IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CECIL R. BEN,
APPELLANT

VS.

NO. 2009-CA-01495-COA

STATE OF MISSISSIPPI,
APPELLEE

****

APPEAL FROM THE CIRCUIT COURT OF LEAKE COUNTY, MISSISSIPPI

****

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

JULIE ANN EPPS; MSB [redacted]
504 E. Peace Street
Canton, Mississippi 39046
Telephone: (601) 407-1410
Facsimile: (601) 407-1435

ATTORNEY FOR APPELLANT

BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 refusal:

1. Cecil R. Ben, Defendant-Appellant;
2. Julie Ann Epps, counsel for Appellant on appeal;
3. James L. Lane and Ottowa Carter, counsel for Appellant at trial;
4. The State of Mississippi, Jim Hood, AG;
5. Jack Thames and Steven Kilgore ADA's attorneys for state at trial;
6. Honorable Vernon R. Cotten, Circuit Judge.

This, the 14th day of July, 2010.

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

BRIEF OF APPELLANT

STATEMENT OF ISSUES

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OR ALTERNATIVELY, THE JURY VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

2. BEN WAS DENIED A SPEEDY TRIAL.

3. THE TRIAL COURT ERRED IN ADMITTING NUMEROUS OUT OF COURT STATEMENTS OF THE ALLEGED VICTIM AND IN ADMITTING NURSE HOCKETT'S OPINION THAT MEGAN WAS TELLING THE TRUTH.

4. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO PRESENT BEN WITH A COMPLETE PANEL OF JURORS BEFORE REQUIRING HIM TO MAKE STRIKES TO JURORS.

5. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING TESTIMONY OF OTIS MINGO WHERE THE PROSECUTOR DID NOT PROVIDE NOTICE OF AN INTENT TO INTRODUCE MISS.R.EVID., RULE 404(B) TESTIMONY.

6. THE LIFE SENTENCE IS DISPROPORTIONATE TO OTHER SENTENCES IN VIOLATION OF THE EIGHTH AMENDMENT AND THE MISSISSIPPI CONSTITUTION'S PROSCRIPTIONS AGAINST CRUEL AND INHUMAN PUNISHMENT AND/OR JURY SENTENCING WITHOUT STANDARDS VIOLATES THOSE AMENDMENTS AND THE DUE PROCESS CLAUSES OF BOTH CONSTITUTIONS.

STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

Cecil R. Ben was indicted on November 4, 2008, in the Circuit Court of Leake County for the forcible rape of Megan Frazier on October 3, 2007, contrary to §97-3-65(4)(a), MCA. RE 7. He was tried by jury beginning January 7, 2009, the Honorable Vernon R. Cotton, presiding. He was found guilty and sentenced to life by the jury by judgment entered on May 15, 2009. RE 5-6.

His Motion for JNOV/New Trial was overruled. R.I/51-59 RE 8-16. He timely appealed his conviction. R.I/60.

(ii) Statement of Facts:

On October 3, 2007, Cecil Ben was a bus driver for the Choctaw Transit Authority. Megan Frazier [hereafter Megan] was an 18-year-old student who lived on Highway 35 outside of Carthage. She rode the bus to school at East Central some miles away. Tr.I/146.

At trial, Megan testified that she was the first person picked up by Ben about 4:30 and 4:30 a.m. on the morning of Wednesday, the 3rd.[1] On the way, Ben pulled off at the intersection of Highways 35 and 25 like he was going to go and get a patient[2] and stopped the bus. According to her, Ben said he was going to take a nap, unbuckled his seat belt, then came to where she was sitting and forcibly had sexual intercourse with her. Tr.II/153.

Megan testified that after he had finished, he cleaned himself off with some paper towels that he threw out the window. Tr.II/159. Like nothing had happened, he started the bus and picked up seven other middle-aged or old people before dropping Megan off at the Transit Authority where she transferred to another bus to school. Tr.II/184. She knew some of them. According to Megan, she was crying and upset, but none of the other passengers noticed and did not offer to help her; nor did she ask. She got off the bus at the Transit Authority to wait for a bus to take her on to school. Re.II/184-85.

She did not report the incident to anyone on the bus, at the Transit authority, on the next bus, or to anyone at school. Nor did she seek assistance from the school infirmary. Tr.II/187-89. She did not ask anyone to come and pick her up although she had a cell phone. She even talked to her mother on it while she was at the Transit authority station waiting for the next. Tr.II/188. She admitted that if she had told her mother, her mother would have had her cousin to get her. Tr.II/191.

---

[1] She told the police that he picked her up at 4:15 a.m. Tr.II/169. The bus was not a full-sized bus, but a smaller one. Tr.I/147.

She attended classes that day and took the bus home after school even though she did not know if Ben would be the driver. She did not call to see if he would be the driver either. Tr.II/190.

Although Ben did not drive the bus on Thursday or Friday, she continued to take the bus to and from school. Ben did not drive the bus on those two days; however, Megan had no way of knowing he would not be the driver. Tr.II/194.

Megan did not tell anyone about the alleged rape until she told her best friend, Maurice Hines on Sunday night at about 11:00 p.m. Maurice told her to tell her mother. She did, and her mother immediately reported the incident to the Choctaw Police who came out early on the morning of October 8th and interviewed Megan. Megan and her mother went with the police to the intersection where she claimed the incident had occurred and recovered **four** paper towels. Once on the scene, the Choctaw Police realized that the City of Carthage had jurisdiction, and the Carthage Police then took over the investigation that same morning. Megan turned over the unwashed clothing that she said she was wearing at the time of the alleged rape, including her shorts and panties.Tr.II/161-65.

They too interviewed Megan and sent her to the health center for an examination. Tr.II/165. Nurse Hockett testified that she interviewed Megan. No sexual rape kit was taken because the incident had allegedly occurred more than 72 hours prior to the time it was reported. According to Nurse Hockett, Megan was upset. She refused testing for STD's and pregnancy. Tr/II/166, 258-59.

---

[2] In addition to transporting students to school, the bus also picked up people for their doctors' appointments or whatever.

Carthage Police subsequently turned over three, not four paper towels,[3] along with Megan's clothing, to the Mississippi Crime Lab where the items were examined for seminal fluid. Tr.II/234, 239. No seminal fluid was found on her shorts or panties. Tr.II/326. Seminal fluid was found on two of the paper towels. The Crime Lab then sent one of the towels to a DNA lab in Texas for DNA testing. Tr.III/306-11. At trial, Casey Dupont. who did the DNA testing at Orchid Cellmark Laboratory in Texas, testified that the DNA from the sample provided from Ben and Megan "could be included in the mixture" of DNA found on the sample. Tr.III/341.

At trial, Ben did not testify, but defended on the ground that the intercourse was consensual.

Since one of the grounds for Ben's appeal is the sufficiency of the evidence, he will discuss additional facts in his argument.

SUMMARY OF THE ARGUMENT

The evidence is insufficient to support the verdict or alternatively is against the overwhelming weight of the evidence. Ben was denied a speedy trial. The trial court made numerous evidentiary errors, including admitting out of court statements of Megan. Ben's right to a speedy trial was denied. Ben's sentence is excessive.

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OR ALTERNATIVELYL, THE JURY VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND THE TRIAL COURT SHOULD HAVE GRANTED BEN A NEW TRIAL.

A. Standard of Review:

1. *Sufficiency of the Evidence:*

[3] No explanation was ever given for why one of the paper towels gathered at the intersection had vanished by the time the evidence got to the crime lab.

The due process clauses of both the state and federal constitution forbid a conviction where the reliable evidence fails to show the Defendant's guilt of each and every element of the offense beyond a reasonable doubt. U.S.Const., Amends. VI and XIV; Miss.Const, Art. 3, Sections 14 and 26; *Jackson v. Virginia*, 443 U.S. 307 (1979); *Carr v. State,* 208 So.2d 886, 889 (Miss.1968). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. at 315.

Should the facts and inferences considered in a challenge to the sufficiency of the evidence point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, the proper remedy is for the appellate court to reverse and discharge. However, if a review of the evidence reveals that it is of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense, the evidence will be deemed to have been sufficient. *Dilworth v. State,* 909 So.2d 731, 736-738 (Miss. 2005).

One Court has described the *Jackson* standard for sufficiency of the evidence as follows:

> The Court of course does not mean that whenever the record supports conflicting inferences, no matter how weak, the prosecution wins, for not only would this be no more stringent than the standard of review in a civil case but also the prosecution would only fail in its proof where there was a total absence of probative evidence, which is the "no evidence" standard rejected in *Jackson.* If *Jackson*'s beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence from "historical" or undisputed facts reaches a certain degree of conjecture and speculation, then the defendant must be acquitted. *Ulster [v. County Court v. Allen*, 442 U.S. 140 (1979)] clarifies that this degree of inferential attenuation is reached at the least when the undisputed facts give equal support to inconsistent inferences. In short, we read the quoted passage from *Jackson* to mean that the simple fact that the evidence gives some support to the defendant does not demand acquittal. However, if the evidence fails to give support to the prosecution sufficient to

allow a reasonable juror to find guilt beyond a reasonable doubt, a verdict must be directed despite the existence of conflicting inferences.

Cosby v. Jones, 682 F.2d 1373. 1383, n.21 (11th Cir. 1982).

2. Weight of the Evidence:

A motion for new trial challenges the weight of the evidence. More evidence of guilt is necessary for the state to withstand a motion for a new trial, than is required to withstand a motion for JNOV.

A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial. *Id.* at 737.

Although the circumstances under which this Court will disturb a jury's verdict are "exceedingly rare," such situations arise "where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind [internal citations omitted]." *Id.* at 737. Despite this high standard, "[t]his Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence [,] even where that evidence is sufficient to withstand a motion for a directed verdict [internal citations omitted]."[4] *Id.*

[4] *E.g., Feranda v. State*, 267 So.2d 305 (Miss.1972); *Barnes v. State*,249 So.2d 383 (Miss.1971); *Cook v. State*,248 So.2d 434 (Miss.1971); *Peterson v. State*,242 So.2d 420 (Miss.1970) ; *Hux v. State*, 234 So.2d 50 (Miss.1970); *Quarles v. State*,199 So.2d 58 (Miss.1967) ; *Yelverton v. State*,191 So.2d 393 (Miss.1966); *Mister v. State*, 190 So.2d 869 (Miss.1966); *Cole v. State*,217

B. The Merits:

At trial, the Judge Cotton denied Ben's motion for directed verdict, peremptory instruction and motion for new trial/jnov. RE 8-16.

The testimony of a prosecutrix in a rape case should always be scrutinized with caution. *Killingsworth v. State,* 74 So.2d 221, 223 (Miss. 1979). "[W]here there is much in the facts and circumstances in evidence to discredit her testimony, another jury should be permitted to pass thereon [internal quotations marks and citation omitted]." *Johnson v. State,* 213 Miss. 808, 813, 58 So. 2d 6, 8 (Miss. 1952). *Accord, Richardson v. State,* 196 Miss. 560, 17 So.2d 799 (1944).

Stated another way, although generally corroboration is not necessary on a forcible rape charge, where the testimony is inherently contradictory or is such as to leave the mind clouded with doubt, the state must produce corroboration or the conviction cannot stand. This is not because the victim's testimony cannot stand alone, but because the law does not allow an inference of fact from evidence not substantial or probative of that fact. To trigger the "corroboration rule," the victim's testimony must be so contradictory or in conflict with physical facts, surrounding circumstances, and common experience as to be unconvincing. *State v. Keightley* 147 S.W.3d 179, 185-188 (Mo.App. S.D. 2004).

Here, Megan's testimony is contradictory, conflicts with the physical facts and surrounding circumstances and common experience. First of all, Megan did not behave like someone who had been forcibly raped. Although numerous people got on the bus after the incident, she failed to report it to them. The State called none of the people who subsequently got on the bus to testify that her behavior was unusual. She did not report the alleged rape to anyone

---

Miss. 779, 65 So.2d 262 (1953); *Dickerson v. State*,54 So.2d 925 (Miss.1951); *Jefferson v. State*,52 So.2d 925 (Miss.1951); *Conway v. State*,177 Miss. 461, 171 So. 16 (1936); *Hutchins v. State*, 220 So.2d 276 (Miss.1969); *Brown v. State*, 219 Miss. 748, 70 So.2d 23 (1954); *Williams v. State*, 220 Miss. 800, 72 So.2d 147 (1954); *Martin v. State*, 197 Miss. 96, 19 So.2d 488

at the Transit Authority, at school or to her family. She continued to ride the bus although she had no way of knowing whether Ben would be the driver. She refused STD and pregnancy testing. Her mother did not testify to any unusual behavior by Megan after the incident; nor did she corroborate Megan's testimony that she was extremely upset after it happened. She claimed to be suicidal, to have showered compulsively and stayed in her room asleep; yet, no one corroborated her claims. Tr. 198. She never sought treatment at school or through the Tribe. Tr.II/198. Megan's behavior then is contrary to common experience of how victims of forcible rape generally behave. *E,g., Upton v. State*, 6 So.2d 129, 130 (Miss. 1942) [failure to report can be a factor which contradicts claim of rape].

Moreover, Megan's testimony that she struggled furiously and was held down by her attacker is contradicted by testimony from other people that she had no bruises or scratches consistent with the violent struggle she described. For example, Nurse Hockett did not observe any marks; nor did Megan draw her attention to any. Officers who took her statement noticed no injuries. Megan's clothing was not torn or damaged in any way. Tr. 326-27. *Id.* [victim had no marks consistent with violence victim said occurred during rape].

In addition, Megan's story at trial was inconsistent in material particulars with her out-of-court statements to officers and others. She testified at trial, he picked her up between 4:30 and a quarter to five, but told the police it was 4:15. Tr. 169. She testified he told her he was going to take a nap. In her report to police, he said "I want to talk to you." Exhibit D-1. She testified she did not say anything, but told police she said it was okay to take a nap. She also told them she told him to go on and pick up the others. Tr. 153, 170, Exhibit D-1. On the other hand, she told Nurse Sharon Hockett that he told her that it would not matter if she screamed or cried, that he was going to do this and you're probably going to like what I do to you anyway. Tr. 266. She

---

(1944); *Jolly v. State*,174 So. 244 (Miss.1937); *Holifield v. State*, 132 Miss. 446, 96 So. 306

testified she "pushed and pushed him" on the chest with both hands and "kicked and hollered." She later admitted, however, that her arms were pinned. Tr. 153, 181. She testified she hit him once. Tr. 154.

According to her Ben had her pinned down against the seat with one arm behind her and was holding her other arm, but simultaneously he was standing while pulling down her pants and underwear. Later she said he had one leg over her while pulling off her underwear. Tr. 155, In her statement to police, he was on top of her when he pulled down her pants and underwear.[5] Tr. 174-76, Exhibit D-1. She testified she was "constantly" fighting him. On the other hand, she said that he had her hands pinned down. Tr. 156. She did not tell police about her arms being pinned down when she gave her report. Tr. 196. She testified she kicked Ben once, but then later said she was "steady kicking" him. Tr. 174, 182. Much of the detail in her trial testimony was not in her report to police. Exhibit D-1.

Megan first testified she did not call anyone to come pick her up at the Transit Authority because she had no one who would pick her up. Then she admitted her cousin would have come. Tr. 191. Furthermore, Maurice Hines, her good friend to whom she first reported the incident, testified that he was not in school or working at the time. He had a car and would have picked her up had she called. Tr. 219. She had a cell phone and even talked to her mother at the Transit Center but did not tell her mother anything about being raped. Tr. 188.

In summary, Megan's testimony was internally inconsistent and inconsistent with her statements and in some respects physically impossible--especially her descriptions of how he removed her panties while standing and simultaneously standing up with one leg over her body while holding her down. While some inconsistencies are certainly to expected, the problem here

---

(1923); *Bolden v. State*, 98 Miss. 723, 54 So. 241 (1910).

is that the inconsistencies go to the heart of whether Ben in fact used physical force. In other words, Megan's inability to consistently recount how she was held and how her clothing was forcibly removed are ones which would be expected if force was not used.

The trial court in ruling on Ben's motion for new trial, however, ignored the substantial contradictions in Megan's testimony. Instead, the court found that her testimony was corroborated by the following:

1. The presence of DNA on the paper towels which was "consistent" with both victims on the paper towels pointed out by Megan to the police;
2. Testimony of Otis Mingo, a dispatcher at Choctaw Transit Authority who heard been remark upon seeing Megan that "that would be some good stuff;"
3. Megan's testimony of confusion, showers, testimony of Maurice Hinds.

RE 13-15.

The problem with the trial judge's analysis; however, is that although this evidence may corroborate the fact of sexual intercourse, it in no way corroborates that the intercourse was forcible. Where corroboration of a prosecutrix' testimony is required, as here, when her testimony is otherwise contradicted, the "corroboration must be, not merely of incidental details, but of the commission of the prohibited act." *Yancy v. State,* 202 Miss. 662, 668, 32 So.2d 151, 152 (1947). In other words, there must be some evidence not only that intercourse occurred, but that the intercourse in fact occurred without the prosecutrix' consent.

In *Gillis v. State,* 152 Miss. 551, 120 So. 455 (1929), the Court held that the corroboration must be of the main elements of the crime—"[t]he secret part of the crime—that element which, in the nature of things, in a great majority of cases, no one else than the guilty

---

[5] Nurse Hockett testified that it would be "medically impossible" that her panties would not have contained seminal fluid residue if there were no panty shield and that her panties and clothing would likely be torn. Tr. 271. She noticed no bruises or lacerations on Megan. Tr. 269-270.

parties would know anything about—is the element as to which she must be corroborated. . . [citation omitted]." *Accord, Howard v. State,* 417 So.2d 932, 933 (Miss. 1982) [birth of baby and access to prosecutrix insufficient]; *Grogan v. State,* 118 So. 627, 627 (Miss. 1928) [testimony that the two people were alone is insufficient corroboration].

In *Johnson v. State,* 213 Miss. 808, 58 So.2d 6 (1952), the defendant was convicted of forcible rape of Lucile Young, a sixty-year-old female. She testified that on the morning in question, the defendant, who lived near her, approached her. His face was painted with white paint, but she recognized him anyway. According to her, he forced her to have sex with him. She did not resist because, according to her, he had a .22 rifle and threatened her if she resisted. *Id.* 58 So.2d at 7.

Afterwards, she went home and prepared and ate lunch. The defendant then came to her house with a fishing pole. She told him to put the pole outside with hers. She told him once of the convicts had come by and raped her. She told him to go back and get his gun. When he came back, she said she was going to call the law. She then went to a nearby place of business and reported the attack. After the defendant was arrested, Lucile told police her attacker was wearing light blue underwear. At the jail, officers determined that the defendant's underwear was indeed light blue. At his home, they found a .22 and a bottle of white shoe polish. *Id.* at 8.

In contrast to Lucile's testimony, the defendant testified that Lucille had voluntarily had sexual relations with him on two prior occasions. Another witness corroborated that he had seen Lucile and the defendant together about ten days prior to the alleged rape under circumstances leading him to believe the meeting was clandestine. *Id.*

The Court found that the corroboration for Lucile's story insufficient to support the conviction. Finding her conduct inconsistent with someone who had been raped, the Court reversed and remanded the case.

Here, as in *Johnson,* there was no corroboration of the allegation of forcible intercourse. In fact, the evidence preponderates the other way.

Moreover, the trial court's reliance on the case of *Otis v. State,* 418 So.2d 65 (Miss. 1982) is misplaced. In *Otis,* no proof of forcible sexual intercourse was necessary because the victim's testimony was "positive and unequivocal " *Id.* at 67. The same cannot be said for Megan's testimony. Corroboration, therefore, is required.

Courts are not required to believe testimony which is inherently incredible or which is contrary to the physical facts. The Mississippi Supreme Court expressed the rule in *Teche Lines v. Bounds*, 182 Miss. 638, 179 So. 747, 749 (1938):

> 'If there be any one thing in the administration of law upon which the decisions, the texts, and the general opinion of bench and bar are in agreement, it is that evidence which is inherently unbelievable or incredible is in effect no evidence * * *. And * * * the overwhelming weight of authority throughout the country is that believable or credible evidence in civil cases is that which is reconcilable with the probabilities of the case and that bare possibilities are not sufficient. Where evidence is so contrary to the probabilities when weighed in the light of common knowledge, common experience, and common sense that impartial, reasonable minds cannot accept it other than as clearly an improbability, it will not support a verdict.

In a number of cases, the Mississippi Supreme Court has found that evidence was so improbable or contradictory that it would not support a verdict. *E.g., Rucker v. Hopkins,* 499 So.2d 766, 769 (Miss. 1986); *Jakup v. Lewis Grocer, Inc.,* 190 Miss. 444, 453, 200 So.2d 597, 600 (1941) ("We concur with the learned and experienced trial judge that the statement could not be safely accepted and acted upon. Courts are not required, they are not permitted, to lay aside common sense and the exercise of that critical judgment which years of experience with witnesses will produce, and accept as true any and every statement which some witness may be so bold as to make, simply because the witness, who has, in all reasonable probability, substituted an after-acquired imagination for facts, has sworn to it."); *Truckers Exchange Bank v. Conroy,* 190 Miss. 242, 199 So. 301 (1940) (holding that a jury should not be permitted to

consider evidence where it is manifest that no reasonable man engaged in a search for truth, uninfluenced by proper motives or considerations would accept or act on the evidence); *Elsworth v. Glindmeyer*, 234 So.2d 312, 318 -320 (Miss. 1970).

In *Sykes v. State*, 45 So. 838 (Miss. 1908), the Court reversed a murder case where the principal witness for the state was the wife of decedent. She had been arrested and examined twice for the crime. Both times, she denied knowing anything about the killing. After her second statement, she implicated the defendant and testified at trial that he came to decedent's house after she and decedent had retired, and killed him with an ax, after which she and the accused buried the body. In that case, the Court held that her testimony was too unworthy of belief to sustain a conviction. *Accord, Carter v. State*, 166 So. 377, 377 (Miss. 1936).

In that case, the Court held that her testimony was too unworthy of belief to sustain a conviction. *Accord, Carter v. State*, 166 So. 377, 377 (Miss. 1936) [chief witness gave contradictory statements]; *Cook v. State*, 248 So.2d 434 (Miss. 1971) [Where case was weak on issue of whether defendant was drunk and instructions were abstract, fairness required that another jury pass on evidence]; *Hux v. State*, 234 So.2d 50, 51 (Miss. 1970) [Although sufficient to survive request for peremptory instruction, "defendant's guilt is in such a state of serious doubt that this Court believes that another jury should be permitted to pass upon the matter"]; *Quarles v. State*, 199 So.2d 58, 61 (Miss. 1967) [Evidence sufficient to survive peremptory instruction, but so weak that another jury should be allowed to pass on evidence]; *Mister v. State*, 190 So.2d 869 (Miss. 1966) [testimony of witness who resembled an accomplice was so inconsistent that defendant was entitled to new trial]; *Miller v. State*, 198 Miss. 217, 22 So.2d 164 (1945) [Although evidence sufficient to withstand request for peremptory instruction, where conviction based on inconsistent testimony of the accomplice, court would reverse for new trial];

Abele v. State, 138 Miss. 772, 103 So. 370 (1925) [reversed where case based on unsubstantiated testimony of accomplice].

In *Joslin v. State,* 91 So. 903, 903 (Miss. 1922), the court granted a new trial in a rape case where the prosecutrix's story was contradicted by her out of court statements and where the story was improbable. *Accord, Allen v. State*, 45 So. 833, 833 (Miss. 1908). The same can be said of the evidence here.

If the Court finds that the evidence is legally sufficient to support a verdict, at the very least, this Court, sitting as the thirteenth juror, should reverse for a new trial.

II. CECIL BEN WAS DENIED A SPEEDY TRIAL IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A criminal defendant's constitutional right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution as well as Article 3, Section 26 of the Mississippi Constitution of 1890. In this case, Cecil Ben's constitutional right to a speedy trial attached at the time of his arrest on October 19, 2007. *United States v. Marion*, 404 U.S. 307, 313-15, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) (stating arrest or formal charges begin speedy trial period); *Box v. State*, 610 So.2d 1148, 1150 (Miss.1992); *Mitchell v. State*, 792 So.2d 192, 210 (Miss. 2001). Ben was not tried until May 13, 2009.

This Court has held that a delay of eight months or more triggers an inquiry into the reasons for the delay. *Sharp v. State*, 786 So.2d 372, 380 (Miss.2001); *Flores v. State*, 574 So.2d 1314, 1322 (Miss.1990); *Jaco v. State*, 574 So.2d 625, 630 (Miss.1990). A delay of eight months or longer is presumptively prejudicial and requires a trial court to examine the four factors of *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) in order to determine if a defendant's right to a speedy trial has been violated.

In *Barker,* the Supreme Court set forth four factors to be balanced to determine a speedy trial violation. Those factors are: (1) the length of the delay; (2) the reason for the delay; (3) the

defendant's assertion of his rights; and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530, 92 S.Ct. 2182; Mitchell, 792 So.2d at 211. No single factor is dispositive. The appellate court looks at the totality of the circumstances in determining if a defendant's rights have been violated. *Watts v. State*, 733 So.2d 214, 235 (Miss.1999); *Herring v. State*, 691 So.2d 948, 955 (Miss.1997); *Flores v. State*, 574 So.2d at 1322; *Trotter v. State*, 554 So.2d 313, 316 (Miss.1989).

A. Length of the delay

Ben was arrested on October 19, 2007. He was not indicted until November 4, 2008. He was tried on May 13, 2009. Since this is considerably more than eight months, this delay is presumptively prejudicial and weighs against the State. *Handley v. State*, 574 So.2d 671, 676 (Miss.1990).

B. Reason for the delay

As this Court has held, the burden is on the State to provide the accused with a speedy trial. Skaggs, 676 So.2d 897, 901 (Miss. 1996). Delays not attributable to the defendant weigh against the prosecution. The burden is on the State to show good cause for the delay. *Vickery v. State*, 535 So.2d 1371, 1377 (Miss.1988). In this case, the state argued and the court accepted that the delay was caused by the need to secure evidence. Specifically, the court found that the delay was caused by the need to obtain DNA evidence from the laboratory in Texas. Tr. 52, RE 28-29..

The trial court also found that Ben could not have been indicted or tried earlier because the state crime lab report was not completed until July of 2008, and the grand jury did not meet again until November of 2008. *Id.* The problem with the court's ruling is that the offense occurred on May 3rd of 2007. The evidence of the paper towels was gathered just a few days later on May 8th of 2007. Notwithstanding the fact that authorities had all the evidence in their

possession at that time, the evidence was not submitted to the crime lab until October of 2007 around the time Ben was arrested. Moreover, no testing was performed by the state crime lab to match the DNA profile until February of 2008 because no blood was even seized from Ben until the 18th of January of 2008. *See, Motion In Limine to Exclude DNA Evidence,* Supp.R.

Accordingly, the state never requested that Orchid Cellmark in Texas even perform DNA testing until after the state crime lab had first performed the initial tests for seminal fluid. thus, the delay was not due to the delay in **running** the tests. The delay was due to the state's delay in **requesting** that the testing be done. The Cellmark testing was completed in June of 2008. The delay, therefore, is directly attributable to the state. *Id.*

The trial court erred, therefore, in finding that the delay and the length of the delay did not weigh against the state. Although appellate courts are "hesitant to weigh the delay heavily against the State where the cause lies with a '[tentacle] of the State,' such as the State crime lab, rather than with the district attorney's office," here the delay was due to the state's failure to timely request testing. *State v. Woodall*, 801 So.2d 678, 683 (Miss.2001). In any event, the failure of the state to fund the crime lab so that it can provide necessary testing is directly attributable to the state, not the defendant.

C. The defendant's assertion of his rights

Although the defendant has some responsibility to assert his speedy trial right, the primary burden falls on the court and the prosecutor to make sure that cases are brought to trial in a timely fashion. *Wiley v. State*, 582 So.2d 1008, 1012 (Miss.1991); Flores, 574 So.2d at 1323. Therefore, although a defendant's failure to assert his right in a timely fashion may weigh against him, it is not itself conclusive. *Spencer v. State*, 592 So.2d 1382, 1388 (Miss.1991); *Smith v. State*, 550 So.2d 406, 409 (Miss.1989); *Estes v. State*, 782 So.2d 1244, 1251 (Miss.App. 2000). Here Ben did not assert his right to a speedy trial until he filed his "Motion to Assert Defendant's

Right to a Speedy Trial and Dismissal of the Indictment for Violation of His Right to a Speedy Trial" on January 8, 2008. *See,* Supp.R.

D. The prejudice to the defendant.

The trial court further found that the defendant had failed to show sufficient prejudice. RE 28-29. However, actual "[p]rejudice is not the *sine qua non* of judicial relief for a deprivation of a defendant's Sixth Amendment right to a speedy trial." *Hoskins v. Wainwright,* 485 F.2d 1186, 1187 (5th Cir. 1973). A defendant suffers "prejudice" from "the mere loss of the right" to a speedy trial. *Id.* "Prejudice," therefore, is "not used synonymously with 'impairment of the defense.'" *Id.*

Rather, there are three basic interests which are served by the Speedy Trial clause. Those are to prevent undue and oppressive incarceration prior to trial; to minimize anxiety and concern accompanying public accusation; and to limit the possibilities that long delay will impair the ability of the accused to defend himself. *Id.,* at 1189. In fact, the Supreme Court has indicated that incarceration and anxiety and concern are the principal forms of prejudice the speedy trial clause is designed to prevent:

> Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. But the **major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.** To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends [emphasis added].

United States v. Marion, 404 U.S. at 320.

Here, Ben was incarcerated from the time of his arrest on October 19, 2007, until November 5, 2007. Tr. 35. As a result of his arrest, Ben was suspended from his job with the Choctaw Transit Authority for 30 days. However, as time went on with no resolution of the case,

he was eventually terminated and barred from employment with the Tribe until the charges were cleared up. Tr. 41. Moreover, the Tribe was unable to keep his job open. Tr. 43. Furthermore, because of the pending charges, Ben was unable to obtain other work, and his wife, therefore, became the only source of income for the family. Tr. 40.

As a result, Ben suffered a great deal of anxiety because the charges dragged on without resolution. Tr. 41-42. Needless to say, pending forcible rape charges caused people to view him with suspicion. Moreover, because Ben was not actually indicted until November of 2008, his attorneys did not interview the witnesses from the bus until after the indictment, and many of them by then were unable to recall how Megan behaved on the bus the day she claimed she was raped. Tr. 43-44. Needless to say, the loss of disinterested witnesses who could have testified to her behavior immediately after the alleged rape was extremely detrimental to Ben's defense. Such witnesses could have confirmed her demeanor on the bus ride and testified whether it was consistent with both her trial testimony and with the demeanor of someone who had just been forcibly raped.

This is precisely the situation the constitution seeks to prevent. As one Court has held, the right to a speedy trial is a personal right and, when an accused is deprived of this right, he suffers "prejudice" from the mere loss of the right. *Hoskins v. Wainwright,* 485 F.2d 1186, 1187 (5th Cir. 1973).

In summary, all the factors except the defendant's demand for speedy trial weigh in favor of the defendant. Because the trial court made errors of law and failed to consider the operative weight to controlling facts, this Court should reverse and dismiss the case for the denial of a speedy trial because the prejudice to Ben cannot now be rectified. Alternatively, the court should reverse for a new trial if the trial court applying the proper standard finds that Ben's case has not been irreparably prejudiced.

III. THE TRIAL COURT ERRED IN ADMITTING NUMEROUS OUT OF COURT STATEMENTS OF THE ALLEGED VICTIM AND IN ADMITTING NURSE HOCKETT'S OPINION THAT MEGAN WAS TELLING THE TRUTH.

It should be obvious that the principal issue with regard to the jury's decision was witness credibility. More specifically, the jury had to decide if Megan was telling the truth when she claimed that Ben forcibly raped her. The prosecutor, therefore, needed to bolster Megan's credibility which was seriously in doubt in view of her failure to timely report the alleged rape and her lack of any physical injuries. The lack of physical injury is completely inconsistent with her testimony that showed a struggle where she would at the very least have been bruised.

Over Ben's objection, the prosecution introduced testimony from Maurice Hines about what Megan told him about the alleged rape the night he talked to her and told her to report the rape. Tr. 206-16. Hines testified at great length as to what Megan told her she had been raped by Cecil Ben, the bus driver, while she was sitting on the bus. She tried to resist and push him away, but he continued to force himself on her. *Id.*

The Court ruled that Hines' testimony fell into an exception to the hearsay rule provided in Miss.R.Evid, Rule 803(3) which provides that testimony of then existing mental, emotional or physical condition is not excluded. RE 17-18. Specifically, that rule would allow admission of

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Hines' testimony, however, has no relationship whatsoever to Megan's state of mind. Rather the testimony relates to her recollection of what happened on the day of the alleged rape.

The commentary to Rule 803(3) states that this exception to the hearsay rule is really a specialized application of Rule 803(1) which provides that present sense impressions are admissible. The commentary also states that the pre-rule *res gestae* is even more closely related

to Rule 803(3) than to Rule 803(1) and 803(2) [excited utterance]. The essential requirement for the admission of the statements is proximity to the event in question, in this case the alleged rape, and spontaneity. *Comment, Rule 803(3), M.R.Evid.* In other words, statements which indicate an intention to do something in the future are admissible to prove that the act intended took place. By contrast, statements of memory to probe that something happened are not admissible. Shepard v. United States, 290 U.S. 96 (1933).

In other cases, the Mississippi Courts have ruled that such hearsay testimony was inadmissible and violated a defendant's Sixth Amendment and Mississippi Constitution rights to confront and cross-examine witnesses. *Edwards v. State*, 856 So.2d 587, 592-593 (Miss.App. 2003). In that case, the trial court admitted a statement to a deputy sheriff that when the victim asked for assistance in removing the defendant from his home, the victim stated, "I want you to come get my son out of the house because he is going to hit me in the head and take my money." Because the statement involved a declarant's statement of memory or belief to prove the fact remembered of believed, the court held it was inadmissible under Miss.R.Evid, Rule 803(3). *Id.*

The same is true here, and the evidence was not admissible and was reversible error.

Although not objected to, in redirect examination, Nurse Hockett when asked if there was anything indicating that Megan was not telling the truth, Hockett answered: "There was nothing to indicate that she was not telling the truth." Tr. 274. It is axiomatic that a witness may not give an opinion that another witness was telling the truth. *Griffith v. State*, 584 So.2d 383, 387 (Miss. 1991). Therefore, the prosecution's question to Hockett was clearly improper. Because Hockett's testimony tended to bolster Megan's credibility with the jury, coming as it did from someone who had expertise in the field of sexual assault examinations, it could only have played a substantial role in the jury's deliberations and may well have tipped the balance. Therefore, it is

error which is plain and particularly when coupled with other errors bolstering Megan's credibility constitutes reversible error.

Even though the defense did not object to the argument, the Mississippi Supreme Court has held that "in cases of prosecutorial misconduct, we have held 'this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made.'" *Randall v. State,* 806 So.2d 185, 210 (Miss. 2001). Where important constitutional rights are involved and the evidence of guilt is weak, the Court should reverse.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO PRESENT BEN WITH A COMPLETE PANEL OF JURORS BEFORE REQUIRING HIM TO MAKE STRIKES TO JURORS.

Because Ben made no objection to this error, review is for plain error or for ineffective assistance of counsel. Where an attorney's failure to object causes errors to be reviewed under a less favorable standard of review, counsel has been ineffective. *Holland v. State,* 656 So.2d 1192, 1198 (Miss. 1995) [trial counsel's failure to preserve a critical error for appeal constitutes ineffective assistance of counsel].

Code section 99-17-3 provides as follows:

> In capital cases the defendant and the state shall each be allowed twelve peremptory challenges. In cases not capital the accused and the state each shall be allowed six peremptory challenges; but all peremptory challenges by the state shall be made before the juror is presented to the prisoner. In all cases the accused shall have presented to him a full panel before being called upon to make his peremptory challenges.[6]

---

[6] "All statutory procedural safeguards that are now a part of the laws enacted by the legislature involving so-called "capital" crimes or offenses or "crimes of a serious nature" still are in full force and effect even though the death penalty has been removed from some of those offenses, included but not limited to armed robbery, forcible rape, and kidnapping. We hold that the legislature by enacting Section 1-3-4 of the Mississippi Code Annotated (1977 Supp.) intended to retain these safeguards in all cases where the maximum sentence is life imprisonment." *Wilburn v. State,* 356 So.2d 1173, 1176 (Miss. 1978).

This Court has mandated that the failure to abide by the statute is reversible error. *Sellen v. State*, 374 So.2d 781, 782 (Miss., 1979); *Peters v. State*, 314 So.2d 724 (Miss.1975); *Gammons v. State*, 85 Miss. 103, 37 So. 609 (1905); *State v. Mitchel*, 70 Miss. 398, 12 So. 710 (1893).

In the instant case, the trial judge required Ben to make strikes even though the state had not presented Ben with a full panel of twelve jurors. Tr. 125-31.

At least some of the jurors had been on juries earlier in the term. There was no request for a special venire. Tr. 345, 347. Under these circumstances, the defendant was prejudiced because the prosecution may have had an unfair advantage in selecting jurors who had earlier served on juries. This Court, therefore, should find plain error and reverse the conviction.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING TESTIMONY OF OTIS MINGO WHERE THE PROSECUTOR DID NOT PROVIDE NOTICE OF AN INTENT TO INTRODUCE MISS.R.EVID., RULE 404(B) TESTIMONY.

Although the admissibility of evidence generally rests within the discretion of the trial court, a trial court abuses its discretion where its decision to admit evidence results from legal error. In that case, a *de novo* standard of review applies. *Jones v. State,* 856 So.2d 389, 393-94 (Miss.App. 2003).

The trial court overruled Ben's objection to the admission of Otis Mingo's testimony about a statement Cecil Ben allegedly made to him prior to the rape. RE 19-20.. Mingo testified "it was like, Megan's laying down, she's got her leg up on the picnic table [at the Transit Authority], and that stuff looks real good." Tr. 293. Mingo further testified that he said to Ben, "Cecil, whatever you're thinking, stop it. She's a young lady." Tr. 294.

The trial court's ruling admitting the statement is predicated on a misunderstanding of applicable law. Specifically, the state argued that by providing the defendant with a witness list which had Mingo's name on it, the state had provided the defendant with notice that it would

introduce Ben's statement. The trial court agreed, and essentially held that the defendant was charged with notice when a witness is identified. RE 19-20, Tr. 291. The court then refused to allow the defense time to interview Mingo. RE 20, Tr. 292.

Assuming for the sake of argument that the statement was admissible pursuant to Rule 404(b), it was nevertheless error to admit the statement when the prosecutor failed to disclose the statement to Ben's attorneys prior to trial. UCCCR, Rule 9.04(A)(2) provides that the "prosecution must" disclose without the necessity of court order, "a copy of any written or recorded statement of the defendant and the substance of any oral statement made by the defendant." It does not say that it is sufficient for the prosecution to give the defendant the name of a witness who might testify to such a statement. The practice of trial by ambush by withholding rebuttal evidence is not accepted in Mississippi. *McGilberry v. State*, 741 So.2d 894, 917-18 (Miss. 1999).

Rule 9.04(I) provides that where the prosecutor during the course of the trial attempts to introduce evidence not disclosed in violation of the rules and the defendant objects, the trial court has the following options:

(1) It can grant a reasonable opportunity to interview the witness or examine any documentary evidence;

(2) If, after such review, the defense still claims undue prejudice or unfair prejudice and seeks a continuance or mistrial, "the court *shall*, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial [emphasis added]."

(3) If the prosecution withdraws the evidence, neither a continuance or mistrial would be appropriate.

Neither the prosecutor nor the trial court followed the rule. The trial court did not exclude the evidence, grant the defense a chance to interview Mingo, or grant a continuance or mistrial. Those were the trial court's choices under the rule. The court failed to comply with the rule, and this case must be reversed. There can be no doubt that Mingo's testimony was prejudicial. *Tolbert v. State,* 441 So.2d 374, 1375-76 (Miss. 1983) [failure to disclose defendant's statement reversible error]; *Ford v. State,* 444 So.2d 841 (Miss. 1984).

VI. THE LIFE SENTENCE IS DISPROPORTIONATE TO OTHER SENTENCES IN VIOLATION OF THE EIGHTH AMENDMENT AND THE MISSISSIPPI CONSTITUTION'S PROSCRIPTIONS AGAINST CRUEL AND INHUMAN PUNISHMENT AND/OR JURY SENTENCING WITHOUT STANDARDS VIOLATES THOSE AMENDMENTS AND THE DUE PROCESS CLAUSES OF BOTH CONSTITUTIONS.

The Eighth Amendment to the United States Constitution and its corollary in the Mississippi Constitution prohibit punishments that are cruel and unusual and which violate the due process clauses of those constitutions. While originally reserved for review of corporal punishments, the Eighth Amendment has been applied to lengthy sentences of incarceration. *Lockyer v. Andrade,* 538 U.S. 63, ----, 123 S.Ct. 1166, 1173, 155 L.Ed.2d 144 (2003) .

For example, in the case of *Davis v. State,* 724 So.2d 342 (Miss. 1998), the Court remanded for resentencing where the trial court sentenced the defendant to sixty years for sale of two rocks of crack. In that case, apparently the defendant was not a first offender. The Court noted that even in cases requiring mandatory sentences, "the punishment must be weighed against the prohibition imposed in the Eighth Amendment to the United States Constitution against cruel and unusual punishment." *Id.* at 345.

The Mississippi Supreme Court was concerned that the trial judge gave no explanation for his sentencing decision; nor did he have the benefit of a pre-sentence investigation. While noting that a trial judge generally has broad discretion to sentence within the statutory limits,

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), nevertheless mandates some form of proportionality analysis when the sentence imposed leads to an inference of "gross disproportinality [citations omitted]." *Davis*, at 344-45.

In *Presley v. State,* 474 So.2d 612 (Miss. 1985), the defendant was convicted of armed robbery as an habitual and was sentenced to forty years in prison without parole. The evidence showed that he stole some steaks and as he escaped, he displayed a knife. Although he was given a presentence hearing, the Mississippi Supreme Court held it to be inadequate because counsel had failed to present mitigating factors and remanded for resentencing. *See, also McGilvery v. State,* 497 So.2d 67 (Miss. 1986) [remanding where a harsh sentence was imposed without explanation but where the sentence might have been imposed for going to trial].

Moreover, the Supreme Court of the United States has recently expressed a willingness to review large punitive damage awards under the Due Process clause and federal common law. *E.g., Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008); *Philip Morris USA v. Williams,* 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003); *Cooper Indus. v. Leatherman Took Group, Inc.* 532 U.S. 424 (2001). In *Exxon,* the Court stated that the "stark unpredictability of punitive awards" in most jurisdictions and the "spread between high and low individual awards" in cases involving similar conduct, is "unacceptable." *Exxon,* 128 S.Ct. at 2625. Accordingly, the Court held that when a court is faced with a punitive award that is substantially out of line with typical awards for similar conduct, the court should reduce the award to accord with typical awards. *Id.* at 2634.

By analogy then, a system which has a wide variation in allowable sentences and which allows a jury unfettered discretion in non-capital cases to select a sentence between such a broad range is arbitrary and violates due process as well as proscriptions against cruel and inhuman punishment. Of the few states allowing jury sentencing in non-death penalty cases which keep

statistics, there is a wide variation in sentences imposed by juries for similar offenses. *See,* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentence in Practice: A Three State Study,* 57 Vand. L. Rev. 885, 888-89 (2004), Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severit and Variance in Two States, 2. J. Empirical Legal Stud.* 331, 337 (2005).

In the instant case, Cecil Ben had no prior convictions; nor did the alleged rape result in severe or permanent physical injuries to Megan. Moreover, Megan is not a child victim. The sentence, therefore, is grossly disproportionate to those sentences given to offenders in similar cases.

As far as the Eighth Circuit Court District is concerned, counsel for Ben has found several recent cases in the appellate courts dealing with rape. In *Mapp v. State,* 843 So.2d 742, 743 (Miss.App. 2003), the defendant was convicted in Leake Count and sentenced to twenty-five years. In *Ladd v. State*, 969 So.2d 141, 143 (Miss.App. 2007), the defendant was convicted of statutory rape of a 15 year-old and received a sentence of twenty years with five years suspended. In *Chim v. State*, 972 So.2d 601, 602 (Miss. 2008), the defendant was sentenced to life imprisonment; however, the rape was of a five year-old girl. In *Wiltcher v. State*, 724 So.2d 933, 935 (Miss.App. 1998), the defendant was sentenced to life for the capital rape of his ten-year-old step-granddaughter].[7]

Thus, in the immediate circuit court district, a life sentence appears to have been reserved for cases involving extremely youthful victims. In Ben's case, of course, Megan was not a child victim.

The Bureau of Justice Statistics of the United States Department of Justice reports that in 2006 [the latest statistics available from the Bureau], state courts reported approximately 14,720

felony convictions for rape. RE 23, Table 1.1. Of those persons convicted for rape 72% were sentenced to prison; whereas, 18% were sentenced to jail and the remainder were sentenced to non-incarceration. RE 24, Table 1.2. The mean sentence for rape was 162 months for those sentenced to prison, 8 months for jail sentences, and 60 months for those sentenced to probation. Table 1.3. The median sentence was 120 months for prison sentences, 6 months in jail and 36 months probation. *Id.*

Ben's life sentence then far exceeds both the mean and median sentences for rape in this country. Moreover, because the jury sentenced Ben, the jury had no information before it on his individual characteristics and mitigating factors such as his lack of prior criminal record. The problem here is that the jury could not have exercised informed discretion as to Ben's sentence because the information before it was so limited that it could not do so. Due process requires that a sentence be based on reliable information regarding both the offense and the offender. *Roberts v. United States,* 445 U.S. 552, 556, 100 S.Ct. 1358, 1362 (1980).

The punishment (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering. Moreover, it is grossly out of proportion to the severity of the crime. Therefore, it is unconstitutional. *Widner v. State*, 631 S.E.2d 675 (Ga. 2006).

In summary, the facts do not support a life sentence. Therefore, this Court should remand the case for resentencing where he can present mitigating evidence in support of a lesser sentence with appropriate standards for imposing a sentence. *Davis v. State*, 724 So.2d at 346.

CONCLUSION

The evidence is either insufficient to support the verdict, or is so inconsistent and contradictory that the Court should reverse. Ben was denied a speedy trial. Moreover, the

---

[7] Cases involving guilty pleas in the district would not carry a life sentence and would not

cumulative effect of evidentiary errors warrants a new trial. Alternatively, the court should reverse for resentencing.

RESPECTFULLY SUBMITTED,
CECIL R. BEN, APPELLANT

BY: _____
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellant, do hereby certify that I have this date mailed, by first class mail, postage prepaid, the original and three copies of the foregoing to the Clerk of this Court in Jackson, Mississippi at PO Box 249 Jackson, Mississippi 39205 have mailed by United States Mail, first class postage prepaid, a true and correct copy to the Honorable Vernon R. Cotten, Circuit Judge, at 205 Main Street, Carthage, Mississippi 39051-4117, Jim Hood, Attorney General, PO Box 220, Jackson, Mississippi 39205 and Mark Duncan, PO Box 603, Philadelphia, Mississippi 39350.

This, the 14th day of July, 2010.

_____
JULIE ANN EPPS

JULIE ANN EPPS; MSB[redacted]
504 E. Peace Street
Canton, Mississippi 39046
Telephone: (601) 407-1410
Facsimile: (601) 407-1435

ATTORNEY FOR APPELLANT

---

generally be appealed.