IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT E. FORREST, JR. — APPELLANT

VS. — NO. 2009-KA-1383

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT E. FORREST, JR. **APPELLANT**

vs. **CAUSE No. 2009-KA-01383-COA**

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 Lincoln County, Mississippi in which the Appellant was convicted and sentenced for his felonies of **TOUCHING OF A CHILD FOR LUSTFUL PURPOSES.**

STATEMENT OF FACTS

Late on the night of 12 December 2006, Sheila Hynum, a conservation officer with the Mississippi Department of Wildlife, Fisheries and Parks, met with the victim in the case at bar and her parents at the Lincoln County Sheriff's Department.[1] The victim told Hynum that her uncle had exposed himself to her and had fondled her. The victim appeared shy and withdrawn.

The victim told Hynum that she, the victim, went to the Appellant's home to spend the night. The victim was lying on an air mattress. When the victim's aunt got into the shower, the Appellant

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[1] Given the nature of the case at bar, unlike the Appellant, we will not refer to the victim by name, but only as "the victim" or "the child". Likewise, we will not use the victim's mother's name. *Morgan v. State*, 995 So.2d 812 (Miss. Ct. App. 2008).

laid down upon the air mattress with the victim and began rubbing her stomach. He then put his hand into her pants and rubbed the victim there. The victim turned away and the Appellant stopped what he was doing.

The victim was at the Appellant's house on another occasion and rode four - wheelers with him. At some point the victim indicated that she had to answer a call of nature. As she did so on one side of the four - wheeler, the Appellant started talking to her. When she turned around, she found that the Appellant was facing her and had exposed himself. The Appellant told her not to tell her parents. The Appellant then took her to a deer stand. When the victim told him that she did not want to be there, he took her back to his house. Upon receipt of this information, Hynum contacted the Department of Human Services. (R. Vol. 2, pp. 59 - 68).

A Family Protection Specialist with the Department of Human Services testified as to her involvement in interviewing the victim. (R. Vol. 2, pp. 68 - 73).

Johnny Hall, Jr., Investigator/Chief deputy with the Lincoln County Sheriff's Department investigated the allegations made against the Appellant. He had the child interviewed at a Child Advocacy Center. He interviewed the Appellant and the Appellant's wife. The Appellant's wife defended her husband. Hall was also given a nightgown that the child was wearing when she was lying on the mattress. (R. Vol. 2, pp. 74 - 86).

Bente Johnson, executive director of the Children's Advocacy Centers of Mississippi, was qualified and accepted as an expert witness in the field of forensic interviewing of children. He testified that he met and interviewed the victim on 2 January 2007. The victim was ten years of age at the time. A video recording was made of the interview, which was received into evidence. The child described what was done to her by the Appellant in the interview, describing the mattress incident and four - wheeler incident. (R. Vol. 2, pp. 89 - 125).

The victim then testified. She was eleven years of age at the time of trial. She testified that she often visited the Appellant's home, sometime spending the night there, the Appellant being her uncle. She stated that she slept on an air mattress when she spent the night. She testified that the Appellant molested her on one occasion while the Appellant's wife was in the bath. She was wearing a bluish-green nightgown and was on the air mattress when the Appellant molested here. Specifically, the Appellant put his hand on her stomach and rubbed her stomach. She had a stomach ache, yet the Appellant moved his hand down and touched her "private" beneath her underwear. She rolled over and the Appellant stopped what he was doing. She identified in court the nightgown she had been wearing when this occurred. She initially said nothing of what the Appellant did because she was afraid he would hurt her.

On a subsequent occasion, the child was riding a four - wheeler with the Appellant. At some point she needed to relieve herself. As she was doing so in front of the vehicle, the Appellant began talking to her. She turned to look at the Appellant and saw that the Appellant had exposed himself to her. The child got back on the four - wheeler. The Appellant explained to her that little boys and girls were different. He told her that since she had seen his privates he could walk around the house naked so long as the child's grandmother was not present. The Appellant also told her not to tell her parents or her aunt.

The victim did not immediately report what the Appellant had done because she was afraid that her mother or the Appellant would be upset with her.

On a subsequent occasion, the victim was again at the Appellant's residence. Her cousin was using the air mattress, so the child wanted to sleep on a couch. Her request was denied by the Appellant and his wife. The Appellant's wife called the victim's mother about the matter, and the victim's mother asked the Appellant's wife to permit the child to sleep on the couch and not to make

the child sleep in bed with the Appellant and his wife. Nonetheless, the victim was made to get in bed with the Appellant and his wife.

The victim was put between the Appellant and his wife. The Appellant's wife was turned to her right as she entertained herself with a cross - word puzzle. The Appellant entertained himself by putting his arm around the child and feeling of himself inside his underwear. At some point, the Appellant laid his penis against the victim's leg. The Appellant's wife the told the Appellant to get off the child. He complied with that order, but, after his wife went back to her cross-word puzzle, the Appellant rolled back over onto the child. The Appellant's wife then fell asleep; the Appellant did as well, lying over the child. The victim never went to sleep for fear of the Appellant.

The victim went to her home the next day but did not immediately tell her parents of what had occurred. She slept the whole of the day. (R. Vol. 2, pp. 125 - 150; Vol. 3, pp. 151 - 513).

The victim's mother then testified. She stated that before the autumn semester of 2006 the victim was a normal child who enjoyed drawing, painting, sculpting clay, a child with a big heart who loved animals and her family. She also loved the Appellant and his wife, and she often visited them at their home, and the child spent the night there about once every month. The child looked forward to her visits. She loved the country and loved to be able to do country things, such as riding a four - wheeler.

Toward the end of 2006, the victim's demeanor markedly changed. She no longer wanted to visit the Appellant and his wife. She was standoffish about leaving her home. The victim became moody, crying about nothing and expressing anger over nothing. The child's mother spoke with the child' teachers to see if the child was having troubles at school.

What had been happening to the child came to light when the Appellant's wife told the victim's mother that the victim refused to ride a four - wheeler with the Appellant, a thing that was

completely out of character for the victim. When the child's mother asked the child about it, the child initially refused to give a reason, stating that "I can't tell you; you'll die". Later, she told her mother about the Appellant's act in exposing himself to her and telling her that he could walk about his house naked when she was there. It was for that reason that the child did not want to return to the Appellant's house. After another couple of days, the child related the other incidents committed by the Appellant, including the touching that occurred on the air mattress and the incident when the child was placed in the Appellant's and his wife's bed.

The child had a close relationship with the Appellant and his wife until the time the Appellant began touching her. (R. Vol. 3, pp. 154 - 160).

The Appellant's wife apparently admitted that she had seen the Appellant "dry - humping" the child while the child was in bed with them. She told the Appellant to get off the child. The Appellant admitted having "dry humped" the child to the child's mother. (R. Vol. 3, pp. 164 - 165).

One of the child's teachers testified. She stated that the child had been am excellent student, was quiet but affectionate toward her teachers, and got along with her fellow students. However, in the fall of 2006 she began to see a difference in the child's demeanor. The child became withdrawn and began to complain of physical ailments. These changes lasted throughout the years. Her teacher was not able to determine the cause for the change in demeanor. (R. Vol. 3, pp. 170 - 173).

Mr. Chris Huff, a clinical social worker and therapist at Southwest Mississippi Children's Advocacy Center, was qualified as an expert witness in the fields of clinical social work and child sexual abuse. The victim was referred to him for therapy.

When Huff first met the victim, sometime prior to Christmas 2006, the victim was experiencing sadness and irritability in some of her relationships. Her family reported significant

changes in her attitude and demeanor. The child exhibited anxiety, anger and sadness primarily over the loss of her relationship between her aunt and uncle and herself. In the course of therapy, the child described three specific events involving the Appellant, those involving the air mattress, four - wheeler and lying between the Appellant and his wife, which have been more fully described above. The child also experienced nightmares. In one of those, the Appellant kidnaped the child. The child also told Huff that there were times in which the Appellant rubbed her chest and hugged her. Therapy on a regular basis continued into June, 2007.

Huff believed that the victim had suffered trauma, and he thought her symptoms were not out of the ordinary for a child victim of sexual abuse. He also thought that she improved in the course of therapy. (R. Vol. 3, pp. 176 - 206).

The defense presented a case - in - chief, opening with the testimony of the Appellant's wife. She testified that her relationship with the victim, at least prior to the victim's disclosures, had been excellent and that the victim often visited her home, often spending the night.

As for the four - wheeler incident, she stated that she observed nothing amiss when the victim and her husband returned from their outing. According to the Appellant's wife, the victim had her arm around the Appellant. The victim told her that she had "tee-teed in the woods again."

As for the air mattress event, she recalled that the victim reported a stomach ache. The victim was dressed for bed. The Appellant asked the victim if she wanted medication for the stomach ached, and the victim declined. The victim was playing with a television game. The Appellant and she were sitting on the mattress. The witness then went to bathe, but did not close the door completely. She could hear the conversation between the Appellant and the victim about the stomach ache. The Appellant's wife believed that the victim would have told her of anything the Appellant had done to her.

As for the occasion when the victim was lying between the Appellant and his wife, the wife admitted that the child was between herself and the Appellant. She said that this had been done before and that the child had no problem with such a sleeping arrangement. The Appellant's wife also said that she had given the child the choice of whether to sleep on a couch but that she chose to sleep with the Appellant and his wife. According to the Appellant's wife, the Appellant and she rolled over toward each other to give each other a goodnight kiss. The child kissed them each on the cheek. The Appellant's wife worried at one point that her husband might "squash" the child. The Appellant's wife said she did not play a cross - word puzzle that night. She said she would have known had her husband attempted to "dry hump" the child.

The child was wearing a gown and a pair of sleep pants. The Appellant was wearing no shirt but a pair of camouflage sleep pants. The Appellant's wife wore a tee - shirt and a pair of shorts. When the wife awakened the next morning, the child was asleep on her stomach. The Appellant was asleep, lying on his side, facing a wall. The Appellant's wife wakened the child, who was excited to be going to a paint ball tournament. The child made no complaint about anything. The child was returned to her mother that afternoon. The child made no complaint about the Appellant that day and in fact sat next to him much of the time. It was said that the child loved the Appellant and stayed with him all of the time.

The Appellant's wife said she had no inkling of what had occurred until 12 December 2006, at 11.17 p.m. It was on that date and time that the child's mother rang her and told her that the Appellant had exposed himself to the child. There were subsequent calls over the next two or three days. According to the Appellant's wife, the child's mother had different stories in each call.

The Appellant's wife then testified that she had been contacted by law enforcement. She gave a statement, then law enforcement wanted to speak with her son. After another meeting, she

was told by the officer that he would not be filing charges but that the victim's mother could file charges.

On cross-examination, the witness admitted that the victim rode a four - wheeler nearly every time the victim visited the witness' home and that it was possible that the talk of having urinated in a field occurred on some other day. (R. Vol. 3, pp. 210 - 246).

The defense then produced the testimony of one Phyllis Ravenscraft, who said she was an acquaintance of the victim's mother and a friend of the Appellant's wife. In January of 2007, Ravenscraft happened to meet the victim's mother at a Belk's store in McComb. The victim's mother told Ravenscraft that the Appellant had molested her daughter and that Ravenscraft should not visit in the Appellant's home anymore. Ravenscraft's son was with her and heard what the victim's mother said and was upset by it. The victim was also present and heard what her mother said. The victim hung her head as her mother told Ravenscraft what she would like to do the Appellant and how the Appellant would serve time for what he had done. Ravenscraft testified that the victim's mother was agitated because Ravenscraft did not believe the story. (R. Vol. 3, pp. 247 - 250).

The Appellant then testified. He said that was acquainted with the victim and described her as a loving child and one with whom he had a very good relationship.

As for the four - wheeler incident, that was a visit to a food plot. The victim and he got off the machine and walked around. The victim saw some rabbits at the edge of the plot and wanted to get close to them. After failing at this, the victim said she need to go to the bathroom. The Appellant said that he offered to drive her back to the house, but the victim said she would relieve herself there, which she did. The Appellant said he walked off and got to the other side of a tree. He told the child to stay where she was. He then relieved himself, on the other side of the tree. The

two were still talking. At some point he saw that the child had changed position. The Appellant said he quickly turned away from her and covered himself up. He did not drop his trousers.

The Appellant said he scolded the child for failing to stay where she was told to stay, which upset the child.

The two then went to a deer stand. The child wanted to climb into it. She did so, the Appellant following her. They sat in the deer stand for two minutes or so and then returned to the house. Back to the house, the child reported that she had "tee teed" in the woods.

As to the mattress incident, the Appellant testified that he readied himself for bed and that his wife got the child ready for bed. The child was on a mattress in the Appellant's room, playing with a video game. The Appellant played the game with her. The Appellant's wife was in the bath. At some point while the Appellant and the child played the game and the Appellant's wife bathed, the child complained of a stomach ache. The child was lying on her back. The Appellant touched her stomach and asked her if she wanted Pepto - Bismal. The Appellant's wife heard the exchange and told them where the medication could be found. The child declined. The Appellant said he kissed the child goodnight and covered her with a blanket. He then got into his bed. At that point the Appellant's wife got into bed and asked the victim if she needed anything.

As for the third incident, the mattress was not available because the Appellant's son had an overnight visitor. They were planning to go to a paint ball tournament the next day. According to the Appellant, the victim and his wife made the decision to have the victim sleep in the Appellant's bed with the Appellant and his wife. The Appellant said he slept on the right side of the bed, facing the wall. The Appellant said that he and his wife kissed each other good night, that the child kissed them good night, and that his wife made a joke about not squashing the child. The Appellant said he turned the light off and that they all went to sleep. He denied having touched the child with his

penis or any other part of his body. He denied having attempted to "dry hump" the child.

The following morning the Appellant and the others in the trailer went to the paint ball tournament. They stayed there for some five hours. They then took the victim to her home. Nothing was said of any touching of the child.

The Appellant denied having fondled the child or exposed himself to the child. The Appellant admitted that he had not heard the victim testify that he had "dry humped" her or "bounced" on her. The Appellant admitted that the victim testified that he had rubbed her leg with his penis. (R. Vol. 3, pp. 251 - 280).

STATEMENT OF ISSUES

1. WERE THE VERDICTS CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

2. WAS THE SENTENCE IMPOSED "EXCESSIVE"?

SUMMARY OF ARGUMENT

1. THAT THE VERDICTS ARE NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

2. THAT THE SENTENCES IMPOSED UPON THE APPELLANT FOR HIS TWO CONVICTION OF GRATIFICATION OF LUST ARE NOT EXCESSIVE

ARGUMENT

1. THAT THE VERDICTS ARE NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In the First Assignment of Error of the Appellant's single - spaced brief[2], it is said that the verdict is contrary to the great weight of the evidence. This claim was raised in the Appellant's

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[2] *See* Rule 32(a) MRAP

motion for a new trial. (R. Vol. 1, pg. 119). The standard of review appurtenant to such a claim is as follows:

> "[a] motion for new trial challenges the weight of the evidence. [Citation omitted] A reversal is warranted only if the trial court *abused its discretion* in denying a motion for new trial." *Ivy v. State,* 949 So.2d 748, 753 (Miss.2007)] (emphasis added). In *Bush* [*v. State,* 895 So.2d 836 (Miss.2005)], this Court set out the standard of review for weight of the evidence, stating:
>
> [w]hen reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial:
>
> the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs For Less, Inc.,* 796 So.2d 942, 947 (Miss.2000).... [T]he evidence should be weighed in the light most favorable to the verdict. *Herring,* 691 So.2d at 957. [citations omitted].

Parramore v. State, 5 So.3rd 1074, 1078 (Miss. 2009).

The Appellant's argument in support of this claim rests entirely upon the supposition that the testimony was so contradictory as to be unworthy of belief.

The victim testified as to two separate acts of gratification of lust as defined by Miss. Code Ann. Section 97-5-23 (Rev. 2006). Specifically, she testified that the Appellant fondled her vagina on one occasion, and rubbed his penis against her leg on another. The Appellant was over the age of eighteen years at the time, and the victim under the age of sixteen years. The victim's testimony was corroborated by the fact that the Appellant and his wife admitted that the victim was present with them when the acts occurred. The victim was on the mattress when that act occurred, and she

was in bed with the Appellant and his wife when the second act occurred.

There was also corroboration in that the victim's mother testified that the Appellant and his wife admitted to the bed incident. The marked change in the victim's personality also corroborated her testimony.

In addition to these considerations, the Appellant has not asserted much less suggested the first reason why the child would have lied about what occurred. To the contrary, the testimony was uniform on the point that the child loved the Appellant and his wife, felt close to them, and that the child's mother and the Appellant's wife were on very good terms.

It may be that the child did not relate the bed incident at the time she told the Wildlife, Fisheries and Parks officer about the mattress and four-wheeler incidents. However, it is hardly unusual in cases of this kind to find that victims fail, at first, to tell the whole story or even lie initially about what they experienced. *Ross v. State*, No. 2009-KA-00796-COA, Slip Op. At 11 (Miss. Ct. App., decided 15 June 2010). The victim explained that her reticence in relating what the Appellant had done was on account of fear of what might happen to her or her mother. It is hardly unknown that abusers of children threaten their victims in an attempt to keep them silent.

As to the attempted point that the child failed to specify when the acts of fondling occurred when she spoke with the witness Brooks, this is a point of little significance. It is quite understandable that the child would not have remembered the specific date, especially given her emotional state at the time. Similarly, the fact that the child mentioned that the Appellant's trousers were down when he exposed himself to her, but may not have said that when she spoke the Wildlife, Fisheries and Parks officer is not particularly important. It is not uncommon, especially when an upset child is involved, for small details to be omitted on one hand or added on another. The important point, though, is that the child was consistent as to the essence of what occurred.

The Appellant then notes that, on account of the Christmas holidays, the child was not interviewed until two weeks after the report. The Court is told that this period was "catastrophic" and allowed the victim's family to "embellish" the victim's account. There is, however, nothing to support this speculation by the Appellant. And, again, the Appellant offers no theory as to why this child, who was so close to the Appellant, would have lied about these things. As to all of these points, it was for the jury to consider the weight and credibility of the testimony, and whether these supposed defects put the child's testimony in great doubt.

The Appellant makes much of his claim that the bed incident was not revealed in the first interviews. However, again, this would be understandable given the age of the child, her emotional condition, and the fear she had that her mother might die. This was a matter for the jury to consider.

The Appellant then attacks the testimony of the victim's mother, asserting that it was contradictory or contradicted in various ways. Whether the victim's mother was right or wrong about what the counselor was told with respect to "dry humping" does not seriously and adversely impact the testimony of the victim. The mother was not present when the acts of fondling occurred, and if she was confused or simply wrong on the point of what the counselor was told, this would merely be something the jury could have considered in weighing her testimony. For all the record shows, the victim was not part of the conversations between the victim's mother and the Appellant's wife concerning the "dry-humping". It is not surprising, then, that the victim would not have told the counselor about those admissions. Nor would it have been likely, given the age of the child, that she would have described what was done to her as "dry humping". On the other hand, it is clear that the child did tell the counselor that the Appellant rubbed his penis against her when she was in the

bed with the Appellant and his wife. (R. Vol. 3, pg. 188).[3]

The victim's testimony is attacked next. It is said that she failed to disclose to the counselor the facts that the Appellant made the comment about walking about naked and that the Appellant's wife was working out a cross - word puzzle when the victim was lying in bed with the Appellant and his wife. Perhaps the victim did not tell the counselor these things; perhaps she did, yet the counselor for whatever reason did not note them or did not testify to them. But whatever the reason, these are niggling points and can not possibly be seen as seriously and adversely affecting the child's testimony. While the victim's mother may or may not have testified that the Appellant was "dry humping" the child all night, the child did testified that he got on top of her and put his penis on her leg. When the Appellant's wife told him to get off of the child, the Appellant did so, but then got back on the child and did it again. Whether this went on all night is utterly insignificant in view of the fact that the Appellant did rub his penis against the child. Whether once, twice or all night is a point without consequence, and whether the mother was expansive in her testimony is not something to affect the child's testimony. These are minor inconsistencies and in no way affect the essence of the child's testimony.

The Appellant then points to alleged discrepancies between the testimony of the mother and Ravenscraft concerning their encounter at a store. Again, whatever discrepancies may be found in the mother's testimony cannot be seen to amount to discrepancies in the child's testimony. The testimony concerning the meeting in the store shed no light on what occurred between the child and

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[3] It is possible that there was some confusion as to what "dry humping" meant. However, it is quite clear that the child did testify that the Appellant rubbed his penis against her, as we have said. Whether this constitutes "dry humping", or whether "dry humping" is something different, something like "aggravated rubbing", so to say, is quite insignificant in terms of whether rubbing or "aggravated rubbing" violates Section 97-5-23.

the Appellant at the Appellant's home.

The Appellant would then have this Court believe that law enforcement thought the allegations against the Appellant were meritless because law enforcement did not immediately arrest the Appellant at or near the time the child reported what the Appellant had done. There is no warrant for such speculation. Law enforcement's investigation was still underway when the child's mother filed her affidavit. (R. Vol. 2, pp. 82 - 86). As for complaint about the Child Advocacy Center, the Appellant does not explain what he means by its failure to "verify" the child's allegations, or how that Center could have "verified" them. The Center did interview the child, and on more than one occasion. Since the Appellant and his wife denied any wrong-doing on the part of the Appellant, and since the only witnesses would have been the child, the Appellant and the Appellant's wife, it is difficult to see what more the Center could have done beyond what it did in "verifying" the child's account.

The jury is the sole judge of the credibility of witnesses. Where there are conflicts in the evidence, it is the jury's duty to evaluate the testimony given at trial and to determine who to believe. *Ross v. State*, No. 2009KA-00796-COA, Slip Op. at 9; 12 (Miss. Ct. App. decided 15 June 2010).

The child's testimony in the case at bar was not impeached. It was not discredited. It may be that she did not report everything that had happened to her at the first or second opportunity to do so, but this is hardly unusual in cases of this kind.

The mother's testimony may have been in conflict with other witnesses on one or two tangential and inconsequential points. Perhaps there was some confusion over the difference, if any, of "dry - humping" and placing the penis on the victim's leg. But nothing in these complaints raised against the mother's testimony acted so as to impeach the victim's testimony. Whether the Appellant "dry humped" the child all night or only on two occasions is neither here nor there. He gratified his

lust by placing his penis on the child's leg.

The plain fact is that the child was consistent in her accounts of what the Appellant had done to her. The child was said to be a loving, truthful child, and there was not the first word of testimony to suggest that her testimony was given out of spite or vengeance. No suggestion at all of a motive to lie. The Appellant and his wife, of course, gave testimony in opposition to the child's testimony. This created an issue for the jury to determine, it having the benefit of seeing and hearing the witnesses. There is no basis to find that the verdict in the case at bar constitutes an unconscionable injustice. *Cf. Ivy v. State*, 949 So.2d 748 (Miss. 2007).

The First Assignment of Error is without merit.

2. THAT THE SENTENCES IMPOSED UPON THE APPELLANT FOR HIS TWO CONVICTION OF GRATIFICATION OF LUST ARE NOT EXCESSIVE

On Count 1 of the indictment, the Appellant was sentence to a term of fifteen years imprisonment, with three years suspended. On Count 2 of the indictment, the Appellant was sentenced to a term of five years imprisonment. Execution of that sentence was suspended. The "to serve portion" of the sentence on Count 1 of the indictment amounted to twelve years, to be served without possibility of early release, parole, etc. (R. Vol. 4, pp. 320 - 321).

In the Second Assignment of Error, the Appellant, while conceding that the sentences imposed are within statutory limits, asserts that the mandatory nature of the "to serve" portion of the sentence is excessive and should be reversed. We do not find that the Appellant raised this issue at the time of sentencing. It was alleged in his motion for a new trial. (R. Vol. 1, pg. 120). However, as the Appellant acknowledges, any objection to a sentence must be made at the time of sentencing. Since there was no objection at the time of sentencing, the Second Assignment of Error should not be considered here.

Assuming for argument that the Second Assignment of Error is before the Court, there is no merit in it.

The Appellant's claim is not based upon *Solem v. Helm*, 463 U.S. 277 (1983), and no attempt was made to demonstrate the *Solem* factors. Consequently, we do not consider that analysis here. His claim, quite simply, is that he is a fairly nice fellow, never been in trouble before, and that the day - for - day aspect of the sentence is excessive. He also takes umbrage at having to register as a sex offender.

The trial court had no authority to make the "to serve" portion of the sentence amenable to parole or some other form of early release. Miss. Code Ann. Section 47-7-3(1)(b) (Supp. 2009); 47-5-139(1)d) (Rev. 2004). The Appellant will be required to register as a sex offender; the trial court had no authority to set aside the requirements of Miss. Code Ann. Section 45-33-25 (Supp. 2009). Circuit Courts do not have the authority or jurisdiction to nullify or ignore the statutes of the legislature.

The Appellant alleges that the sentence does not take into account the rehabilitative nature of sentencing. Yet, the Appellant fails to take into account that what sentences shall be imposed upon conviction of felonies is solely a matter for the legislature to determine. *King v. State*, 857 So.2d 702, 732 (Miss. 2003). He also fails to take into account that parole and probation are matters arising from legislative grace, rather than of judicial discretion. He further fails to take into account that there is no liberty interest in parole in this State. *Harden v. State*, 580 So.2d 1221 (Miss. 1991). The legislature has determined, and not without good reason, that the scourge of child sexual abuse requires a strong deterrent. It was a matter wholly within the prerogative of the legislature to determine whether or to what extent sentencing in sex crimes would be amenable to parole or some other kind of early release.

Finally, the Appellant suggests his sentence should have been subject to parole or early release because the evidence of his guilt was not compelling. We disagree with the Appellant's assessment of nature of the evidence of his guilt. Beyond that, though, whether the evidence of guilt was overwhelming or merely beyond a reasonable doubt has nothing to do with sentencing, at least in instances such as the case at bar where the legislature has clearly and specifically spoken as to the availability of parole or early release.

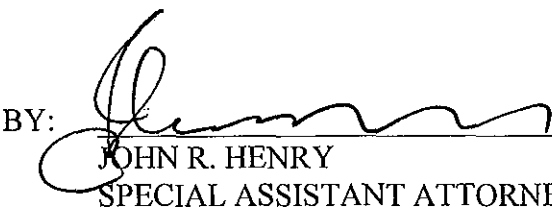
The Second Assignment of Error is without merit.

CONCLUSION

The Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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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 David Strong
Circuit Court Judge
P. O. Drawer 1387
McComb, MS 39649

Honorable Dewitt (Dee) Bates, Jr.
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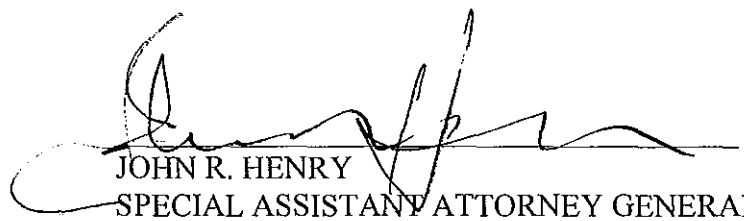
Brookhaven, MS 39601

This the 2nd day of July, 2010.



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