

No. 2008-CA-01082-COA

IN THE SUPREME COURT OF MISSISSIPPI

STATE OF MISSISSIPPI

Appellee

VS.

BOBBY WAYNE WALLEY

Appellant

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANT

On Appeal from the Circuit Court of Wayne County

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies pursuant to Mississippi Supreme Court Rule 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

Bobby Wayne Walley
Defendant/Appellant

Honorable Jim Hood
Attorney General

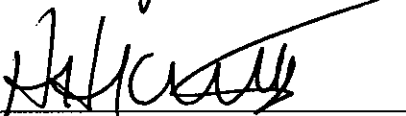
Honorable E.J. Mitchell
District Attorney of Wayne County

Honorable Dan Angero
Assistant District Attorney of Wayne County

Honorable Robert W. Bailey
Circuit Court Judge Wayne County

Honorable H. H. Klein, III
Attorney for Appellant/Defendant

SO CERTIFIED, this the 11th day of September, A.D., 2008.



H. H. KLEIN, III

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STATEMENT OF ISSUES

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STATEMENT OF THE CASE

Bobby Wayne and Kala Walley were indicted by the Wayne County Grand Jury in a two (2) count indictment charging Statutory Rape and Lustful Touching of a Child in Wayne County Circuit Court Cause No. 06-88-K. On June 20, 2006, Bobby Wayne Walley and Kala Walley entered pleas of guilty to sexual battery of a child alleged in the indictment. On October 23, 2006, a sentencing hearing was held wherein Bobby Walley was sentenced to twenty (20) years in the Mississippi Department of Corrections, fifteen (15) years to serve, five (5) suspended. On October 23, 2006, at the same sentencing hearing Kala Walley was sentenced to twenty (20) years in the Mississippi Department of Corrections three (3) years to serve, seventeen (17) years suspended.

Bobby Walley filed a Motion to Re-Sentence pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act which was denied on May 27, 2008. It is from the Order Denying Motion for Post-Conviction Collateral Relief that Bobby Walley brings his appeal.

STATEMENT OF FACTS

During the January 2006 Term of the Wayne County Grand Jury, Bobby Walley and Kala Walley were indicted in a two (2) count indictment charging Statutory Rape and Lustful Touching of a Child in Wayne County Circuit Court Cause No. 06-88-K. (RE 1)(UPCCR Motion Exhibit A) The indictment charged Kala Walley with Statutory Rape and Lustful Touching of a Child, and also charged Bobby Walley with Statutory Rape and Lustful Touching of a Child, all charges alleged to have been committed at the same time and sentencing from the same set of facts and circumstances.

On June 19, 2006, Bobby Walley executed a Petition to Enter Plea of Guilty in Wayne County Circuit Court Cause No. 06-88-K to charge of Sexual Battery of a Child, pursuant to an agreement with the State of Mississippi including a fifteen (15) year cap on any sentence of incarceration. (RE 4)(UPCCR Motion Exhibit B) Likewise, on June 19, 2006, Kala Walley executed a Petition to Enter Plea of Guilty in Wayne County Circuit Court Cause No. 06-88-K to a charge of Sexual Battery of a Child, pursuant to an agreement with the State of Mississippi including a five (5) year cap on any sentence of incarceration. (RE 10)(UPCCR Motion Exhibit C)

On June 20, 2006, Bobby Walley appeared in the Circuit Court of Wayne County Mississippi and entered an plea of guilty to sexual battery of a child. Likewise, on June 20, 2006, Kala Walley appeared in the Circuit Court of Wayne County Mississippi and entered a plea of guilty to sexual battery of a child.(RE 16)(UPCCR Motion Exhibit D)

On June 20, 2006, the Circuit Court of Wayne County Mississippi entered an Order Accepting Plea and Sentencing regarding Bobby Walley to the charge of sexual battery of a child. (RE 35)(UPCCR Motion Exhibit E) Likewise, on June 20, 2006, the Circuit Court of Wayne County Mississippi entered an Order Accepting Plea and Sentencing regarding Kala Walley to the charge

of sexual battery of a child. (RE 36)(UPCCR Motion Exhibit F)

On October 23, 2006, a sentencing hearing was held by Circuit Judge Robert W. Bailey. (RE 37)(UPCCR Motion Exhibit G) Bobby Walley was sentenced to twenty (20) years in the Mississippi Department of Corrections, fifteen (15) years to serve, five (5) years suspended. (RE 76)(UPCCR Motion Exhibit H) At the same sentencing hearing Kala Walley was sentenced to twenty (20) years in the Mississippi Department of Corrections, three (3) years to serve, seventeen (17) years suspended. (RE 80)(UPCCR Motion Exhibit I)

On May 31, 2007, Bobby Walley filed a Motion to Re-Sentence Pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act. (RE 84)

On May 27, 2008, Judge Robert W. Bailey entered an Order Denying Motion for Post-Conviction Collateral Relief without a hearing. (RE 175)

SUMMARY OF THE ARGUMENT

The Trial Court erred when it did not justify in the record the harsh and disproportionate sentence imposed on Bobby Walley as compared to the sentence imposed on Kala Walley at the same time for the same crime. When compared to the sentence imposed on Kala Walley, the sentence imposed on Bobby Walley violated Federal and State Law. There is nothing in the record to justify the additional twelve (12) years of incarceration received by Bobby Walley.

The Trial Court erred as the sentence imposed on Bobby Walley amounts to cruel and unusual punishment. The State of Mississippi presented facts, evidence and argument in the sentencing hearing on October 23, 2006 which submitted to the Trial Court that Bobby Walley and Kala Walley at all times acted in concert and conjunction with each other in committing the sex acts on the minor child. Specifically, the Trial Court never stated or considered that Bobby Walley's role and participation in the offense differed from Kala Walley's role and participation in the sex acts committed.

The Trial Court erred when it sentenced Bobby Walley, a male, to five (5) times the number of years of incarceration to serve in the Mississippi Department of Corrections, as compared to the co-defendant Kala Walley, a female. The sentences were imposed at the same time, for the same crime, by the same Circuit Court Judge and for the same level of participation in the crime. The face of the record reflects the only difference between defendants is that Bobby Walley is a male and Kala Walley is a female. The unjustified different sentences presents a prima facie case of gender discrimination in sentencing in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

LEGAL ARGUMENT

I.

The Trial Court erred when it did not justify in the record the harsh and disproportionate sentence imposed on Bobby Walley

The Trial Court wholly failed to justify or explain in the record the harsh and disproportionate sentence imposed on Bobby Walley as compared to the sentence imposed on Kala Walley at the same time for the same crime. (RE 37) Bobby Walley was sentenced to twenty (20) years in the Mississippi Department of Corrections, with fifteen (15) years to serve and three (3) years supervised probation. (RE 76) At the same time and during the same sentencing hearing, Kala Walley was sentenced to twenty (20) years in the Mississippi Department of Corrections, three (3) years to serve and seventeen (17) years suspended followed by three (3) years supervised probation. (RE 80)

The Fourteenth Amendment to the United States Constitution provides that no person shall be denied equal protection of the laws. The United States Supreme Court in **Solem v. Helm**, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), set forth a proportionality analysis which applies when a threshold comparison of the crime committed to the sentence imposed leads to an inference of "gross disproportionality". **Solem** requires the following factors to be considered 1) the gravity of the offense and the harshness of the penalty; 2) the sentences imposed on other criminals in the jurisdiction; and 3) the sentence imposed for commission of the same crime in other jurisdictions. In this case, the gravity of the offense is not questioned. However, the harshness of the penalty when compared to the sentence received by co-defendant Kala Walley is harsh and grossly disproportionate. Bobby Walley specifically challenged the disproportionate sentencing in his

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Uniform Post Conviction Collateral Relief Motion. (RE 84) The Trial Court denied Bobby Walley's Post Conviction Petition by erroneously relying upon his failure to protest his co-defendant's plea bargain which included a five (5) year cap of incarceration. The issue is not the plea bargained "cap", but rather the sentence imposed by the Circuit Court. It is clear that the sentence of Bobby Walley and likewise co-defendant Kala Walley was determined by the Trial Court. (RE 4) (RE 10) (RE 16) The comparison of sentences in this case goes well beyond the **Solem** factor which requires comparison of sentences imposed on other criminals in the same jurisdiction or in other jurisdictions. In the case at bar, the sentences imposed involve co-defendants whose participation in the crime to which they plead guilty is exactly the same. The issue is not whether the sentence received by Bobby Walley is within the statutory limits, but whether there is justification for the lesser sentence received by his co-defendant for the same crime at the same time. There is clearly a inference of gross disproportionality as discussed in **Womack v. State**, 827 So.2d 55, (Miss. App., 2002). In **Womack**, the Trial Court set forth specific reasons for the disparity between the sentence imposed on Womack and similarly situated defendants in the Fourth Circuit Court District. There is no difference between Bobby Walley and Kala Walley and their participation in the crime to which they plead guilty and were sentenced.

In **Davis v. State**, 724 So.2d 342 (Miss. 1988) the defendant was convicted of sale of cocaine within fifteen hundred (1500) feet of a church, and without any explanation, was sentenced by the Trial Court to sixty (60) years in the Mississippi Department of Corrections. The Mississippi Supreme Court held the following:

"In summary, under the facts of this case and given the lack of justification for the sentence on the fact of the record on appeal, it is appropriate that the case be remanded for further consideration of the

sentence imposed, consistent with those principles declared in *Presley*, *McGilvery* and *Clowers* and in the spirit of *Solem*. Davis has in her brief listed possibly comparable cases in which far lesser sentences were imposed both in Copiah and in adjoining Pike Counties. Upon remand, these cases will no doubt be considered by the trial court. Trial counsel in other cases should not read the decision of the Court in this case to provide security when no defense is offered and no effort is made to present matters justifying what they and their clients deem to be appropriate sentences, nor should this decision be read as imposing new restrictions on what remains very broad discretion in sentencing matters.”

The sentence was reversed and remanded for re-sentencing. In *McGilvery v. State*, 487 So.2d 67 (Miss. 1986), *McGilvery* and co-defendant Tanner were convicted for the same armed robbery charge. *McGilvery* was sentenced to forty-five (45) years in the Mississippi Department of Corrections and Tanner was sentenced to twenty-five (25) years in the Mississippi Department of Corrections. In *McGilvery*, as in the case at bar, the Trial Judge gave no explanation as to his reason for the difference in the sentences. The Mississippi Supreme Court remanded the case for a sentencing hearing by the Circuit Judge so that he could be given an opportunity to state for the record appropriate reasons for the disparity in the two sentences. Most importantly, the Court held that if there are none, then *McGilvery*’s sentence should be reduced. Likewise, if the Trial Court in this case can provide no reasons for the disparity between the sentence imposed on Bobby Walley as compared the sentence imposed on Kala Walley, then Bobby Walley’s sentence should be reduced.

The Order Denying Motion for Post Conviction Collateral Relief should be reversed and remanded, or alternatively the sentence imposed on Bobby Walley should be reversed and rendered, and he should thereafter be sentenced to twenty (20) years in the Mississippi Department of Corrections with three(3) years to serve and seventeen (17) years suspended, followed by three (3)

years probation. Alternatively, the sentence on Bobby Walley should be reversed and remanded for sentencing consistent with the sentence received by co-defendant Kala Walley.

II.

The sentence imposed on Bobby Walley presents a prima facie case of gender discrimination.

The Trial Court erred when it sentenced Bobby Walley, a male, to five (5) times the number of years of incarceration to serve in the Mississippi Department of Corrections as compared to co-defendant Kala Walley, a female. The issue of discrimination has been addressed by the United States Supreme Court in **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69(1986) the Mississippi Supreme Court has applied the race neutral standard of **Batson** to gender discrimination in the selection of a jury. In **Snow v. State**, 800 So.2d472 (Miss. 2001) the Court spoke to the establishment of prima facia gender and race discrimination. Likewise, the principals of **Batson**, **Snow**, and a litany of federal and state cases prohibit discrimination in the judicial process. The Uniform Post Conviction Collateral Relief Motion herein establishes a prima facie case of gender discrimination which is not justified or explained by the Trial Court. The Order Denying Motion for Post Conviction Collateral Relief (RE 175) cites **Sellars v. State**, 963 So.2d 1183 (Miss. App. 2007) as controlling precedent. A full reading of **Sellars** reveals that the Petition for Post Conviction Relief filed therein failed because the Trial Court gave reasons and used its discretion in determining Sellars' sentence. In the case at bar, the Trial Court failed to give any reason to justify the disparity between the sentences imposed on Bobby Walley and Kala Walley.


The Order Denying Motion for Post Conviction Collateral Relief should be reversed and remanded, or alternatively the sentence imposed on Bobby Walley should be reversed and rendered,

and he should thereafter be sentenced to twenty (20) years in the Mississippi Department of Corrections with three(3) years to serve and seventeen (17) years suspended, followed by three (3) years probation. Alternatively, the sentence on Bobby Walley should be reversed and remanded for sentencing consistent with the sentence received by co-defendant Kala Walley.

CONCLUSION

For these reasons, and any other reason this Court may find on the record, Bobby Walley's sentence should be overturned and he should be re-sentenced accordingly.

Respectfully submitted,



H. H. KLEIN, III

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellant's Brief
was this date posted via first class mail, postage prepaid, to the following:

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This the 11th day of September, A.D., 2008.



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