Vol.1, pp. 84 - 85)

In the event, however, that this Court should determine that the First Assignment of Error is properly before the Court, and further determine that the sentence imposed against the prisoner was grossly disproportionate, or determine that the court failed to adequately explain the reasons for the sentences, there is no need to remand this case in order to permit the Circuit Court to explain its reasons. The reason this is so is because the Circuit Court did that in the Order it entered in denying relief on the prisoner’s motion. We adopt the Circuit Court’s order here. In this Order, the court stated that it felt that the sentences imposed were appropriate in view of what it had seen of the exhibits and video and what it had heard in the sentencing hearing. The other reason was because the prisoner agreed to the term of imprisonment, knowing that his wife would receive a lesser “to serve” term. This being so, the Circuit Court can hardly be faulted for having accepted the agreement the prisoner made.



The Appellant agreed to the sentencing provisions; he did not object to the sentence on the ground raised here at the time of sentencing. He may not be heard to do so here.

The First Assignment of Error is utterly without merit.

**2. THAT THE SECOND ASSIGNMENT OF ERROR IS NOT BEFORE THE COURT; THAT THE PRINCIPLES EMANATING FROM *BATSON* v. *KENTUCKY* AND PROGENY HAVE NO APPLICATION IN NON-JURY SENTENCING PROCEEDINGS**

In the Second Assignment of Error, the prisoner accuses the Circuit Court of having practiced sex (or gender) discrimination against him. There was no objection during the sentencing hearing on this ground. It may not be raised in post - conviction relief. *Tate, supra*.

Assuming the Second Assignment of Error is before the Court, there is no merit in it. *Batson v. Kentucky*, 476 U.S. 79 (1986) and progeny, it is hardly necessary to say, concern the process of choosing jurors. Those cases have utterly nothing to do with sentencing issues. *Snow v. State*, 800 So.2d 472 (Miss. 2001) provides nothing to demonstrate the applicability of *Batson* to a non-jury sentencing hearing.

There is not one word in this record to suggest that the Circuit Court engaged in sex discrimination against the prisoner. On the other hand, it is quite clear that the difference in the “to serve” portions of the sentences meted out to the prisoner and his wife were directly the consequence of plea bargains entered into by the prisoner and his wife. The Circuit Court cannot possibly be faulted for having accepted what the prisoner and his wife agreed to.

It may be that the Circuit Court did not address this issue at the sentencing hearing. But this is hardly surprising in view of the fact that the issue was never raised. The court did address the issue in the Order denying relief on the motion for post - conviction relief. Thus, in the event that this Court should find some error in the Circuit Court’s failure to divine this issue during the sentencing hearing, there is no need to remand this case. The court has explained its reasons in



the Order denying relief.

### CONCLUSION

The Order of the Circuit Court denying relief on the prisoner's motion in post - conviction relief should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

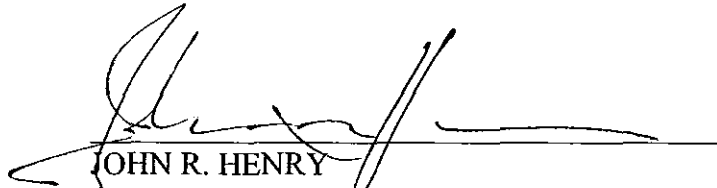
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 11th day of December, 2008.



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