IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RANDALL M. POWELL — APPELLANT

VS. — NO. 2009-KA-0675

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

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

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**VS.** **NO. 2009-KA-0675**

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

# BRIEF FOR THE APPELLEE

## STATEMENT OF ISSUES

I. THE JURY'S VERDICT OF GUILTY OF STATUTORY RAPE IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

II. THE JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF THE CRIME CHARGED.

III. POWELL FAILS TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

IV. THE SENTENCED WAS NOT IMPOSED UNCONSTITUTIONALLY.

V. POWELL'S SENTENCE IS NOT DISPROPORTIONATE TO THE VILE CRIME HE COMMITTED.

## STATEMENT OF FACTS

When school let out for summer break in May of 2008, eleven-year-old R.P., who lived with her father, Randall Powell, went to stay with her mom, Sequoia Powell, for the summer. The night before Sequoia picked R.P. up, R.P. telephoned her mother and complained that it hurt and burned when she went to the bathroom. T. 14. Sequoia informed Powell that she would be taking R.P. to the doctor. T. 16.

Powell told Sequoia that it was probably just a urinary tract infection, that R.P. got them all the time, and further instructed Sequoia to "just get some of those women creams and put on her and she'll be all right in a little while." T. 16. When Sequoia insisted that R.P. needed to see a doctor, Powell told her to call him back to let him know what the doctor said. T. 16

Nurse Practitioner Michael Williams ordered a urinalysis. T. 31. The test results showed that R.P. did in fact have a urinary tract infection, but also had trichomoniases, a sexually transmitted disease. T. 32. R.P. initially denied that she had had sexual contact with anyone. 26. Sequoia immediately called Powell to inform him of the situation. T. 25. Powell's explanation was that older kids who are sexually active live in the house, and perhaps R.P.'s clothes were washed together with theirs. T. 25. The Department of Human Services was contacted, and a D.H.S. worker came to interview R.P. at the hospital. T. 25. R.P. admitted to the social worker that her father had been raping her since her fourth grade year in 2006. T. 49.

Copiah County Sheriff's Department Investigator Chad Sills interviewed Powell. T. 74. Powell denied having sex with his eleven-year-old daughter, but admitted that he and his current wife, Melody Powell, had previously contracted trichomoniases. T. 75. Powell also informed Sills that R.P. was always with him and never went anywhere with anyone else. T. 75.

Powell was indicted and tried for statutory rape. His defense was that he was impotent, and therefore could not have engaged in sexual intercourse with his daughter. A Copiah County Circuit Court jury returned a verdict of guilty of statutory rape. Powell was sentenced to serve thirty years in the Mississippi Department of Corrections.

## SUMMARY OF ARGUMENT

The jury's verdict is not against the weight of the evidence. The jury was faced with the victim's disclosure that Powell raped her versus Powell's denial. It is within the sole province of the jury to resolve conflicts in the evidence. Because the verdict is not against the weight of the evidence and represents no

unconscionable injustice, the verdict must be upheld.

The jury was properly instructed on the elements of statutory rape. The elements instruction tracked the language of the statute verbatim. Further, if Powell wanted an instruction which provided a definition, it was his duty to offer one.

Powell has failed to show that defense counsel rendered deficient performance, much less deficiencies which prejudiced the outcome of his case.

Powell's claim that his sentence was imposed unconstitutionally because the trial court asked if he would be filing a direct appeal is based on nothing more than wild speculation.

Powell's claim that his sentence is disproportionate to the crime committed is procedurally barred as he failed to raise the issue in the trial court. Additionally, Powell has failed to raise an inference of gross disproportionality.

## ARGUMENT

### I. THE JURY'S VERDICT OF GUILTY OF STATUTORY RAPE IS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

Powell claims that the jury's verdict is against the weight of the evidence because no physical evidence of penetration was presented, the defense put on testimony which alleged that Powell was impotent, and Powell claims that R.P. could have contracted the same sexually transmitted disease that he and his wife just happened to have elsewhere. The duty of resolving conflicts in the evidence lies within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). The jury is also charged with the exclusive duty of assessing witness credibility and determining the weight to afford each witness's testimony. *McClain v. State*, 625 So.2d 774, 778 (Miss. 1993). Powell's aforementioned complaints are jury arguments which were clearly rejected by the jury.

The eleven-year-old victim in this case testified that her father vaginally raped her approximately

ten times between 2006 and 2008. T. 49, 51. She told one of her sisters about the sexual abuse, but told no one else because she was scared. T. 50, 66. There is no indication that R.P. would have ever reported the rapes had she not been diagnosed with trichomoniasis. R.P. never accused anyone but her father of raping her. Additionally, R.P. had never been left alone with another male, and no males spent the night at her mother's home when she was there. T. 18, 52. Even Powell admitted that R.P. never went anywhere, as she was always with him. T. 75. R.P.'s allegations were corroborated with the medical evidence that she contracted a sexually transmitted disease that her father also had.

Powell, on the other hand, denied having sex with his daughter. He claimed that he was impotent due to high blood pressure medication which he began taking since 2005. T. 113. However, Powell was forced to admit that he was sexually active, as he admitted that he "possibly" fathered a child which was born on March 12, 2007. T. 122-123. Powell also admitted to authorities that both he and his wife had the same sexually transmitted disease that R.P. had contracted. T. 75. However, he never mentioned to authorities that he allegedly suffered from erectile dysfunction. T. 75.

Melody Powell did not lend much credibility to the defense. She acknowledged that she contracted trichomoniasis as the result of an extramarital affair, but claimed she did not give it to Powell due to his alleged impotence. T. 95. It was apparently just coincidental that he just so happened to have the same disease. According to Melody, her husband was impotent since 2005. T. 94. Yet, as admitted by Powell, he was having sex with someone as late as May or June of 2006. T. 125.

It is well-settled that even the uncorroborated testimony of a single witness is sufficient to support a jury's verdict. *Collins v. State*, 817 So.2d 644, 658 (¶46) (Miss. Ct. App. 2002). The jury was faced with the victim's claim that her father repeatedly raped her, a version of events which was corroborated with medical evidence, versus Powell's denial. The jury clearly found R.P. to be the more credible witness. Because the jury's verdict is not against the weight of the evidence, and because the verdict represents no

unconscionable injustice, the verdict must not be disturbed on appeal. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005).

## II. THE JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF THE CRIME CHARGED.

Powell was charged with and found guilty of violating Mississippi Code Annotated section 97-3-65 (b), which states, "The crime of statutory rape is committed when a person of any age has sexual intercourse with a child who is under the age of fourteen years; is twenty-four or more months younger than the person; and is not the person's spouse." Miss. Code Ann. §97-3-65(b). Powell claims on appeal that the jury was not properly instructed of the elements of the offense. However, jury instruction 3 tracked the language of the statute verbatim. C.P. 24. Specifically, Powell complains that the term "penetration" was not defined for the jury. This assertion is puzzling, as the term penetration was not used in the jury instructions. Rather, the jury was asked to decide whether Powell had sexual intercourse with the victim. C.P. 24.

It is true that both sexual penetration and sexual intercourse include, by their statutory definitions include the insertion of any object into the victim's sexual organs. Miss. Code Ann. §97-3-97. However, there was no allegation that Powell inserted anything other than his penis into the victim's vagina. Therefore, there was no need to instruct the jury that sexual intercourse could include more than what a juror of average intelligence would understand the term to encompass. Further, trial courts are not required to *sua sponte* instruct the jury or suggest instructions for the parties. *Booze v. State*, 942 So.2d 272, 275 (¶15) (Miss. Ct. App. 2006). If Powell wanted an instruction defining any term, it was his duty to request such an instruction. "[N]o error may be predicated upon the Court's refusal to give an instruction defense counsel never requested." *Williams v. State*, 566 So.2d 469, 472 (Miss.1990). Accordingly, Powell's second assignment of error must fail.

## III. POWELL FAILS TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The State would stipulate that the record is sufficient for this honorable Court to dispose of the appellant's claim of ineffective assistance of counsel in this direct appeal. Powell claims that defense counsel was ineffective for failing to timely submit a peremptory instruction, failing to renew the motion for directed verdict at the close of the defense case-in-chief, and for failing to request a definition of sexual penetration.

To prove a claim of ineffective assistance of counsel, the appellant must show that trial counsel's performance was in fact deficient, and the deficiencies prejudiced the outcome of the case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As to Powell's claim that defense counsel did not timely submit a peremptory instruction, the record makes clear that the trial court stated that it would deny such an instruction. T. 139-140. Accordingly, the trial court found it unnecessary for trial counsel to submit a written instruction. T. 140.[1] Neither prong of *Strickland* is met with Powell's first example of alleged ineffective assistance.

Regarding Powell's claim that defense counsel was constitutionally deficient for failing to renew the motion for directed verdict at the close of the defendant's case-in-chief, this Court has held that such an omission is not constitutionally deficient where a motion for JNOV or in the alternative a new trial is filed. *Fulks v. State*, 944 So. 2d 79, 83 (¶10) (Miss. Ct. App. 2006) (citing *Simon v. State*, 857 So.2d 668, 689(¶ 56) (Miss. 2003)). Because the trial court had the opportunity to rule on the issue of whether sufficient evidence was presented to support the jury's verdict in denying Powell's motion for JNOV, Powell cannot prove the second *Strickland* prong.

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[1]Additionally, Powell's appellate counsel also filed his motion for JNOV. That motion alleged that the trial court erred in refusing the defendant's peremptory instruction, yet on appeal, he claims that such an instruction was not submitted. C.P. 40.

Finally, Powell claims that defense counsel was ineffective for failing to request an instruction defining "penetration." Again, the jury instruction providing the elements of the crime charged tracked the statute and used the term "sexual intercourse." It would have made no sense for defense counsel to request an instruction on penetration, when the only evidence against Powell was that he inserted his penis in his daughter's vagina. T. 49. It was not alleged that Powell inserted anything else into his daughter's sexual organs. Therefore, a definition of penetration would have only confused the jury. Powell has failed to meet either *Strickland* requirement with his final claim of ineffective assistance.

For the foregoing reasons, Powell has failed to prove defense counsel's performance was constitutionally deficient.

## IV. THE SENTENCED WAS NOT IMPOSED UNCONSTITUTIONALLY.

Powell's claim that the trial court considered the fact that Powell planned to appeal in deciding his sentence is so unreasonable as to nearly be frivolous. It is clear from the record that the trial court inquired about whether Powell would appeal so that the court could inform Powell that he must file certain motions in a timely manner in order to perfect his appeal. T. 140-141. Powell's fourth assignment of error is based on nothing more than wild speculation.

## V. POWELL'S SENTENCE IS NOT DISPROPORTIONATE TO THE VILE CRIME HE COMMITTED.

The maximum sentence for statutory rape is life imprisonment. Powell received thirty years. Powell's proportionality argument is procedurally barred as he failed to raise the issue before the trial court. *Edwards v. State*, 800 So.2d 454, 468 (Miss. 2001). However, should this honorable Court find any reason to address the merits of the appellant's claim, the State advances the following argument without abandoning its position that the issue is procedurally barred.

As a general rule, sentences which do not exceed the statutory maximum will not be disturbed on

appeal. *Johnson v. State*, 950 So.2d 178, 183 (¶22) (Miss. 2007). "[P]roviding punishment for crime is a function of the legislature, and, unless the punishment specified by statute constitutes cruel and unusual treatment, it will not be disturbed by the judiciary." *Id.* (citing *Presley v. State*, 474 So.2d 612, 620 (Miss. 1985)). The United States Supreme Court overruled *Solem v. Helm*, 463 U.S. 277 (1983), to the extent that it found a guarantee of proportionality in the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) ("It should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law.... We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."). Nevertheless, reviewing courts may still consider the *Solem* factors, but only when "a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." *Johnson* at 183 (¶22).

Powell argues only that his sentence is harsh because he is a first offender. Rape is a heinous crime, regardless of the identity of the victim. To rape one's own daughter, an eleven-year-old child, is perhaps the most vile crime that can be committed. In addition to his final claim being procedurally barred, Powell has failed to raise an inference of gross disproportionality.

## CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Powell's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

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

## CERTIFICATE OF SERVICE

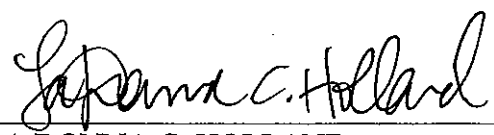
I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Lamar Pickard
Circuit Court Judge
Post Office Box 310
Hazlehurst, MS 39083

Honorable Alexander C. Martin
District Attorney
Post Office Drawer 767
Hazlehurst, MS 39083

Ross Barnett, Jr., Esquire
Attorney at Law
501 South State Street
Jackson, MS 39201-5306

This the 20th day of January, 2010.



LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

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