IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONALD HOOD — APPELLANT

VS. — NO. 2008-KA-0099-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On December 11, 2007, Ronald Hood, "Hood" was tried for "exploitation of children" under M. C. A.. § 97-5-31 and M. C. A. § 97-5-33(5) as an habitual offender before a Yazoo County Circuit Court jury, the Honorable Jannie M. Lewis presiding. R.1. Hood was found guilty and given a twenty year sentence in the custody of the Mississippi Department of Corrections. R. 178. C.P. 58. From that conviction he appealed to the Mississippi Supreme Court. C.P. 60.

ISSUES ON APPEAL

I.
WAS THERE A VIOLATION OF THE MARITAL PRIVILEGE?

II.
WAS 'SEXUAL EXPLICIT CONDUCT' DEPICTED ON HOOD'S VIDEOS?

III.
WERE THE STATUTES UNCONSTITUTIONALLY VAGUE?

IV.

DID THE PROSECUTION USE INFLAMMATORY ARGUMENTS?

STATEMENT OF FACTS

On July 10, 2006, Hood was indicted for "exploitation of children" under M. C.A. § 97-5-31 and § 97-5-33(5) by a Yazoo County Grand Jury. This was for possession of video tapes of actual male children under eighteen years of age engaged in "sexually explicit conduct." C.P. 3. His indictment was amended to reflect his habitual offender status. C.P. 38.

On December 11, 2007, Ronald Hood was tried for exploitation of children under M. C. A. § 97-5-31 and M. C. A. § 97-5-33(5) as an habitual offender before a Yazoo County Circuit Court jury, the Honorable Jannie M. Lewis presiding. R.1. Hood was represented by Mr. Trent L. Walker. R. 1.

Hood's counsel moved to exclude any testimony from Mrs. Melissa Hood, the wife of Mr. Hood. This was on grounds that her testimony would allegedly violate M. R. E. Rule 504, the husband wife confidential communication privilege. The prosecution pointed out that "a crime against the person of a minor child" was involved in this case. The trial court denied the motion. R. 73.

Mrs. Melissa Hood testified that she was married to Mr. Hood. Prior to their marriage, Hood admitted to having in his possession video tapes. He showed Melissa a video tape showing naked male children's exposed genitals. Melissa Hood was shocked and told him not to have such video materials in her house. Hood told her he would not expose her to these images again. R. 91. Melissa identified exhibit 1 as being the video tape that shocked her . R. 107.

When Melissa found a tape in a box of stuff that belonged to Hood, she put it in her VCR and viewed it. This was on March 13, 2006. This was after they were married. It was not identified by any title or description. What she saw again shocked her. She showed it to her sister, who took it out and threw it in the garbage. R. 92. She also confronted Hood when he returned home, telling him

she had a four year nephew she was concerned about. R. 92. They told Hood he would have to leave their home. R. 93.

On cross examination, Melissa testified that the male models she viewed on the tape were as young as five to seven. R. 103. This was in answer to what proof she had of the age of the models shown on the tape.

When Hood was confronted by Melissa and her sister after they found another video tape showing males genitals, and told to leave her home, Hood told her that he had the videos because "I started the stuff." R. 93. Hood also told her that he would take his tapes to California where he believed it was legal to possess them. R. 96.

Detective Larry Davis testified to being contacted by Ms. Melissa Hood. This was in March 13, 2006. R. 107. Davis identified state's exhibit 1 as being the tape he received from her on March 13, 2006. R. 108. Davis received a search warrant for Simmons Mini Storage, unit 42. This unit was registered in the name of Mr. Hood. R. 109.

In that storage unit, Davis found more than one hundred VCR tapes as well two smaller camcorder tapes. R. 112-113. Exhibit 4 was identified as being one of the tapes found in that storage unit. R. 115. It showed many photographs of young male nudes. R. 115.

On cross examination, Detective Davis testified that the male models "were young." R. 122. He estimated their age to be from ten to sixteen years of age. R. 122.

At the conclusion of the prosecution's case, the trial court overruled a motion for a directed verdict. R. 130. This was based upon an alleged lack of evidence that Hood personally possessed the tapes, as well as that the models in the nude photographs which he allegedly possessed were not sexually explicit or lascivious. They were "just naked." R. 127-129.

Hood chose not to testify in his own behalf. R. 130-131.

Hood was found guilty and given a twenty year sentence as an habitual offender in the custody of the Mississippi Department of Corrections. This was after the trial court found sufficient evidence for determining that Hood was an habitual offender. R. 178; C.P. 58. From that conviction he appealed to the Mississippi Supreme Court. C.P. 60.

SUMMARY OF ARGUMENT

1. The trial court found that the marital privilege did not apply under the facts of this case. R. 73. There is a presumption that the trial court's ruling was correct. **Clark v. State**, 503 So. 2d 277, 280 (Miss. 1987). Crimes against minor children were involved in this case. M. R. E. 504(d) provides for an exception to the marriage privilege where a spouse is charged with a crime "against the person of any minor child." **Fisher v. State** 690 So.2d 268, 272 (Miss. 1996).

In addition, Mrs. Melissa Hood testified about communication between herself and Hood which occurred prior to their marriage. R. 91; 97. There was therefore no claim to any such marital privilege for Hood's admissions to having video tapes of young naked males in his possession at that time. She also testified that Hood admitted that he had the videos because he "started it." R. 93.

2. The Record reflects that "sexually explicit conduct" was depicted. There was evidence that the videos clearly showed photographic "exhibitions of the genitals" of the young male models. This included close up shots of the genitals of the models. These genital images were to the exclusion of the rest of their bodies. A viewer could not see the faces of the young males shown with their hips tilted forward for the camera. This allowed the viewer of the videos to see the male genitals for long periods of time without any obstruction to their view.

These images were clearly different from the photographs of nude children taken from a Yazoo City public library. None of these public library images included close up views that exclusively focused on the male model's genitals. R. 140. In **Osbourne v. Ohio**, 495 U. S. 103, 113-114, 109 L. Ed. 2d 98, 110 S. Ct. 1691, 1698 (1990), the U. S. Supreme Court found Ohio's statute prohibiting individuals from possessing photographs which involved lewd exhibitions of the young models genitals constitutional.

3. This issue was waived for failure to raise it with the trial court. **Patterson v. State**, 594 So. 2d

606, 609 (Miss. 1992). And the exploitation of children statutes, which include definitions for "sexual explicit conduct," "lascivious" and other terms provided advance warning of the conduct to be avoided. The statutes were not therefore unconstitutionally vague.

See M. C. A.. § 97-5-31(a), (b)(v)and(f) as well as M. C. A. § 97-5-33(5). "Sexual explicit conduct" is defined as "actual or simulated." "Sexual explicit conduct" includes "lascivious exhibition of the genitals or pubic area" of any child under eighteen years of age. And "simulated conduct" includes displays of genitals that "gives the appearance of sexual conduct or incipient sexual conduct." Lascivious exhibition means the showing of genitals to arouse sexual desire.

In **New York v. Ferber** 458 U.S. 747, 773-774, 102 S. Ct. 3348, 3363 (U.S. N.Y. 1982), the U.S. Supreme Court found the New York statute forbidding the possession of photographs of young people making "a lewd exhibition of the model's genitals" constitutional. The Court found that this prohibition could be distinguished from displays of nudity which had cultural or anthropological significance on "a case by case" factual basis.

4. This issue was waived for failure to make a contemporaneous objection. **Whigham v. State**, 611 So. 2d 988, 995 (Miss. 1995). R. 154-178.

The appellee believes that when viewed in context, the prosecution's arguments were not unfairly prejudicial but rather about facts in evidence. The argument was about male nude video tapes and photographs with the models male genitals prominently displayed. They were displayed for potential viewers of these images. The prosecutor's argument was about inferences from these visually significant facts. It was also in response to Hood's defense about the images being innocent anthropological pictures which allegedly had legitimate scientific or geographical significance. R. 127-128; 168-170. In **Reynolds v. State** 913 So.2d 290, 299 (Miss. 2005), the Mississippi Supreme court found that the prosecution's response to defense arguments in closing would not be

viewed as impermissible.

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS THE MARITAL PRIVILEGE DID NOT APPLY.

Hood believes that his right to have communication between himself and his wife held confidential was violated in the instant cause. He believes that his wife, Melissa, should not have been allowed to testify. He thinks the evidence against him dealt with confidential communication between them while he was still married to her. Hood also argues that M. R. E. 601, the general rule on competency, is in conflict with M. R. E. 504 on marital confidential privilege. Appellant's brief page 9-11.

To the contrary, to the best of the appellee's knowledge, the issue of conflicts in evidentiary rules dealing with competency to testify and spouses was never raised with the trial court. R.72-73. It was therefore waived.

> In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated:
> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State**, 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); **Crawford v. State**, 515 So. 2d 936,938 (Miss. 1987); ...

In addition to being waived, as was pointed out by the prosecution, the charge against Hood involved a crime against the person of minor children.

> Powell: Well, because this involves children, and there's an exception specifically made regarding abuse, neglect, the exploitation of children, that the testimony is allowable under these circumstances.
>
> Trial court: Motion is denied. R. 73.

In **Fisher v. State** 690 So.2d 268, 272 (Miss. 1996), the Supreme Court revised Rule 504 "prospectively." It did so by adding section (d) which created an exception to the privilege where

a spouse was charged with "a crime against the person of any minor child."

> Miss. R. Evid. 601 (a)(2) indicates an obvious growing concern about sexual and violent abuse against children. Today, we amend the exceptions in M. R.E. 504(d) to reflect the same concern. The authority to adopt and amend the Mississippi Rules of Evidence is an inherent power of the judicial branch of government. See Miss. Const. Art. 6, § 144 (1890); **Hall v. State**, 539 So.2d 1338, 1345-1346; **Hudspeth v. State Highway Comm'n**, 534 So.2d 210, 213. The amendment to Rule 504(d) shall read:
>
> (d) Exceptions. **There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against (1) the person of any minor child** or (2) the person or property of (i) the other spouse, (ii) a person residing in the household of either spouse, or (iii) a third person committed in the course of committing a crime against any of the persons described in (d)(1) or (2) of this Rule.
>
> **Rule 504(d) as revised shall apply prospectively upon publication in West's Southern Reporter.** (Emphasis by Appellee).

The appellee would submit that the alleged conflict in the rules of evidence between M. R. E. rule 504 and 601 issue was waived. It was waived for failure to raise it with the trial court on the same grounds being raised on appeal. R. 72-73.

In addition, it is lacking in merit. The rules of evidence on marital privilege were revised "prospectively" by **Fisher, supra**. Hood was tried in 2007 long after the exception to the rule was placed into effect by the Mississippi Supreme Court in 1996. The rule provides an exception where a spouse is charged with a crime against the person of <u>any</u> minor child.

Additionally, Mrs. Melissa Hood testified that "prior "to her marrying Hood, he told her that he had "tapes." He not only told her, he showed her. Shocked by what she saw, she told him not to have these tapes in her trailer. She did not want to ever see any such nude male genital images again. R. 91; 97.

> A. And I'm like, "What stuff?" And he said, "There's tapes." I said, "Get one of them out and let me see what it is." He did, and when he put it in, I said, "Whoa! Hold." I said, "Uh-unh, I can't watch that. That's stomach turning." And I said, "If

you're going to marry me, if you're going to live in my house, you've got to get rid of this stuff. I can't take this." And he said, "You don't got nothing to worry about. R. 91.

This communication involved admission of possession of videos depicting nudity. It was not be in violation of the M. R. E. 504 the marital privilege. The record reflects that this would be admissible into evidence as an admission against interest. M. R. E. 804(b)(3). The record reflects that at the time this admission against interest was made Melissa were not married to Hood. This was a pre-nuptial statement. R. 91-92.

The record reflects that the charges against Hood were charges involving crimes against minor male children. C.P. 3. The Supreme Court has found by evidentiary rule and by case law that where this occurs there is an exception to the normal marital privileged for confidential communication. In addition, as show with cites to the record , Melissa testified to communication with Hood prior to their being married. R. 91-92. This communication involved Hood's admission to being in possession of videos showing the genitals of young male models.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS SEXUALLY EXPLICIT DEPICTION OF GENITALS.

Hood argues that there was no basis for finding that the young males in the videos he possessed were engaged in any "sexual explicit conduct." Hood believes that these video displays of young males were innocent pictures of naked male children playing. He compares them to the photographs taken by persons working for the **National Geographic** magazine. They are intended to provide scientific or anthropological information to potential viewers.

Hood also believes that there was never any proof that he possessed the video images with the intent to arouse his or any other viewer's sexual desires. He believes the images were simply pictures of naked children. They were not engaged in any obscene or sexually explicit conduct. He also thinks there was never any proof that the nudes shown in the videos were under the age of eighteen. Appellant's brief page 11-13.

To the contrary, the record indicates that the videos shown in state's exhibit 1 and 4 included numerous close up shots focused "exclusively" on the genital area of the young male nudes depicted in the photographs or videos. In addition, one video tape shows the scanning of a bed room. The camera focuses first on a picture of a teddy bear and then on a close up of a young males genitals. The young male is curled up on the bed like the teddy bear. The camera focuses on the genitals of young male nudes for a lengthy period of time without the viewer being able to even see the face of the boy being filmed. R. 84-85.

Under the definitions for the exploitation of children statutes are definitions for "sexually explicit conduct" indicating that the conduct can be "actual or simulated." M. C. A. § 97-5-31(b). In addition, "sexual explicit conduct" includes "genital" images "that gives the appearance of sexual

conduct or incipient sexual conduct." See M C A § 97-5-33(f).

> M. C. A. § 97-5-31. Exploitation of children; definitions.
> As used in sections 97-5-33 through 97-5-37, the following words and phrases shall have meanings given to them in this section:
>
> (a) child means any individual who has not attained the age of eighteen years.
> (b) **sexually explicit conduct means actual or simulated.**
>
> (v) **lascivious exhibition of the genitals or public area of any person...**
>
> © producing means producing, directing, manufacturing, issuing, publishing or advertising
>
> (f) **simulated means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct.** (Emphasis by Appellee).

A definition of lascivious includes that which is lewd, or lustful. In other words, if something is lascivious it appeals to a persons lust or sexual desires. See Webster's Dictionary for definition of lascivious.

During opening argument, the prosecution pointed out that one of the young men shown on the video tape is described as being thirteen years old by the narrator for the video tape.

> Now, what are these tapes going to show? The first tape contains four different videos. **The first one is concerning a thirteen year old boy. I know his age because he says in there, or at least the narration to it says that he's thirteen years old and he goes through essentially a history of him and as a nudist and a bunch of other young boys.** R. 82-83. (Emphasis by appellee)

The trial court denied a motion for a directed verdict. It did so because it found , as stated by the prosecution, that the videos displayed to the court and jury focused on the genitals of the male models in every video. These were not photographs designed to shown the beauty of the models' overall forms or their athleticism but rather merely incidentally showed the bodily forms and shapes of the models to focus solely on their genital or pubic area.

Walker: I would urge that Mr. Hood is not guilty and cannot be found guilty because

the young men pictured in the videos are not engaged in sexually explicit behavior.

They are just nude. R. 127-128. ...

Powell...**Now, in the videos we have just seen, we not only have exhibition of the genitals in every shot, in the context of particularly in the second two, all male to male, all young males of different ages in poses that are specifically for the camera and to display the genital area.** And in the last video that was taken, there is shots of every person who is posed in there of not only a photo from a distance, but close-ups of the genital area, themselves, where nothing else can be seen after they go in these close ups, other than the genitals of the individuals involved. **These photographs certainly are for the purpose of stimulating lustfulness and sexual desire or sexual suggestive, which is all lascivious means. So those displays, themselves, there's no other reason to do the close up shots of the genitals only, other than for some sexual connotation, and that meets the definition of the statute.** R. 129-130 (Emphasis by Appellee)

Court: Defendant's motion for directed verdict is denied. R. 129-130.

Jury instruction 4 stated as follows:

The Court instructs the jury that the term "sexually explicit conduct" as is used in other instructions in this cause, means the lascivious exhibition of the genitals or pubic area. The term "lascivious" means that the exhibition of the genitals of pubic area is intended to stimulate lustfulness or sexual desire, or that such exhibition is sexually suggestive. C.P. 43.

On cross examination of Mr. Paul Cartwright, a librarian, it was brought out that none of the photographs of nude children shown in a local Yazoo City public library book had any close up photos of their genital area.

Q. **Are any of these photographs close ups or photographs where you just zoom in solely on the genital areas?**

A. **No.** R. 140. (Emphasis by Appellee).

During closing argument, Mr. Waldrup for the prosecution pointed out that in the photographs of nude children found in a local library, there were no photographs that focused exclusively upon the genitals of the children. Whereas this is the case in exhibit 1 and 4.

This stuff that they brought in from the library, let's see; what was it? It was a 227

> page book, seven pictures provided, over 40,000 books in the library. Two of them, from a distance, showed the genitals of a child. How many of them panned in on the genitals? None of them. There's a big difference. R. 158.

In **Blackwell v. State** 915 So.2d 453, 456 (Miss. App. 2005), the Court of Appeals found jury instructions instructing the jury that photographing a person under eighteen who was engaging in sexually explicit conduct was proper for cases based upon charges under M. C. A. § 97-5-33(2).

In that case, Blackwell was indicted under 97-5-33(2), since there was evidence that he had photographed P.T., an young female child, with another male. It showed her being touched on her breasts and inside her underclothes near or on her genital area by the other male shown before the camera.

> The jury was given three instructions stating that, for a finding of guilt, it had to find beyond a reasonable doubt that Blackwell photographed a person under the age of eighteen engaging in sexually explicit conduct or in the simulation of sexually explicit conduct. Thus, contrary to Blackwell's assertion, the jury was instructed on all of the essential elements of the crime of child exploitation by three jury instructions tracking the language of § 97-5-33(2).

In the instant case, Hood was indicted under 97-5-33(5). There was evidence of constructive possession of video tapes. These tapes showed children engaged in "sexual explicit conduct" which can include by definition "incipient sexual conduct." Incipient sexual conduct can include "lascivious displaying of genitals" which means designed to arouse sexual desire and passion. Lascivious means lewd, lustful or wanton. It means appealing to a person's sexual desires.

In **U.S. v. Slanina**, 359 F. 3d 356, 357 (5th Circuit 2005), the 5th Circuit Court of Appeals found in a federal pornography case that the prosecution did not have to present expert witness. They did not need them to testify regarding the sexual significance of the visual images of children engaged in sexual activity. The court found the jurors, as finders of fact, were capable of determining if the images were real images of real children as opposed to "virtual images."

> Juries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial judge. **Kimler**, 335 F. 3rd at 1142. Therefore, the government was not required to present any additional evidence or expert testimony to meet its burden of proof to show the images downloaded by Slanina depicted real children, and not virtual children. The district court, as the trier of fact in this case, was capable of reviewing the evidence to determine whether the government met its burden of proof to show that the images depicted real children.

The record reflects that the video images shown to the jury were videos showing "sexually explicit conduct." There was no issues raised as to whether the male models whose genitals were shown were real as opposed to virtual.

While there were no images of models engaging in actual intercourse, masturbation, or touching of each other genitals, the images involved "visual depictions" of the genitals and pubic area of the models to the exclusion of the rest of their bodies. Some of the images of the males models genitals were for as long as thirty minutes. R. 85.

Sexual explicit conduct can include "actual or simulated conduct." It can also involve "lascivious exhibition of the genitals or public areas" of the models. It does not have to depict actual touching between persons of the same sex or the opposite sex. See M. C. A. § 97-5-31; exploitation, definitions.

There is an abundance of evidence indicating that the videos possessed by Hood were videos that involved "the lascivious exhibit of the genitals or public area" of the young male models. This exhibition of genitals in many instances was almost exclusive rather than incidental while showing images of other parts of the models bodies from the front, side or rear.

There was also corroborated testimony from Melissa Hood, and Detective Davis that the videos showed young male models who were as young as five, seven, ten and up to sixteen. R. 103, 122. This was in addition to nude male identified by the narrator of a video as being the thirteen

years old. R. 82-83. This would make them under the age of eighteen for statutory purposes. See M. C. A. § . 97-5-31 (a).

The Appellee would submit that this issue is also lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. AND THE STATUTES PROVIDED ADVANCE NOTICE OF WHAT IS FORBIDDEN.

Hood believes that the exploitation of children statutes in question in the instant cause are unconstitutional. They are unconstitutional because the word "lascivious" is allegedly vague and never explained by statute. Hood thinks that the statute does not properly distinguish between mere nude photos where genitals are seen as opposed to nudes engaged in recognizable sexual actions such as intercourse. He thinks his videos were like the naked children shown in **The National Geographic**. This confusion about the significance of the nude images made it difficult for him to know in advance what conduct was forbidden under these statutes. Appellant's brief page 14-15.

The appellee has found no objection in the record to the constitutionality of the child exploitation statutes. R. 1-191; C.P. 1-67.

In **Patterson v. State**, 594 So. 2d 606, 609 (Miss. 1992), the Court stated that a constitutional issue not raised with the trial court was waived on appeal.

> The rule that questions not raised in the lower court will not be reviewed on appeal is particularly true where constitutional questions are involved. **Stewart v. City of Pascagoula**, 206 So. 2d 325 (Miss. 1968). These questions were waived–forfeited, if you please–if not asserted at the trial level. **Contreara v. State**, 445 So. 2d 543, 544 (Miss. 1984) [Appellant did not raise in lower court the constitutionality of statute proscribing crime against nature, and for that reason the question could not be considered on appeal].

In addition, included under M. C. A. § 97-5-31, exploitation of children, are definitions. In section(f) "simulated" is defined as meaning "any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct." The depiction of the genitals of children for purposes of "incipient sexual conduct" would seem to the appellee to include the

possession of the photographs, or videos for purposes of stimulating the viewers sexual arousal and/or sexual satisfaction in some manner. They involve "the lascivious exhibition of the genitals or public area" of the models, as defined in section (v).

As stated under proposition 3, the video images of nude male children shown in state's exhibit 1 and 4 are focused almost exclusively upon the genitals of the boys. One of them focuses on the genitals of nude children shown in a setting of a celebration. There are adults present in a festive mood. They are serving wine and beer to the nude models. The nude models have their genitals exposed to the camera. R. 83-84.

In **New York v. Ferber** 458 U.S. 747, 773-774, 102 S. Ct. 3348, 3363 (U.S. N.Y. 1982), the United States Supreme Court found that the New York state statute forbidding "the possession" of pictures of young people engaged in sexually explicit conduct was not overly broad in its possible application to individual cases.

> Applying these principles, we hold that § 263.15 is not substantially over-broad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in § 263.15. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, § 263.15 is "not substantially over-broad and ... whatever over-breadth may exist *774 should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." **Broadrick v. Oklahoma**, 413 U.S., at 615-616, 93 S. Ct., at 2917-2918.
>
> In **Osbourne v. Ohio**, 495 U. S. 103, 113-114, 109 L. Ed. 2d 98, 110 S. Ct. 1691, 1698

(1990), the United States Supreme Court found that Osborne's possession in his home of four photographs of a nude male adolescent was in violation of Ohio's statute. This was Ohio's statute forbidding the possession of child pornography. Osbourn's photographs depicted a young male posed in a sexually explicit position.

The Court found that the statute did not criminalize conduct which was protected by the United States Constitution. Osbourne's photographs were focused upon the genitals of the male model.

The Court found that the statute was not over broad. It also found that Osborne had advance notice of the conduct that was to be avoided. Given the seriousness of the harm to the child victims, the state had a legitimate interest in "attempting to stamp out this vice at all levels of the distribution chain." 495 U.S. at 110.

> However, that may be, Osbourne's over breath challenge, in any event, fails because the statute, as construed by the Ohio Supreme Court on Osbourne's direct appeal, plainly survives overbreath scrutiny. Under the Ohio Supreme Court reading, the statute prohibits 'the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals and where the person depicted is neither the child nor the ward of the person charged.

The appellee would submit that this issue was not only waived, it is also lacking in merit.

PROPOSITION IV

THIS ISSUE WAS WAIVED. AND THE PROSECUTORS' REMARKS WERE NOT IMPROPER.

Hood believes that he was denied a fair trial because of improper remarks by the prosecution during opening and closing argument. He believes these improper remarks were gratuitous and designed to inflame the passions of the jurors and distract them from the evidence against him in the record of this cause. He believes comments about the way the camera showed the genitals and how long they are exposed to the camera were unfairly prejudicial. Appellant's brief page 16-17.

The record reflects there was no objection to the state's opening and closing arguments on pages 83-85, and 159 and 175.

In **Whigham v. State**, 611 So. 2d 988, 995 (Miss. 1995), this Court stated that it without a contemporaneous objection to the state's closing argument, that this issue was waived.

> Counsel for the first time on appeal complains that the closing argument of the State commented upon Whigham's failure to testify. It is, of course, incumbent upon counsel at trial to make a contemporary argument, and also in his motion for a new trial, failing in which the error is waived. **Dennis v. State**, 555 So. 2d 679 (Miss. 1989); **Dunaway v. State**, 551 So. 2d 162 (Miss. 1989)...

Issues related to the prosecution's comments during closing were therefore waived. While there was an objection made to the last videotape, which was apparently homemade, the trial court overruled the objection. R. 159. The objection was that "there's no evidence as to the origin of the tape or whether or not Mr. Hood knows who made it?"

Whereas, the record indicates that one of the tapes the jurors viewed did appear to be home made. It shows random shots inside a bed room before it focused exclusively upon the genitals of a young boy for some thirty minutes. R. 84-85.

There was record evidence that Mr. Hood had this home made video tape in his constructive

possession in his storage shed. R. 83-84; 115. In addition, there was testimony from Melissa Hood to an admission against interest on the part of Hood. He admitted to her, prior to their marriage, that he was in possession of these video tapes of naked young men. R. 91-92.

When confronted over his having possession of video tapes in her home, Hood stated that "I've got it because I started the stuff." R. 93.

In **Strahan v. State** 955 So. 2d 968, 974 (Miss. App. 2007), the Court found that although some of the closing argument were improper that they were not grounds for reversal. The natural and probable effect of the objected to argument did not result in any unfair prejudice to Strahan.

> ¶ 21. Despite the procedural bar, this Court may address the statements if they were so inflammatory and prejudicial that the trial court should have objected to them sua sponte. Id. (citations omitted). The standard of review for such statements is "whether the natural and probable effect of the improper argument of the prosecuting attorney [created] an unjust prejudice against the accused and [secured] a decision influenced by the prejudice so created" such that a new trial should be granted. **Craft v. State**, 226 Miss. 426, 435, 84 So.2d 531, 534 (1956). While the prosecutor's remarks in this case certainly were inappropriate and should have drawn an objection from defense counsel and an admonition from the trial judge, this Court cannot say that the prosecutor's comments rose to a level that requires this Court to reverse this case and remand it for a new trial, particularly in light of the evidence against Strahan.

In **Reynolds v. State** 913 So.2d 290, 299 (Miss. 2005), the Supreme Court found that it is not objectionable for the prosecution to respond to the defense's arguments during closing.

> ¶ 33. The defense also argues that the State should not have been allowed to make comments on the good job that the police do in its closing statement to bolster its case. The defense did not raise a contemporaneous objection as to the State's remarks. This Court has held that "[i]f no contemporaneous objection is made, the error, if any, is waived." **Walker v. State**, 671 So.2d 581, 597 (Miss.1995) (citing **Foster v. State**, 639 So.2d 1263, 1270 (Miss.1994)). On appeal, this Court is under no obligation to review an assignment of error when an objection was not made. See **Carr v. State**, 655 So.2d 824, 832 (Miss.1995). The contemporaneous objection rule is designed to enable the trial court to correct an error with proper instructions to the jury whenever possible. **Gray v. State**, 487 So.2d 1304, 1312 (Miss.1986) (citing **Baker v. State** , 327 So.2d 288, 292-93 (Miss.1976)). See also **Johnson v. State**, 477 So.2d 196, 210 (Miss.1985).

¶ 34. Furthermore, the remarks made by the State regarding the police department were made in reference to allegations raised by the defense on close. The remarks were tied to addressing the defense's statements asking why Reynolds's clothes were not tested to see whose blood was on her clothes. The State stated:

The appellee would submit that this issue was not only waived but is also lacking in merit.

CONCLUSION

Hood's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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