IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COY MICHAEL EDMOND APPELLANT

VS. CAUSE NO.: 2008-KA-01027-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATES 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 disqualification or recusal.

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Hon. Joe Morgan Wilson
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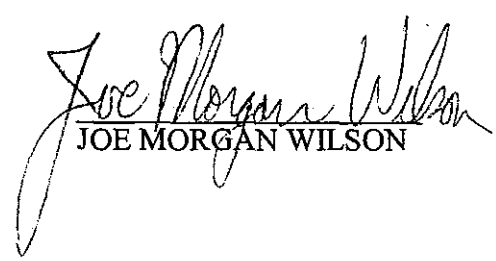
Coy Michael Edmond
Appellant



JOE MORGAN WILSON

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STATEMENT OF THE CASE

The alleged victim in this action was Heather Crews, a teenage girl who was living in Lafayette County, Mississippi. She was asked to babysit for the family of the Defendant, Coy Michael Edmond supposedly on February 4, 2006. She was babysitting for the Defendant's children when she claimed that the Defendant came out of the bedroom and approached her during which time they allegedly had sexual contact from which arose the charge of sexual battery against a female between the age of fourteen and sixteen years.

The Defendant was subsequently arrested, and later indicted by the Circuit Court of Lafayette County, Mississippi. He was tried on the charge of sexual battery on May 12th and 13th, 2008. He was found guilty of said charge from which this appeal has resulted.

ARGUMENT

I
THE STATE FAILED TO ADEQUATELY PROVE THE AGE OF THE VICTIM

The State of Mississippi provided the testimony of Judy Crews, mother of the alleged victim, who testified as follows:

Q And is Heather Crews your natural daughter?
A No, we adopted her.
Q Had you not adopted her would she be of blood relation of yours?
A Yes, sir.
Q How would she have been related to you by blood even the absence of your adoption?
A She would be my niece.
Q Was she your brother or sister's child?
A My sister.
Q Do you know what Heather's birthday is?
A May 16, 1990. (Tr 60-61)

Q When was the adoption finally effective?
A 1990, April 4th.
Q And she has been your daughter living with you since then?
A In 2000 is when she was adopted.
Q Not 1990?
A Yes, that was the year she was born in. (Tr 63)

It is clear even from her confused testimony that she adopted this child in the year 2000 when the child was allegedly ten years old, but that she in no way testified as to her own personal knowledge of when the child was born, even though she acknowledged that she was physically the child's aunt. She did not testify where the child was born or whether or not she had her own personal knowledge of the time, date and place of birth.

Although this Court has ruled against this issue in the past it held as follows:

> "Age . . . may be adequately proven by testimony." *Wright v. State*, 856 So.2d 341, 344 (¶9) (Miss. Ct. App. 2003) (citing *Taylor v. State*, 744 So. 2d 304,319 (¶54) (Miss. Ct. App. 1999) This rule has not changed. The State is not required to provide a birth certificate or other documentation to show age, particularly where, as here, the victim and her mother both clearly state her date of birth and age at the time of the incident.

The Appellant would distinguish between *Wright and Taylor* hereinabove cited and the case at bar. The adoptive mother in this case in no way indicated that she knew of her own personal knowledge the date of birth of the child, nor was a birth certificate provided either in discovery or by being offered into evidence at trial. Consequently the above case law should not have the same application as in this case.

Secondly, upon taking the witness stand the child Heather Crews testified as follows:

Q And I don't think I asked you this, Heather, what is your birthday?
A 5/16/90
Q 5/16 of 90?
A Uh-huh. (Tr 93)

It is obvious that this child could not possibly know when she was born, as has been reflected by *Messina v. New York Life Ins. Co.,* 173 Miss. 378, 161 So. 462 (1935) where this Court held:

> The authorities seem to be in general accord that the best proof of age is the testimony of living witnesses who were present at the birth and distinctly remember the event, or who, although not present, yet were so situated as to have positive knowledge and remembrance of the date thereof . . . The authorities do not seem to be so well in accord as to probative value of an official birth certificate, although they do generally hold that such a certificate is of a higher grade of evidence than mere opinions.
> L. H.'s age was established as five years old at the time of the incident, and six years old at the time of trial, by testimony of L. H. and her mother. Her mother's testimony would be admissible, and sufficient, by the standard of *Messina* . . . L. H.'s testimony is admissible under the rationale of *Tisale v. Jefferson Standard Life Ins.,*

244 Miss. 839, 147 So. 2d 122 (1962): "It is obvious that the appellant did not and could not have any personal knowledge as to the date of his birth. His information must have necessarily been based on hearsay." *Tisdale at 846.*

Based upon such language the alleged victim's testimony was certainly hearsay and it is very likely that Judy Crews, the adoptive mother's information was also hearsay. It would appear from her testimony that she was not around this child for a great amount of time during her early life on this earth, but there is absolutely no testimony offered by anyone who indicated that they knew the day that this child was born. The issue becomes crucial when one realizes that at the time of the alleged offense the child was, even by her own hearsay testimony, nearly sixteen years old, the age of consent.

The indictment in this case reads as follows:

> COY MICHAEL EDMOND late of the County and State aforesaid, on or about the 4th day of February, 2006, in the County and State aforesaid, and within the jurisdiction of this Court, being twenty-six (26) years old at the time, did unlawfully, willfully and feloniously engage in sexual penetration with a child, H.C., who was fifteen (15) years old at the time, date of birth 05-16-90, to wit is at least fourteen (14) but under sixteen (16) years of age, is thirty six (36) months or more younger than EDMOND, in violation of the provisions of Section 97-3-95 (1)(a)of the Mississippi Code of 1972, Annotated, as amended, which offense is punishable pursuant to Section 97-3-101 (2)(b) a) of the Mississippi Code of 1972, Annotated, as amended, by imprisonment in the State Penitentiary for not more than thirty (30) years, or fined not more than Ten Thousand Dollars ($10,000.00), or both, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

It is the burden of the State of Mississippi to prove each and every element of the offense beyond a reasonable doubt. It is not the duty of the defense to assist in doing so and consequently a crucial and jurisdictional element of this alleged crime has failed to be proven beyond a reasonable doubt: that is that the child was "at least 14 but under sixteen years of age" at the time of the alleged offense.

ARGUMENT
II
THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE STATE TO PROCEED AFTER REVEALING THE ALLEGED VICTIM WAS OF LIMITED MENTAL CAPACITY INFORMATION WHICH SHOULD HAVE BEEN REASONABLY KNOWN TO THEM AND PROVIDED THE DEFENDANT WELL BEFORE TRIAL

Rule 9.04 (E) of the Uniform Circuit And County Court Rules states as follows:

> Both the state and the defendant have a duty to timely supplement discovery. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's attorney of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

The Appellant would show this Court that the following statements were made at the commencement of the trial on May 12, 2008, by Assistant District Attorney T. R. Trout:

> BY MR. TROUT: One other matter, Your Honor. The victim in this case is Heather Crews. She is a female who was age 15 at the time of this event. There will be evidence to indicate that she is a little developmentally delayed. Has an IQ around 60, 70, something like that. And she is, she wants her mother in the courtroom when she testifies, now the order of proof which the State intends to present would have her mother as a witness before she testifies, but there is a possibility that we can have to recall her mother later in the proceedings. (Tr 49)

Upon the revelation of such discovery of the alleged victim's mental incapacity the Court responded:

> BY THE COURT: I understand. What is the position of the defendant on that request?
> MR. WILSON: Your Honor, first problem I have is that he has just given me verbally I guess some discovery that he was not aware of. This girls purported I.Q. I do adult and child disability cases on a regular basis and I feel I'm qualified to know the I.Q. that he just provided is a borderline retarded person. Now this case has been under indictment now for two and a half years and this is the first time I have heard this. And I'm not certain that I would not have asked this court for a competency and

she can have a Wexler evaluation, may have had one as to whether or not she is capable of coming in here and testifying before a jury. Because this is a very crucial thing. Whether she is capable of realizing the seriousness of these accusations or not, I don't know. I would have assumed that she was until Mr. Trout just revealed this. And the fact that she wants her mother in here, I think it certainly sets it up for real strong situation for reversible error and I think that is the danger that Mr. Trout would have to face but I would have to object to the mother, you know, if we had a hearing on this perhaps a month ago when we were aware of this then we could have sorted it all out in chambers and dealt with it. But here we are, we are about to put that jury back in the box and they have already been selected. I really do have problems. I know we can't go give this girl a test and let the jury sit here for 20 hours. I read those examinations all the time and these psychologists render their opinions. And of course, I know we are not talking about a McNaughten rule for a witness. We are talking about, you know, what are they capable of knowing. Do they understand the seriousness of what she is accusing a man of a very serious felony crime. Does she realize how important it is to tell the truth or not. I don't know but 69 I Q really, really bothers me. And it really does. You know, of course he made an oral motion I'm having to make an oral objection because this is a total surprise. And you know, a total surprise. I don't know. I have a very serious problem with it. Which I don't want to appeal it. I don't want a conviction but I think I have got a reversible error already.

(Tr 50-51)

In response Mr. Trout stated:

BY MR. TROUT: Your Honor, the State just found out about this from the mother . . . and I regret that we just disclosed it but we just learned it. And so, it can be handled in the appropriate fashion as it's always handled and there serving no reversible error here the court is going to make a ruling which is in its discretion about whether the child understands the oath and understands the obligations to tell the truth. (Tr 52)

The trial Court overruled the objection.

The Court was in error for not following Rule 9.04 (I) which states as follows:

If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order

as it deems just under the circumstances.
If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:

1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and

2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence of grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence of grant a mistrial.

3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

The Appellant would submit that under Rule 9.04 (I) that this attempt to introduce evidence was made during the course of the trial and not prior to trial which required the Court to take action. Under Rule 9.04 (I) (1) it states that the Court should "Grant the defense a reasonable opportunity to interview the newly discovered witness." This cannot apply because the witness was already known being the alleged victim in this case, yet her mental capacity was not known, and it was almost as if she was another individual from that provided in the State's discovery.

Under Rule 9.04 (I) (2) if the Defendant had claimed undue surprise or undue prejudice he could seek a continuance or mistrial but no such opportunity was afforded the Appellant in this case. In fact such an opportunity could not have been afforded him with no prior knowledge, since he would have needed to have secured a professional medical opinion as to the child's capacity. That such could not be done in a matter of minutes or even hours, nor could it have been accomplished by his interrogating this witness whose written statements he already had been provided in discovery.

That for the prosecutor to indicate that they had just then been informed of the girl's mental

capacity and that he wanted her mother to remain in the courtroom was highly prejudicial to the defense. That a psychologist should have been appointed to determine whether or not this child was capable of testifying, and as difficult as it was under any circumstances for the defense counsel to interrogate a teenage girl as to an alleged sexual offense, it became even more delicate to have to interrogate a teenage girl who has mental deficiencies. That such crucial information should have been immediately provided to the Appellant so that he could discoverl whether or not psychological testing needed to be done to determine her mental capacity, limited or otherwise.

A case frequently cited concerning discovery violations is *Box v. State,* 437 So. 2d 19 (Miss. 1983). In that case the Court found "because of the State's failure to comply with its obligations under Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice, we reverse."

The Court found:

> At trial the State called as its witness one Michael Waters, the owner of the automobile allegedly used to make the trip from Jackson to Greenwood to perpetrate the robbery. Waters was a witness clearly within the scope of the discovery allowed at the November 19 hearing. His name was not disclosed to the defense until late on the evening before the trial began . . . The photographs likewise were within the scope of the discovery order but had not been disclosed until a few moments before they were produced at trial. Over the strenuous objection of the defendant, these items of evidence were received and were presented to the jury. Defendant did not, however, seek a continuance or a mistrial. *Box v. State,* 437 So. 2d 20 (Miss. 1983)

In *Box* the Appellant made an assignment of error that:

> The Court erred in admitting into evidence testimony of a witness and photographs which had not been furnished defense counsel in compliance with an order for production. *Box* at 20.

In that case the prosecution, nine months before the trial knew the existence of that witness and that he would most likely be called to testify but his identity was not disclosed until the evening before the trial began. The Court in its ruling concluded:

> Under the facts of this case we believe reversal is warranted. Although we are not hide-bound to reverse every case in which there was some failure by the State to abide by discovery rule, this case should be reversed and remanded for a new trial. Prosecuting attorneys, as well as defense attorneys, must recognize the obligation to abide by discovery rules. A rule which is not enforced is no rule. *Box at* 21

The Appellant would show that such is the case presently before the Court. Although the teenage girl, the alleged victim Heather Crews was known since she was the alleged victim and certainly would of necessity be a witness, it was not disclosed until after the jury was selected, that she was of limited intelligence. The Appellant would submit that this is nearly the same as indicating that she was a different person because a person of limited intelligence has to be treated very carefully as if a teenage girl would not have already of necessity had to be treated carefully. With her having limited intelligence it was so much more so. The Appellant needed at the very least the opportunity to review any medical and psychological records concerning her ability to be a competent witness. That the prosecution as well as the Court, seemed to not regard as serious the issue of her limited capacity. Yet the prosecution felt that she was of such limited capacity, that although she was a few months from 18 years old at the time of the trial, her mother should remain with her in the courtroom as if she were a little child.

Further: The essential purpose of Rule 9.04 is the elimination of trial by ambush and surprise. *Robinson v. State* 508 So. 2d 1067, 1070 (Miss. 1987)

In the 2001 case of *Gray v. State*, 799 So. 2d 53 at 59 (Miss. 2001) the Court quoted *Kolberg v. State* 704 So. 2d 1307, 1317 (Miss. 1997):

> This Court has reiterated the guidelines set forth in Rule 4.06 on the procedure for when the prosecution attempted to admit evidence that was not timely disclosed . . . First, the court should allow the defense an opportunity to review the evidence. Unif. Crim. R. Cir. Ct. Practice 4.06(i)(1). Second, if the defense "claims unfair surprise or undue prejudice and seeks a continuance or mistrial," the court should exclude the evidence, grant the continuance, or grant a mistrial. Unif. Crim. R. Cir.

Ct. Practice 4.06(i)(2). 59

Unfortunately in this case it was not simply a matter of evidence "to review" but was a person who for two years had been thought to be a normal teenage girl by the State but at the trial and after the jury had been selected it was alleged that she was at the very least borderline retarded. There was no way the court could allow a few minutes to correct such a discovery violation.

As *Gray* continued to discuss:

> Assuming areguendo that the trial court erred in not allowing the introduction of the newspaper into evidence, the error at best is harmless error. In *Catholic Diocese of Natchez-Jackson v, Jaquith,* 224 So. 2d 216, 221 (Miss. 1969) (quoting 5 Am. Jur. 2d *Appeal and Error* § 776 (1962), this Court held the distinction between harmless error and reversible error is as follows:
>
> To warrant reversal, two elements must be shown: error, and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the final outcome of the case; it is prejudicial, and ground for reversal, only when it affects the final result of the case and works adversely to a substantial right of the party assigning it. Obviously, in order for the rule of harmless error to be called into play in support of a judgment, the judgment must be otherwise supportable, and will be reversed when there is nothing in the pleadings or evidence to support it.

Several years later this Court stated in *Forrest v. State* 335 So. 2d 900, 903 (Miss. 1976), that:

> an error is harmless only when it is apparent on the face of the record that a fair minded jury could have arrived at no verdict other than that of guilty.

The Appellant would show before this Court that, first of all, as in *Gray* there was error. Once it is determined by this Court that there was error, then the decision must be made was it harmless error or reversible error. By the definition in *Forrest* it would show that it had to be "apparent on the face of the record that a fair minded jury could have arrived at no other verdict other than that of guilty" to be harmless error. In this case if the alleged victim had been found to be an

incompetent witness the case would fail altogether because the only other witness was a Bobby Wilkerson who was a witness only to hearsay. Admittedly the hearsay was admissible under the admission exception to the hearsay rule, but corroboration without a complaining witness would mean that the case would fail entirely. Consequently using the standard as set forth in both *Catholic Diocese* and *Forrest* the error was clearly not harmless. If the error was not harmless, it must of necessity be reversible error.

In contrast to the cases previously cited *Isom v. State, 928 So. 2d 840,845-846 (Miss. 2006)* provides a fact situation showing harmless error:

> In this case, defense counsel claimed that he needed time to interview the witnesses and prepare a defense. The trial court overruled the *Box* objection by defense counsel. However, the trial court did allow defense counsel fifteen minutes to interview the witnesses. In his brief, Isom argues that defense counsel was made aware of the two witnesses the week of trial, only had an opportunity to contact the witnesses the day before their testimony, and only had fifteen minutes on the day of their testimony to interview them . . .
>
> The Everitts were recently discovered witnesses. Once the prosecution was aware of the witnesses, it informed Isom's counsel. There is no evidence that the prosecution deliberately withheld any information from Isom . . . at 845
>
> The trial court erred by failing to grant a continuance and admitting Jessica and Martha's testimony. However, these errors were harmless because the evidence was so overwhelming that the jury could have sustained a conviction of burglary of a dwelling even without Jessica and Martha's testimony. 845-846

The Court concluded:

> Clearly, the above facts are overwhelming that the jury could have sustained a conviction of burglary of a dwelling even without Jessica and Martha's testimony. 846

In *Isom* the Supreme Court found overwhelming evidence to convict with or without the discovery violation. This is totally different from the Appellant's conviction. His conviction had

to stand or fail based on the testimony of the alleged victim, Heather Crews.

III
THE COURT ERRED IN FAILING TO APPLY THE TENDER YEARS EXCEPTION ASSUMING THAT THE ALLEGED VICTIM HAD A MENTAL AGE OF LESS THAN FOURTEEN YEARS

The Appellant would show that this Court saw fit to overrule his objection when the District Attorney admitted that the alleged victim was of limited mental capacity with a possible I.Q. of 60 to 70.

Since the Court chose to overrule the Appellant's objection to offering the alleged victim as an individual of limited mental capacity he should have followed the tender years exception to the hearsay rule.

> Mississippi's pre-rule tender years exception did not define "tender years." See *Williams v. State*, 427 So. 2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.
>
> Rule 803, Mississippi Rules of Evidence, Comments

The Appellant would show this Court that if this Court felt it was not appropriate to exclude her testimony or grant an examination of the child by a psychologist that he should have at least reviewed the factors listed in the Tender Years Exception which states:

> Some factors that the court should examine are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote: (8) certainty that the statements were made; (9) the credibility of the

person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as in indicia of reliability.

Rule 803, Mississippi Rules of Evidence, Comment (25)

The Appellant would acknowledge that while hearsay was not used directly as proof in this case the following interrogation by the Appellant's attorney to the alleged victim's mother Judy Crews was as follows:

Q And you are basing your belief because you signed an affidavit to something that you didn't see, right?
A I believe my daughter.
Q That is not what I asked you really. But you signed an affidavit?
A Yes, I did.
Q And what you signed an affidavit to you actually were not a witness to that event were you?
A No.
Q And you are basing your belief on believing what she said?
A Yes, sir. (Tr 86-87)

In that statement she acknowledged that her affidavit was not based upon personal knowledge but was based upon the hearsay statement of the alleged victim, Heather Crews.

At the very least the Court should have recognized the following:

Penny v. State, 960 So. 2d 533 at 540 (Miss. 2006) which quoted:

A child is competent to testify if the court ascertains that the child possesses " the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness. *Mohr v State* 584 So. 2d 426, 431 (Miss. 1991)

In this trial the Circuit Judge did not make a determination of the child's ability to perceive

or remember events, etc., and in no way interrogated her so such a determination could not have been made.

Mohr further states:

> Mississippi Courts generally allow children of tender years to testify if competent. Rule 601 of the Mississippi Rules of evidence provides that every person is competent to be a witness unless they are incompetent or otherwise restricted. It is in the sound discretion of the trial judge to determine the competency of a child witness. Before allowing the child to testify, the judge should determine "that the child has the ability to perceive and remember events, to understand and answer questions intelligently and to comprehend and accept the importance of truthfulness." *House v. State, 445 So. 2d 815, 827 (Miss. 1984). cited by Mohr v State at page 431*

Again the Court made no determination of the child's ability espcially after being advised at the commencement of the trial by the State that she was of limited mental capacity between 60 and 70 IQ.

In the present case the trial judge merely said the following:

> BY THE COURT: Two issues before the Court; one on the issue of the competency of the witness. The Court has no reason now to believe that the witness should not be allowed and permitted to testify. And the other one is that the mother, I'm going to grant the States request that the mother be allowed to be in the courtroom while the daughter testifies on peril that the mother may subsequently be disallowed from testifying if called after the daughter or if recalled after the daughter on things that she might have learned while in the courtroom.
>
> (Tr 52)

It is clear that the trial court did not even attempt to interrogate the child in order to determine whether or not she was competent to testify, apparently believing that he was not required to do so under the tender years exception or even under *Mohr's* "ability to perceive and remember . . ."

The Appellant would show that it was obvious that there was confusion on the part of the

alleged victim when she was interrogated by the State:

Q Heather, I'm going to show you here in this statement, it says Dusty and Mike Edmond wanted me to babysit for them so I did and they had left and then around 1:30 or 2:00 o'clock they had come home. Now is that correct?
A The part they had wanted me to babysit. Yes, but I had gotten the days confused from when I had babysat before.
Q I guess what I'm asking for is did, first off did as far as you did Dusty come home that night?
A She didn't. (Tr 99)

Upon the Appellant's counsel's crossexamining her the following took place:

Q Now you just mentioned to Mr. Trout that there was a difference in your statement that you had written and, by the way, is that in your own hand writing?
A Yes.
Q That there was a difference in your statement and what you just testified to?
A Yes.
Q You recall that he asked you about that?
A Yes. (Tr 101)

Q But that was not really what happened, you said Dusty wasn't there when you came there, never was there and didn't come in at all that night?
A Yes.
Q And why did you say one thing in your written statement that you provided Mr. Trout and another in your verbal statement you just testified to?
A Because I had got my nights confused from a prior time that I had babysat for them.
Q Now you see how important this is, do you not?
A Yes.
Q To not be confused because we are talking about a serious criminal activity; do you know that?
A Yes. (Tr 102)

Further on she was asked:

Q So how much time passed after that did you discuss this or acknowledge it with anyone?
A It had been a while. I'm not sure of how long but I know it had been a while.
Q As much as a month or week?
A As much as a month.
Q Okay and who did you first discuss it with?
A Dusty and my dad. (Tr 103)

Finally Heather Crews was asked

Q If I asked you if this could have been as soon as five or six days as opposed to a month could that be true?
A Yes.
Q Your just not sure?
A No, I'm not.
Q But the statement that you had given was some other night?
A Yes.
Q Would it not be strange that an event as serious as this you couldn't remember which occasion it was?
A Yes, but it's very easy to get the nights confused. (Tr 104)

It should be clear from reviewing the hearinabove quoted testimony that she could not get her dates and occasions correct as to when the alleged incident happened nor was she clear whether it was a day, five days or a month later that she first revealed this alleged incident to anyone. An examination by the trial court could have reduced or eliminated such problems. His failure to do so was reversible error.

IV

THE TRIAL COURT ERRED BY FAILING TO OVERRULE THE APPELLANT'S MOTION FOR A NEW TRIAL

The Appellant argued the issues of the inconsistencies and different stories put forth by the victim as follows:

> She apparently combined two or three possible weekends and then after that upon examination she was asked when she revealed this and I believe from the witness stand she said a month after the alleged event. Then when I asked her could the records be correct that it was possibly February 9th, because the event allegedly

> happened on the 4th, she said well it could have been. Then the statement that was put on the screen said she said an hour after she had been confronted which was one calender day after. And that was the statement that Mr. Trout had put up on the screen. So she basically had three different stories.
>
> (Tr 204)

The defense counsel went on to say:

> Secondly, the defendant testified that she had a crush on him and had even gone to her family to discuss it. And in so doing this testimony was completely un rebutted and this certainly gave her a strong motive to fantasize and even continue the fantasizing or out right lie, we don't know which. (Tr 205)

At this point the Court had the opportunity to correct its error in allowing a teenage witness who he had not questioned either in chambers or in the courtroom outside the presence of the jury as previously argued in Argument III. He had the opportunity to see her inconsistencies and her confusion and chose not to take action. Secondly, the defense counsel again raised the issue of her "limited mental capacity" not being provided in timely discovery. Again the Court had the opportunity to grant a new trial to then have the girl examined. He put himself in the place of a psychologist when he said, ". . . she is nonetheless presented herself credibly and well as a witness in the courts opinion . . ." (Tr 206)

Although the trial judge has wide latitude in what testimony and other evidence to allow he must follow the law which he did not do consequently denying the defense his opportunity to correct the errors of the trial.

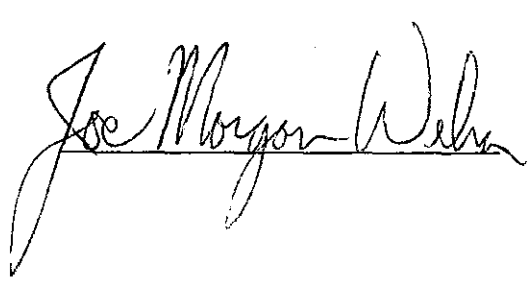
The key inquiry is whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction. *Brown v. State, 907 So. 2d 336, 339 (Miss. 2005) quoting Carr v. State 208 So. 2d 886, 889 (Miss. 1968).* In this case the evidence fails for which the Court should have granted a new trial.

CONCLUSION

The Defendant was convicted based upon the testimony of an admittedly mentally limited teenager. Her age at the time of the alleged offense was not proven beyond a reasonable doubt which was a crucial element to proving the crime of sexual battery. The State committed a serious discovery violation in not acknowledging the limited mental capacity of the alleged victim until the day of trial after the jury had been impaneled. They Judge overruled the defense objection and commenced to allow her to testify with absolutely no examination of her, which she being a child of limited capacity was a child of tender years for which he should have carefully examined her as to her ability to understand, remember, to tell the truth, etc. Such memory was clearly shown to be faulty by her testimony and her confusion over dates, circumstances and how long it was before she revealed this alleged crime.

Consequently, the trial court committed reversible error in allowing a conviction for which age was not proven, allowing the alleged victim to testify with limited mental capacity and with no examination whatsoever by the court as to whether or not she was a competent witness. Therefor the trial court committed several errors all of which cumulatively amount to reversible error. This case should be reversed and remanded for a new trial.

Respectfully submitted this the 2nd day of December, 2008.



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CERTIFICATE OF MAILING

I, Joe Morgan Wilson, Attorney for Appellant COY MICHAEL EDMOND, certify that I have this day mailed by United States Mail, postage pre paid, the original and three copies of the forgoing attached brief for Appellant to the following:

Hon. Betty Sephton
Supreme Court Clerk
P. O. Box 117
Jackson, MS 39205

This the 3rd day of December, 2008.

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CERTIFICATE OF SERVICE

I, Joe Morgan Wilson, attorney for Appellant, COY MICHAEL EDMOND, certify that I have this day mailed by first class mail, postage prepaid, a true and correct copy of the foregoing and attached Brief For Appellant.

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