IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RANDY LAMAR TAPPER — APPELLANT

VS. — NO. 2009-KA-0544

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### STATE CASES



### STATE STATUTES

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**RANDY LAMAR TAPPER** **APPELLANT**

**vs.** **CAUSE No. 2009-KA-00544-SCT**

**THE STATE OF MISSISSIPPI** **APPELLEE**

# BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

## STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Jackson County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **SEXUAL BATTERY** (two counts) and **TOUCHING OF A CHILD FOR LUSTFUL PURPOSES** (five counts).

## STATEMENT OF FACTS

The Appellant does not challenge the sufficiency of the evidence undergirding his convictions, nor does he assert that those convictions are opposed by the great weight of the evidence. It therefore will be unnecessary to dwell at length on the facts of this sordid case.

The mother of the victims[1] testified that her children and she were living in Moss Point, Mississippi in August of 2006. The Appellant was a cousin to the mother. Among the mother's

[1] We will follow the Appellant's use of "L.P." and "C.C." to identify the victims.

children were two daughters, L.P., who was eight years of age in August of 2006, and C.C., who was six years of age at that time.

In the summer of 2006, the mother of the victims became reacquainted with the Appellant. The Appellant met the children and asked their mother to permit the victims to come to his residence to play with his daughter.

On the weekend of 18 August 2006, the girls spent that weekend with the Appellant. The Appellant came for them on that Friday and returned them to their mother the following Monday. When the girls returned, they came into their residence by themselves and went into the bathroom to draw a bath for themselves. Their mother discovered that the girls' vaginal areas were red; the girls told her that they were "burning." The girls were taken to an emergency room. An interview with a forensic interviewer was set after the medical examination. ( R. Vol. 5, pp. 264 - 277).

A criminal investigator was sent out to the Appellant's trailer on the day following the medical examination of the victims. The investigator was admitted into the trailer by one Nicole Tapper. Nicole Tapper told the investigator that the Appellant was napping in his daughter's bedroom. The investigator looked into that room, which was filled clothes and MRE's and junk. The investigator could not locate the Appellant in the room or in the trailer, so she left. Later she was told that the Appellant had been under the bed in the room filled with clothes and MREs and junk. Once the Appellant was taken out from under the bed, he complained of some medical problems. He was "checked" and then taken to the sheriff's department and to an interview room.

The Appellant denied having sexually abused the victims, but he did admit that he had slept with the victims. ( R. Vol. 6, pp. 283 - 304).

The Appellant's wife, who married the Appellant when she was fifteen years of age and pregnant with his daughter, and who stood charged at the time of the Appellant's trial with felony child abuse, testified that the Appellant occasionally slept with their daughter. She herself slept in another room with their son. When the victims in the case at bar stayed with them, the Appellant slept with them. On the weekend of 18 August 2006, the victims spent the weekend with the Appellant and his wife. The wife went into the bedroom that the Appellant used and found the Appellant lying between the two girls. The Appellant told his wife that one of the girls had fallen out of bed. The Appellant and the girls were dressed for bed. The girls appeared to have enjoyed themselves over the weekend. ( R. Vol. 6, pp. 306 - 319).

L.P. testified. She stated that she used to go the Appellant's trailer to spend the weekends. She had fun swimming in a pool, going to a creek and riding a 4-wheeler. Except for one night, she slept with the Appellant in the Appellant's daughter's room. When sleeping with the Appellant, she wore a shirt and shorts. Her sister also slept with the Appellant. His daughter did as well occasionally.

The Appellant touched her "wrong spot" with his hand and his penis. The Appellant also attempted to put his "wrong spot" in her "wrong spot." This attempt caused her pain; she screamed, and the Appellant's wife came into the bedroom. The Appellant told his wife that L.P. had fallen out of the bed. The Appellant's wife left, the Appellant went to a bathroom, and L.P. stood in a corner, crying.

The Appellant then tried to put his "wrong spot" into L.P's sister's "wrong spot." The Appellant went to the bathroom again. Her sister went to the corner and joined L.P. They got under a cover and pretended they were asleep. When the Appellant returned, he asked them whether they were going to come to bed. They did not answer. The Appellant left them alone

and did not touch them again that night. However, L.P. saw something white come out of the Appellant's wrong spot while he was in the bed and while she was in the corner with her sister.

L.P recalled being taken to a hospital after she returned home and being given two shots and telling people what had happened to her. She stated that the Appellant touched her "wrong spot" with his penis five times over the summer of 2006. ( R. Vol. 6, pp. 322 - 342).

C.C. testified. She knew the Appellant and had been to his residence a couple of times. She referred to the vaginal area as a coochee, and the genital area of a male as a pecker. The Appellant touched her coochee with his hand. When she visited the Appellant, she slept in the Appellant's daughter's bed with the Appellant and her sister. ( R. Vol. 6, pp. 343 - 353).

C.C. was interviewed and examined by a sexual assault nurse examiner. C.C. told the nurse that her "cookie" had been touched by a "pecker," and that the assailant had also used the third digit of his hand to touch her "cookie." C.C. told the nurse that she experienced a burning sensation when she urinated. C.C. indicated that she had seen something wet come out of the assailant's "pecker." The assailant told C.C. not to tell anyone.

A physical examination of this child revealed a small, deep red area between the labia majora and labia minora, and redness along the hymenal edges. Something had to have penetrated the labia to have caused this redness. The nurse also found a pinworm in the hymenal area. This was an odd thing since only one was found, and not in the area of the anus where they are usually found. She did not think that the pinworm was the cause of the redness. ( R. Vol. 6, pp. 354 - 385).

Another sexual assault nurse examiner spoke to and examined L.P. L.P. told her that the Appellant, during the night of a two - day period, placed his penis between her buttocks and between her legs. The victim stated that threats and force were used, the Appellant threatening to

hurt her mother, father and herself. The nurse then conducted a sexual assault examination. The nurse found reddening of the child's vagina, secretions, and a strong odor. ( R. Vol. 6, pp. 385 - 405).

Laura Greer, a forensic interviewer, testified. Exhibit 32-A was published to the jury, a video recordings of the interviews of C.P. and L.P. The victims described what the Appellant had done to them in these interviews. ( R. Vol. 6, pp. 413 - 420; Vol. 7, pp. 421 - 432; Exhibit 32-A).

The prosecution then called a girl of thirteen to testify. She stated that she and her younger sister also spent the night with the Appellant. The Appellant made it a practice to attempt to put his penis into her vagina either while at a creek during the day or while lying on a mattress at night. The Appellant threatened to kill her if she told anyone. ( R. Vol. 7, pp. 438 - 445).

The Appellant testified for the defense. The Appellant denied having sexually abused L.P. He thought he had been accused of it because L.P.'s mother knew that "inappropriate things" were going on in her home and that she knew that he was going to "turn her in for them." He likewise denied having abused C.P. and denied having touched or penetrated either child's vagina. He thought the children's mother had coached them on their account. He thought the children's mother was selling marijuana. The Appellant's idea was that the mother coached her daughters to tell stories on him in order to keep him from reporting her. As to the other witnesses, they were simply lying. As for the thirteen-year-old girl, who testified as to what the Appellant had done to her, the Appellant testified that one Caleb Eley was the one who had done that. The Appellant told that child's mother to report it, but, according to the Appellant, that child's mother falsely accused him of having molested the child.

The Appellant figured that the redness on the victim's sexual organs was caused by the victims. ( R. Vol. 7, pp. 455 - 497).

## STATEMENT OF ISSUES

**1. DID THE TRIAL COURT ERR IN FAILING TO EXCUSE VENIREMEN FOR CAUSE?**

**2. DID THE TRIAL COURT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION TO QUASH THE INDICTMENT?**

**3. DID THE CONVICTIONS FOR FONDLING MERGE WITH THE CONVICTIONS FOR SEXUAL BATTERY?**

## SUMMARY OF ARGUMENT

**1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT CHALLENGES FOR CAUSE AS TO CERTAIN VENIREMEN**

**2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO QUASH THE INDICTMENT**

**3. THAT THE APPELLANT'S CONVICTION TOUCHING DID NOT MERGE WITH HIS CONVICTION OF SEXUAL BATTERY**

## ARGUMENT

**1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT CHALLENGES FOR CAUSE AS TO CERTAIN VENIREMEN**

In the First Assignment of Error, the Appellant asserts that the trial court erred in refusing to grant his challenges for cause as to veniremen 6, 9 and 31. He further assigns error on the part of the trial court in grant a challenge for cause as to venireman number 23.

Venireman 6

This person, one Vaughn, stated that his wife worked with a Tamara Mimms, who worked with the Jackson County sheriff's department. He stated, though, that that fact would not influence him. ( R. Vol. 5, pp. 204 - 205). He also knew one Ronnie Porter, who was also

employed at the sheriff's department. He stated that the fact that he knew Porter would not influence him. ( R. Vol. 5, pp. 207). Further on in *voir dire*, in response to questions put by the defense to the venire, Vaughn gave it for his opinion that the Appellant was required to prove his innocence. However, he also indicated, by failing to state otherwise, that he understood that everyone charged with a crime is presumed to be innocent. ( R. Vol. 5, pg. 231)

Venireman 9

Venireman 9 indicated that a person should try to prove his innocence if charged with a crime. He also indicated that he understood there was a presumption of innocence in favor of a person charged with a crime. ( R. Vol. 5, pg. 231)

Venireman 31

This person expressed the view that the Appellant would need to present evidence on his behalf, that it would not be fair to him if he did not. This person stated: "He would need to present his evidence. It wouldn't be fair just left all on the State. He would need evidence from him, as well." ( R. Vol. 5, pg. 236).

It will be noted that the defense did not ask these individuals whether they could put their notions about what the defense should have to prove aside and be guided by the instructions given by the trial court. However, the defense did ask the veniremen whether they understood that it was the State's burden to establish the Appellant's guilt. No one indicated that he did not understand or agree with that precept. ( R. Vol. 5, pg. 236). The State put no questions to the venire at the conclusion of the defense *voir dire*.

The defense moved to strike veniremen 6, 9 and 31 for cause. The prosecutor responded that, in the case of venireman 6, that person repeatedly stated that he would follow the court's instructions. The prosecutor further pointed out that the defense failed to enquire of the

venireman whether his belief would influence him, regardless of the court's instructions. The court refused to grant the challenge for cause.

As for venireman 9, the court stated that all that happened with respect to 6 and 9 was that they expressed their opinion. On the other hand, they consistently stated that they could be fair and impartial jurors and could follow the instructions given by the court. The court refused the challenge for cause as to venireman 9.

As for venireman 31, the prosecutor opined that that venireman only meant that the Appellant ought to have the opportunity to put on whatever evidence he had. The defense, not surprisingly, did not agree with that assessment. The trial court refused the challenge for cause. ( R. Vol. 5, pp. 245 - 247).

It appears that the defense exercised peremptory challenges as to veniremen 6 (D-2), 9 (D-4), and 31 (D-10). The defense and the State each had twelve peremptory challenges; the defense used all of its challenges. ( R. Vol. 5, pp. 248 - 249).

A trial court enjoys wide discretion in determining whether a challenge for cause ought to be granted or denied. *Lattimer v. State*, 952 So.2d 206, 214 (Miss. Ct. App. 2006). In order to support a challenge for cause, there must be a clear showing that the venireman's views would substantially impair the performance of his duties. A clear showing requires more than a single response to an initial enquiry. A juror's views do not of themselves constitute a ground for a challenge. *McDonald v. State*, 921 So.2d 353, 357 (Miss. Ct. App. 2005).

It is hardly necessary to concede that, to the extent that these veniremen intended to be understood to say that an accused has obligation to introduce evidence in his behalf, any such understanding of the law or expectation personal to themselves was a mistaken notion. But the question is not really so much as whether they had such an understanding or expectation as much

as it is whether the record demonstrates their willingness to set aside their personal views and be capable and willing to follow the instructions of the court. As pointed out by the prosecutor at trial, no attempt was made by the defense to determine whether these views on the part of these veniremen were so firmly entrenched that they would not or could not set them aside and follow the instructions of the court.

On the other hand, the record is clear that the venire was informed that the State of Mississippi bore the burden of establishing the Appellant's guilt. ( R. Vol. 5, pg. 199; 236). The venire was asked whether it could follow the instructions of law given by the court. No one indicated that he would be unable to do so. ( R. Vol. 5, pg. 212). All of the veniremen indicated that they understood and agreed that an accused is presumed innocent until proven guilty. None of them thought that an accused could have a fair trial if some members of his jury presumed guilt before trial began. ( R. Vol. 5, pg. 231). The jury was instructed that the State of Mississippi bore the burden of establishing the Appellant's guilt. ( R. Vol. 2, pg. 208).

In any event, the Appellant did testify. There is no indication that his decision to testify was made because the defense thought the jurors would hold it against the Appellant if he did not testify. The fact that the Appellant testified ought make the issue insignificant: regardless of what these veniremen thought, the fact that the Appellant testified obviated any cause for concern. Had the Appellant not testified, then it seems to us that the issue would be of greater importance.

Since it was never shown that these three jurors could not set aside their notions of whether an accused should testify, this Court should not find an abuse of discretion on the part of the trial court in refusing the challenges for cause as to them. As the Appellant acknowledges, the veniremen stated that they could follow the law. Such statements are accorded considerable

deference, citing *Scott v. Ball*, 595 So.2d 848 (Miss. 1992). (Brief for the Appellant, at 8).

The Appellant, though, would have this Court avoid this result. He posits that it is impossible for a venireman to hold views that are contrary to well established constitutional law and at the same time assert that he will be fair and impartial, and apply the law as given by the trial court. This is a highly speculative position, however. Perhaps the Appellant is correct in some cases, cases in which the prospective juror makes it plain that he will not relinquish his views regardless of what the court instructs. This sort of thing is most commonly seen in death penalty cases, cases in which a prospective juror makes it plain that he will not vote to impose a death penalty regardless of the evidence and the law.

But this is not the case here. These jurors, according to the trial court, were expressing opinions at most, not positions. The trial court heard these jurors, observed their demeanor, and was in the best position to determine those persons' meaning. There were no follow - up questions put to these people by the defense, yet they agreed with the proposition that it was the State's burden to establish guilt, not the accused's burden to establish innocence. The record in the case at bar does not demonstrate that these three would not and did not follow the instructions of the court. In order to support a challenge for cause, made on the basis of a venireman's opinions, there must be a clear showing that the venireman's opinions would substantially impair the performance of his duties. *McDonald, supra.* That showing was not made in the case at bar. The trial court thus did not abuse its discretion in denying the challenges for cause at to these three.

In the event, however, that this Court should view the matter differently, there is nonetheless no basis to reverse this case. As the Appellant recognizes, there is "a prerequisite for establishing a claim of a denial of constitutional rights due to a denial of a challenge for cause" in

that an appellant must show not only that the challenge or challenges for cause were denied and that he exhausted his peremptory challenges but that also an incompetent venireman was forced to be seated on the jury, citing *Chisholm v. State*, 529 So.2d 635 (Miss. 1988). (Brief for the Appellant, at 9). In the case at bar, the Appellant did in fact exercise three peremptory challenges against these three veniremen. He has not alleged, and there is nothing to show, that an incompetent juror was forced to sit on the jury on account of the exercise of his peremptory challenges on these three veniremen. This being so, as *Chisholm* demonstrates, the Appellant is in no position to complain of the trial court's action with respect to the challenges for cause as to these three veniremen. *Mettetal v. State*, 615 So.2d 600, 603 (Miss. 1993).

The Appellant rather coyly suggests that the Court should ignore the rule in *Chisholm*. There is no cause to do, and the Appellant advances no reason to do so. Beyond that, though, the Appellant overlooks the fact that cases are not to be reversed on account of said - to - be errors unless error was in fact committed and, equally important, that the error was prejudicial to the accused. *Nicholson ex rel Gollott v. State*, 672 So.2d 744 (Miss. 1996). Since the three veniremen the Appellant claimed to be unfit to serve on the jury did not serve, and since there is no showing that the Appellant was unable to remove some other unfit juror on account of having been put to using three peremptory challenges to remove the three that the trial court refused to remove on cause grounds, there is simply no prejudice to the Appellant.

Venireman 23

Venireman 23, one James Larson, stated that the prosecutor at trial had prosecuted his brother. Larson believed his brother innocent of the charge against him, which he thought was a charge of sexual battery, and further believed that his brother's trial was unfair. He also believed that the sentence his brother received was unfair. Nonetheless, Larson told the court that he

believed that he could be fair and impartial and abide by the instructions of the court and render a fair and impartial decision, if chosen to sit as a juror. ( R. Vol. 5, pp. 187 - 188; 220 - 221). The State, noting that the charge against Larson's brother was actually for fondling, challenged Larson for cause. As grounds, the prosecutor noted that the brother's conviction "was still eating at him." The prosecutor also pointed out that the judge in the case at bar also tried Larson's brother. The defense objected, noting that Larson indicated that he could be fair and impartial. The court granted the State's challenge for cause. ( R. Vol. 5, pg. 242).

The Appellant asserts sauce - for - the -goose, sauce - for - the - gander argument, asserting that, if the trial court granted the State's challenge as to Larson, it should have granted the defense challenges to veniremen 6, 9 and 31. The Appellant, though, presents no authority for this proposition.

We think there was a clear distinction between the challenge as to Larson and the challenges to veniremen 6, 9 and 31. Larson made it clear that he felt that his brother was not guilty of the charge against him and felt that his brother's trial and sentence had been unfair. The judge of the trial court who tried Larson's brother was the same who presided in the case at bar. By his comments, it was a more than fair conclusion to be reached that Larson had a specific and personal animus against the prosecution, and quite likely the judge as well. The complaint about the lack of a fair trial and sentence was a complaint about the judge; the fact that Larson thought his brother innocent was a complaint about the prosecution.

Veniremen 6, 9 and 31 did not express such sentiments. They were speaking generally about their opinions, opinions which were in no way specific to the case at bar and which in no way disclosed an animus toward the court or the prosecutor, or even the defense, for that matter. These veniremen indicated that they could follow the instructions of the court, notwithstanding

their notions.

There was a substantial distinction between the State's challenge as to Larson and the Appellant's challenge as to 6, 9, and 31. Nonetheless, the Appellant may not be heard to complain of the trial court's granting of the State's challenge for cause. Miss. Code Ann. Section 13-5-79 (Rev. 2002)(Exclusion of a juror found by a trial court to be incapable of trying the case impartially shall not be assignable as error on appeal). The Appellant had no right to have a particular person sit on his jury, only the right to a fair and impartial jury. *Coverson v. State*, 617 So.2d 642, 645 - 646 (Miss. 1993). It has not been asserted or shown that the challenge as to Larson deprived the Appellant of a fair and impartial jury.

The Appellant may not be heard to complain of Larson's exclusion. Even so, there was a clear distinction between the reasons for the challenge against Larson and the challenge against veniremen 6, 9, and 31. The trial court did not engage in unfair and disparate treatment with respect to these challenges.

The First Assignment of Error is without merit.

**2. THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO QUASH THE INDICTMENT**

In the Second Assignment of Error, the Appellant asserts that the indictment, with respect to the dates alleged on which the Appellant committed his felonies, was too vague and that such vagueness compromised his ability to present a defense. The Appellant suggests that perhaps an alibi defense would have been available, but he does not state what periods or period of time would have been perhaps amenable to an alibi defense.

Counts four through seven of the indictment alleged that the Appellant committed the felony of touching a child for lustful purposes between 1 June 2006 through 19 August 2006. (

R. Vol. 1, pg. 9). The time period embraced by these four counts was about three months.

The Appellant filed a motion to quash the indictment, which alleged that the time frame alleged was insufficient to allow for an effective defense. ( R. Vol. 2, pp. 166 - 168). A hearing was held on this motion, in which the Appellant, citing *Moses v. State*, 795 So.2d 569 (Miss. Ct. App. 2001), asserted the allegations of the motion. It was said that the counts of the indictment were nearly identical and failed to provide the Appellant "necessary information."

The State responded, stating that the dates alleged had been made as narrow as possible. The reason counts four through seven alleged a June through August time frame was because the victim alleged in those counts, L.P., stated that the Appellant's acts occurred over the summer. A more specific time could not be ascertained. The prosecutor further pointed out that there was no way to avoid using the same language in each of those counts. The Appellant was alleged to have committed acts of fondling throughout the summer. Each act constituting a separate crime, there was no other way to charge them. The trial court denied relief on the Appellant's motion. ( R. Vol. 4, pp. 118 - 126).

Specific dates in a child sexual abuse case are not required to be alleged in an indictment so long as the accused is fully and fairly informed of the charge against him. *Eakes vs. State*, 665 So.2d 852, 860 (Miss. 1995). Specific dates should be alleged if at all possible, but the failure to do so does not work a fatal defect in an indictment. *Price v. State*, 898 So.2d 641, 654 - 655 (Miss. 2005).

In the case at bar, the counts of the indictment clearly and sufficiently informed the Appellant of what felonies he was charged with having committed. Some of the counts, courts one through three, gave specific dates in August of 2006. But the other counts were not as specific because the victim could not give a more specific date. Clearly, though, the State

alleged the dates of commission as specifically as it could. In child sexual abuse cases, it is hardly uncommon that the victims will be unable to recall and testify to specific dates, as this Court has recognized. *Morris v. State*, 595 So.2d 840 (Miss. 1991).

The Appellant suggests that maybe he might have had an alibi defense had more specific dates been alleged. Yet, neither in the trial court nor here does he give flesh to that suggestion. The mere suggestion that maybe there might have been an alibi defense is not sufficient to demonstrate that the defense was compromised by the lack of specific dates. *Gordon v. State*, 977 So.2d 420, 431 (Miss. Ct. App. 2008).

The Appellant, of course, relies heavily upon *Moses v. State*, 795 So.2d 569 (Miss. Ct. App. 2001). That decision, though, involved two victims, twenty - two incidents, alleged to have occurred over a three - year period. It is true that the Court of Appeals found error in the trial court's handling of the issue, but it is critical to focus on why error was found. The Court of Appeals pointed out that the State was in possession of information which would have considerably shortened the time - frame alleged in the indictment as well as other information that would have specifically identified the incidents that the counts were based upon. *Moses*, at 572.

There is nothing remotely comparable in the case at bar to *Moses*. Here, the State clearly made its best effort to alleged the dates of commission as exact as possible. There is no indication that the State was in possession of information that would have given a more precise time frame. The time frame involved in the case at bar was about three months, not a period of over three years in *Moses*. There were seven counts in the case at bar, not twenty two as in *Moses*.

The fact that counts four through seven used the same or substantially the same language

is not significant. The Appellant was alleged to have committed acts of unlawful touching of a child. It is hardly a surprise to see that the State used the same language in each count, that being in an effort to properly charge the commission of that offense. It may be that the State did a similar thing in *Moses*, but that was not what the Court of Appeals found to be objectionable. The problem was not the use of repetitive language; the problem was that the State could have made its allegations with respect to time of commission more specific than it did. *Moses* has no application in the case at bar.

The Second Assignment of Error is without merit.

**3. THAT THE APPELLANT'S CONVICTION TOUCHING DID NOT MERGE WITH HIS CONVICTION OF SEXUAL BATTERY**

In his Third Assignment of Error, the Appellant contends that fondling is lesser - included to sexual battery and that for that reason the fondling conviction under count two of the indictment should have merged into the sexual battery conviction of count one.[2] The Appellant points to this Honorable Court's decision in *Friley v. State*, 879 So.2d 1031 (Miss. 2004) and asserts that it is impossible to commit sexual battery without necessarily committing fondling. C.C. testified that the Appellant had used his penis and also used a finger. There was physical testimony to show that the child had been vaginally penetrated.

The Court did find in *Friley* that it is impossible to commit sexual battery without necessarily committing an unlawful touching. However, the flaw in the Appellant's reasoning is that he ignores the fact that it is possible to commit an unlawful touching without committing sexual battery, sexual battery requiring penetration where unlawful touching does not. The Court

---

[2] Counts one and two alleged sexual battery and unlawful touching respectively. The victim of these offenses was C.C. The balance of the indictment concerned crimes against L.P. ( R. Vol. 1, pp. 8-9).

of Appeals has found that sexual battery and unlawful touching are separate crimes and that unlawful touching does not merge into sexual battery. *Steward v. State*, No. 2008-CP-00902-COA (Miss. Ct. App., Decided 22 September 2009, Not Yet Officially Reported).

The sexual battery count concerned an event separate from the unlawful touching count. Perhaps the act of unlawful touching occurred relatively close in time to the act of sexual battery, but, if so, this would be insignificant: temporal proximity does not generate a judicial union of separate and distinct criminal acts. *Wright v. State*, 540 So.2d 1 (Miss. 1989).

The Third Assignment of Error is without merit.

## CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

## CERTIFICATE OF SERVICE

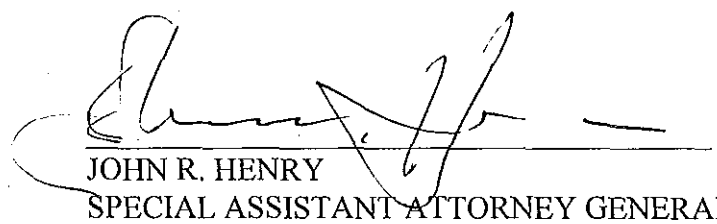
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert B. Krebs
Circuit Court Judge
P. O. Box 998
Pascagoula, MS 39568-1959

Honorable Anthony Lawrence, III
District Attorney
P. O. Box 1756
Pascagoula, MS 39568-1756

Justin T. Cook, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 16th day of November, 2009.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680