

2009-KA-1383T

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. The parties listed in the title of this case.
2. Joseph A. Fernald, Jr., counsel for Appellant at trial and on appeal.
3. Dewitt Bates, Esquire, District Attorney, counsel for Appellee at trial and on appeal.
4. Honorable David Strong, Jr., Circuit Court Judge.

This the 31 day of March, 2010.

  
Counsel for Appellant

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## **BRIEF OF APPELLANT**

### **STATEMENT OF ISSUES**

1. The verdict rendered by the Jury on April 18, 2008 is against the overwhelming evidence presented at trial.
2. The sentence of the Court in placing Robert Forrest in the Custody of the State of Mississippi for twelve years requiring him to serve said term day for day without chance for parole or early release is excessive and should be reversed.

### **STATEMENT OF THE CASE**

Robbie Forrest was indicted by the Lincoln County Grand Jury on April 5, 2007, (DE-4, 5) on two counts of touching for lustful purposes in violation of Section 97-5-23 of the Mississippi Code of 1972 as amended. He was served on May 4, 2007. (DE-6) On May 11, 2007 he appeared in the Lincoln County Circuit Court and waived arraignment. (DE-13).

On July 13, 2007 Counsel for Mr. Forrest, the Honorable J. C. Ainsworth filed his Motion For Subpoena Duces Tecum to request a copy of the video of the Southwest Mississippi Child Advocacy Center (CAC) interview of the alleged victim in this case. (DE 7-10). Based on the sensitivity of the issues, the Parties agreed to be bound by the terms of a Protective Order and said Order was entered on August 16, 2007. (DE-11, 12, 13, 14, 15, 16).

Omnibus Hearing was held before the Honorable Circuit Court Judge David Strong on August 16, 2007. (DE- 18, 19, 20, 21). The matter was set for trial on November 27, 2007. On November 19, 2007, Mr. Ainsworth filed a Motion For Continuance requesting time to secure an expert witness to review the evidence in the case including the video of the CAC interview. (DE-22, 23, 24). The Trial Court granted the continuance by order entered in the Lincoln County Circuit Court on November 19, 2007. The Court did not reset the case for a date certain. (DE-29).

On January 3, 2008, the Honorable J.C. Ainsworth died suddenly. The Honorable Joseph A. Fernald Jr. entered the case on behalf of Mr. Forrest.

On February 4, 2008, another Protective Order was entered enjoining Mr. Fernald from the use and the limiting the conditions under which the CAC video could be viewed and used. (DE-30, 31).

Subsequently, the matter was placed on the trial docket for March 12, 2008. However, on March 9, 2008, Counsel for Mr. Forrest filed a Motion For Continuance based on the fact that

he had been unable to secure the file of Mr. Ainsworth from the storage facility maintained by the Estate of J.C. Ainsworth. (DE-33, 34, 35, 36). There were valuable notes concerning the use of an expert witness and a review of the video by the expert witness. Despite the delay, the file was never found.

On April 9, 2008, in anticipation of trial, the Defense filed their witness list and served a copy on the State of Mississippi. (DE-37, 38). The State of Mississippi filed their Jury instructions along with a reservation to call any witness the Defense had listed in their letter (DE-39 through 47) on April 14, 2007. The State also filed a Memorandum of Law and two Motions in Limine contemporaneously with their Jury Instructions. The Memorandum of Law focused on the State's position that the marital privilege against spousal testimony did not apply to the case at bar. (DE-48 through 52). The first Motion in Limine concerned a prohibition against any mention of the possible sentences that could be given upon guilty verdict. (DE-53 through 57). The second Motion in Limine concerned the States request to strike or limit the testimony of witnesses who were poised to testify as to the motive of the putative victim and her mother in prosecuting this case. (DE-58 through 61).

The matter had been set for trial on Tuesday, April 15, 2008. However, on April 14, 2007, Counsel for Mr. Forrest requested a continuance due to the sudden illness and hospitalization of Joy Forrest, the wife of the Defendant. Mrs. Forrest was suffering from a colon blockage and was in the hospital due to pain and the need for tests. (DE-62 through 65) In addition to providing moral and emotional support for his husband, Mrs. Forrest was a critical fact witness. The case was continued by the Court until April 17, 2008. A letter had been forwarded to Counsel for the State of Mississippi on April 9, 2008, when the problem was made known to him. (DE-67, 68).

The Defense filed their Jury Instructions on April 17, 2008, in anticipation of trial on the merits. (DE-69 through 83).

The trial was held on April 17<sup>th</sup> and 18<sup>th</sup> in Brookhaven, Mississippi in the Circuit Court of Lincoln County in and for the people of Lincoln County. Upon deliberation by the jury, Mr. Forrest was found guilty of two counts of touching for lustful purposes in violation of Section 97-5-23 of the Mississippi Code of 1972 as amended. (DE-95, 96).

A Pre-Sentence Investigation was conducted on April 18, 2007, which found that Mr. Forrest had no prior criminal history. (DE-107 through 116).

On April 21, 2008, the Court pronounced sentence on Mr. Forrest sentencing him to serve fifteen years in the custody of the State of Mississippi, serving the first twelve years with three years probation as to Count One and five years as to Count Two suspended for five years

probation, said sentences to run consecutively and the sentence to be served day for day without chance of early release or parole. Upon his release, Mr. Forrest would be required to register as a sex offender. Mr. Forrest was also ordered to pay a \$10,000.00 fine and court costs. (DE-117).

Counsel for Mr. Forrest filed his Motion for New Trial and To Set Aside The Verdict of The Jury alleging that the verdict of the Jury was: 1.) against the overwhelming weight of evidence; 2.) Based on the improper admission of testimony of Bente Hess Johnson and Chris Huff; and 3.) The sentence of Robert Forrest was excessive and should be reversed based on his prior history and lack of criminal history. (DE-119, 120,121). The Motion was denied by the Court on May 15, 2008, with the order entered on May 19, 2008. (DE-122).

Notice of Appeal was entered on June 17, 2008. DE-124, 125). However, at this point, based largely on miscommunication and confusion of Mr. Forrest's representation by Trial Counsel or the Office of Indigent Appeals, the file languished in Circuit Court until Trial Counsel was advised that the file was not presented for representation by the Office of Indigent Appeals at which point Counsel prepared the necessary documents to perfect the appeal to wit the Designation of Record, Certificate of Compliance with Rule 11(b)(1) and took up preparation of the appeal pro bono. (DE-128 through 134).

#### **SUMMARY OF THE ARGUMENT:**

Appellant Robert Forrest submits that the verdict of the Jury in his trial is in error and should be reversed.

In support of his claim, Mr. Forrest asserts that the testimony of the alleged victim and additional witnesses was contradictory and said contradictions were material in nature. The Court was also in error when it allowed the testimony of Bente Hess Johnson of the Child Advocacy Center to be admitted when it was clear that their protocol was not followed and the child's inconsistent statements were dismissed as understandable. Further, the testimony of Chris Huff clearly indicated that he had not considered the inconsistent statements of the child nor had he been advised of those contradictory statements. Mr. Forrest also points to the testimony of Johnny Hall, Investigator for the Lincoln County Sheriff's Office who upon investigation did not file charges or conduct anything but a cursory investigation. Finally, Robert Forrest argues that the Court's imposition of a twelve year sentence imposed as day for day without chance of early release or parole is extreme given the past history of the Defendant and the fact there was not one scintilla of criminal activity in his past.

1. THE VERDICT RENDERED BY THE JURY ON APRIL 18, 2008 IS AGAINST THE OVERWHELMING EVIDENCE PRESENTED AT TRIAL AND SHOULD BE REVERSED.

On April 18, 2008, a jury entered a verdict of guilty against Robert Forrest for two counts of touching for lustful purposes. Mr. Forrest submits to this Honorable Court that the verdict is against the overwhelming weight and sufficiency of the evidence presented by the State at trial and should be reversed.

The Supreme Court can set aside a jury verdict if it is clear that it is a result of bias, prejudice, passion or is manifestly against the overwhelming weight of evidence. Murphree v. State, 228 So. 2d 599, Certiorari denied 90 S. Ct. 1509, 397 U.S. 1068, 25 L. Ed. 2d. 690. (Miss. 1969). The standard of Review of a criminal case in the Supreme Court is that if all the testimony offered by the State, together with all the reasonable inferences drawn therefrom, must be considered and if that evidence will support a verdict of guilty, the jury's decision will not be overturned. Noreles v. State, 464 So 2d. 1151 (Miss.) Matters regarding the weight and credibility of the evidence are to be resolved by the jury and a reversal is warranted only where, with respect to one or more of the elements of the offense charged, the evidence is such that reasonable and fair minded jurors could only find the defendant not guilty. Robinson v. State 757 So. 2d. 1051 (Miss. 2000). The jury is the sole judge of the weight and credibility of witnesses and the reviewing Court cannot set the verdict aside unless it is clear that the verdict is the result of prejudice, bias or fraud or it is manifestly against the weight of credible evidence. Dixon v. State, 519 So. 2d. 1226 (Miss. 1988). The Court of Appeals will not set aside a verdict of guilty by a jury, which is the arbiter of the weight and credibility of the evidence, without concluding the evidence, taken in a light most favorable to the verdict, could not have supported the reasonable juror's conclusion that defendant was guilty beyond a reasonable doubt. Norwood v. State 741 So. 2d. 992, (Miss. 1999).

The States Case in chief rests on contradictory testimony.

The testimony of Officer Sheila Hynum, the first person to confront the alleged victim, is indicative of the contradictions. (DE 59-68) The statement that she received from the child (DE 65, RE 1) does not include the incident on the bed with Joy and Robert Forrest. Further, the Officer testified that the parents sat in the room with the child as she gave her statement. There was no evidence of when the alleged events occurred. The testimony of Shonda Brooks, Social Worker with the Department of Human Services is also replete with contradictions. She conducted her interview with the child moments after Officer Hynum. Once again, there is no date for the incident but the child tells her that it happened "a couple of months ago" (DE-72). Skylar does develop the description of the four-wheeler incident to include a statement that Mr. Forrest's pants were down when he urinated. Investigator Johnny Hall, Lincoln County Sheriff's Office, received the case on December 14, 2005 and took an intake report for the case. (74-88). He attempted to schedule the Child Advocacy (CAC) interview but since it was the Christmas holidays, the interview would be put off until January 2, 2006. At this critical stage of the

investigation, a two week delay before a statement can be developed to ascertain the facts of the incident is catastrophic. It gives the victim and family the opportunity to embellish the allegations. The State, at this critical juncture did nothing to preserve an adequate record of the events that occurred over three months earlier by the victim's own admonition. Officer Hall met with Mr. Forrest on December 14, 2006, but did not arrest him on that date despite the statements. The CAC interview does not take place until January 2, 2006, seventeen days later. Officer Hall testified he was present at the interview as an observer, but it is more important to note that after the interview, nothing happens. No arrest, no further questioning by law enforcement, nothing (DE-82-85). Then, on February 5, 2007, Judy Easley, Skylar's mother visits Officer Hall and the "bed incident" appears on the scene for the first time replete with allegations of penis rubbing on Skylar. (DE 85). That allegation was not in the Hynum or Brooks statements and surfaces only after a thirty-two day interval when the child is in the sole care of her parents. Even then, Investigator Hall does not sign an affidavit or issue a warrant. (DE- 82-83). He informs the parents they can file but, he "had other things to do at the time" (DE 83). Finally, on February 13, 2007, Judy Easley files an affidavit and Robert Forrest is arrested.

The testimony of Judy Easley (DE 154-170) creates additional contradictions as to the evidence. Judi Easley, Skylar's mother testified that Mr. Forrest "dry humped " her daughter during the bed incident, was on top of her and that her sister Joy knew he was doing it. Mrs. Easley testified that Joy rolled over and told him to stop. (DE 164-165). Mrs. Easley then goes on to recount that Mr. Forrest put his hands in Skylar's pants pockets while riding on the four wheeler and touched her. (DE 166). She testified further that her sister Joy told her of these transgressions. (DE 168). However, upon further questioning concerning the fact that none of the professionals in the case testified to this information, Mrs. Easley testified that her counselor, Dr. Huff knew about the incident because Skyler told him in her sessions. (DE 167). The problem is that Dr. Huff did not know about these statements and in fact he testified to that fact. (DE 199-201). Dr. Huff was not privy to any of the embellishments made by Mrs. Easley. Her testimony raises serious credibility questions give the fact that in the periods between December 13<sup>th</sup> to January 2, 2007, when the CAC interview occurred, Mrs. Easley had sole custody and control over the child. Further, in the period following the CAC interview, Mrs. Easley was the primary caretaker of the child and in an advantageous position to foster allegations in the child's mind.

The testimony of Skylar Easley provides further contradictions (DE 128-153). On direct examination the child tells the jury that her uncle told her that now that she had seen his privates, "he could walk around the house naked" (DE 137). She testifies that Joy is doing a crossword puzzle while the incident in the bed is happening. (DE 146). However, none of this has ever been told to Dr. Huff, law enforcement or Bente Johnson. Upon questioning, the witness says "She just remembered it." (DE 146-147). The witness admits that her description of her uncle's

clothing during the four wheeler incident is being offered for the first time. (DE 148-149). More importantly she never describes Mr. Forrest as humping her continuously as her mother did. In point of fact, the testimony of these two witnesses are glaring examples of Manufactured Testimony for the trial. There is absolutely no consistency to the version of events from December 12, 2006, until the trial.

The testimony of Chris Huff of the CAC offers the most salient point on the inconsistencies of the facts in this case. When questioned on the inconsistent statements of the child and her mother, Mr. Huff stated that those would be important statements for his counseling. He testified that the statements were not made to him. (DE 199-200). It is just as important that not one of the law enforcement or counseling professionals heard those statements. It's only at trial when Judi Easley has a long period of time with her child that they surface. The story is embellished with statements that would be dispositive if made during the investigation. However, their introduction at trial is contradictory and evidence of unreliable witnesses. Mr. Huff continually dismisses the inconsistencies as the child is in a state of "tentative disclosure" to avoid the obvious problem. The testimony of Judi Easley is what causes the inconsistencies. She says the child said those things but the record is totally devoid of Skylar making those statements. Mrs. Easley also testified that if Skylar's testimony concerning the version of the events surrounding the bed incident was different from her testimony that day she would be lying. (DE 168). In point of fact, Skylar's testimony was markedly different from her mother's testimony that day.

The testimony of Phyllis Ravencraft (DE 247-249) offers a direct contradiction to the testimony of Judi Easley. Judi Easley testified that she did not discuss the incident in front of Skylar in a store in McComb. (DE 163). However, Mrs. Ravencraft testified that such a conversation occurred and Skylar was present. (DE 249-250). Joy Forrest's testimony that Judi made repeated calls and threats is consistent with Mrs. Ravencraft's testimony and also calls Mrs. Easley's credibility into question. (DE 210-245).

Robert Forrest contends that these contradictions are sufficient to meet the test required to reverse the verdict of the Jury under the authorities cited above. The testimony of the alleged victim and her mother are in direct conflict and are embellished for trial. The conduct and inaction of law enforcement in arresting Mr. Forrest serves to put the finder of fact on notice that they did not believe this was a good case. The "professionals at the CAC make no determination to verify the story of the child opting instead to perform some psycho-babble analysis to arrive at the statement that she is credible. But how do you make that leap when they did not ascertain any facts. In point of fact, Mr. Huff stated that it would be significant if the inconsistencies did in fact make contrary statements but, there is no study or evidence that would make her "credible" especially since this case took a long time to get to an arrest. It took the disciplinary

team four months to move from the initial complaint to an arrest. During that whole time, the child was in the sole custody and direct care of her mother. It is also important to note that in the period from the initial complaint to the trial, Skylar's narrative of events changes dramatically. Judy's testimony is off the map when it comes to credibility and inconsistencies. Said inconsistencies should put the reasonable juror on notice that there exists a credibility problem and constitutes reasonable doubt. Clearly, the verdict is a result of juror bias and sympathy because there are too many holes in the State's case to support the verdict of guilty.

The verdict of the jury is the result of juror bias, sympathy and prejudice against Robert Forrest and should be reversed as being against the overwhelming weight of evidence presented at trial and should be reversed.

2. THE SENTENCE OF THE COURT IN PLACING ROBERT FORREST IN THE CUSTODY OF THE STATE OF MISSISSIPPI FOR TWELVE YEARS REQUIRING HIM TO SERVE SAID TERM DAY FOR DAY WITHOUT CHANCE FOR PAROLE OR EARLY RELEASE IS EXCESSIVE AND SHOULD BE REVERSED.

Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute. Johnson v. State, 908 So.2d. 900 (Miss. Ct. App., 2005) The defendant must object to his sentence at the time of his sentencing or they will be procedurally barred from subsequent objection to the sentence. Jackson v. State ( 2005 WL 2431109 (Miss. Ct. App. 2005). However, the United States Supreme Court has determines that the sentencing decision of the Court must be tailored to fit the offender and not merely the offense. Williams v. People of New York, 337 U.S. 241, 69 S. Ct. 1079, 933 L. Ed. 1337 (1949). Ultimately, the Court's sentence should be the result of informed judicial discretion and should take into consideration the rehabilitative purposes of sentencing. U.S. v. Hartford, 489 F. 2d. 652, 656 (5<sup>th</sup> Cir. 1974). Appellant Robert Forrest recognizes the discretion of the Court is the fundamental basis for the determination of the sentence to be imposed upon a guilty verdict. At the sentencing hearing, (DE 315-321) a number of parties submitted testimony and written appeals for leniency for Robert Forrest to the Court for consideration. The Court took note of the witnesses, statements and the statement of Judi Easley prior to the imposition of the sentence. The Court also had the presentence investigation for review, (DE 107 -116, RE 7-15) which indicated that Mr. Forrest's record was devoid of any criminal behavior. Robert Forrest asserts that the imposition of the sentence of the court, (DE 117-118, RE 16, 17) for day for day incarceration without chance for early release is excessive. The sentence is clearly within the statutory guidelines; however, Mr. Forrest contends that the imposition of the day for day condition is excessive considering that Mr. Forrest has no criminal record and will be required to

be registered as a sex offender upon release from prison. Mr. Forrest would assert that the imposition of the day for day condition does not take into consideration the rehabilitative nature of sentencing. Further the questionable nature of the evidence and testimony at trial is also evidence that Mr. Forrest case, despite the verdict, was not accepted by the Defendant. He maintained his innocence at trial, upon sentencing and through this day. However, his maintenance of his innocence should not be taken as arrogance and disrespect for the court or system but the logical basis of our criminal justice system. Robert Forrest contends that while the time limits of the sentence are within statutory guidelines, the day for day condition is unfair and should be subject to reversal by this Honorable Court as excessive in light of the facts and evidence presented at trial, Mr. Forrest's prior history and his role in the local community at large.

### **CONCLUSION:**

Appellant Robert Forrest requests this Honorable Court, for the reasons set out in this Appellant Brief, reverse the verdict of the Lincoln County Jury in finding him guilty of two counts of touching for lustful purposes and remand this matter for retrial on the merits or in the alternative dismissal. Mr. Forrest also request s the Court review the record in this trial and upon said review vacate the sentence of the court to remove the day for day feature as set out by the Trial Judge.

Respectfully submitted,

Robert E. Forrest, Jr.

BY: 

\_\_\_\_\_  
Joseph A. Fernald, Jr.  
Attorney for Appellant

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### **CONCLUSION:**

Appellant Robert Forrest requests this Honorable Court, for the reasons set out in this Appellant Brief, reverse the verdict of the Lincoln County Jury in finding him guilty of two counts of touching for lustful purposes and remand this matter for retrial on the merits or in the alternative dismissal. Mr. Forrest also request s the Court review the record in this trial and upon said review vacate the sentence of the court to remove the day for day feature as set out by the Trial Judge.

Respectfully submitted,

Robert E. Forrest, Jr.

BY: \_\_\_\_\_  
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Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, Joseph A. Fernald, Jr., attorney for Appellant Robert E. Forrest, Jr., certify that I have this day served a copy of the Brief of Appellee via United States Postal Service, postage prepaid, to the following:

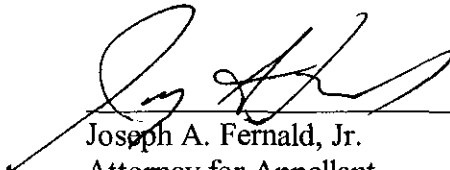
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\_\_\_\_\_  
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