IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-00669-COA

CARLOS TAYLOR **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	03/20/2009
TRIAL JUDGE:	HON. W. ASHLEY HINES
COURT FROM WHICH APPEALED:	LEFLORE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ERIN E. PRIDGEN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAURA H. TEDDER
DISTRICT ATTORNEY:	WILLIE DEWAYNE RICHARDSON
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF POSSESSION OF A CONTROLLED SUBSTANCE IN A CORRECTIONAL FACILITY AND SENTENCED AS A HABITUAL OFFENDER TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITHOUT ELIGIBILITY FOR PAROLE OR PROBATION
DISPOSITION:	AFFIRMED – 10/11/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE IRVING, P.J., MYERS AND MAXWELL, JJ.

IRVING, P.J., FOR THE COURT:

¶1. In 2000, Carlos Taylor was convicted of statutory rape and selling marijuana. While serving time for those offenses, Taylor was convicted of possessing marijuana in a correctional facility. The LeFlore County Circuit Court subsequently sentenced Taylor as

a habitual offender to life in the custody of the Mississippi Department of Corrections, without eligibility for parole or probation. The circuit court determined that Taylor qualified under Mississippi Code Annotated section 99-19-83 (Rev. 2007) as a habitual offender because he had previously been convicted of statutory rape, which the court found to be a crime of violence. Unhappy with that determination, Taylor appeals and asserts that his life sentence is disproportionate to his crime and that the circuit court erred in finding that his prior conviction for statutory rape constitutes a crime of violence.

¶2. We find that statutory rape is a per se crime of violence in Mississippi and that Taylor's sentence is proper; therefore, we affirm the judgment of the circuit court.

FACTS

¶3. On November 16, 2007, Taylor was incarcerated at the Delta Correctional Facility in Greenwood, Mississippi. Taylor had finished receiving visitors for a one-hour visitation and was being strip-searched by Officer Tyrone Banks before returning to his cell. During the search, Officer Banks observed a plastic bag in Taylor's hand. Taylor refused to relinquish possession of the bag and instead attempted to run from the room. After warning Taylor, Officer Banks sprayed him with pepper spray. Taylor ignored the spray and ran into the visitation room, where he entered the visitor's restroom and attempted to flush the bag that had been in his hand down the toilet. Officer Banks subdued Taylor, and other officers recovered the bag's contents and a twenty-dollar bill from the toilet. Later testing confirmed that approximately 14.3 grams of marijuana were recovered from the toilet.

¶4. Additional facts, as necessary, will be related during our analysis and discussion of the issues.

ANALYSIS AND DISCUSSION OF THE ISSUES

¶5. Taylor claims that the circuit court erred in finding that his conviction for statutory rape constitutes a prior conviction of a violent crime; Taylor also contends that his sentence is disproportionate to his crime. Both of these contentions involve questions of law; therefore, our standard of review is de novo. *Valmain v. State*, 5 So. 3d 1079, 1082 (¶9) (Miss. 2009) (citing *DeLoach v. State*, 722 So. 2d 512, 518 (¶25) (Miss. 1998)).

¶6. Taylor was sentenced under section 99-19-83, which mandates a life sentence when a defendant has two prior convictions on which he has served at least a year, one of which is "a crime of violence." Taylor contends that his prior conviction for statutory rape was not proven to be a crime of violence; on the other hand, the State contends that statutory rape is a per se crime of violence.

¶7. Taylor relies on *Hughes v. State*, 892 So. 2d 203 (Miss. 2004) to support his contention that statutory rape is not necessarily a crime of violence. In *Hughes*, William Ray Hughes had a prior conviction for the statutory rape of a seven-year-old child; Hughes was nineteen years old at the time of the rape. *Id.* at 211 (¶19). The *Hughes* court noted that under those circumstances, "Hughes'[s] prior crime must be viewed as one of violence . . . ." *Id.* In discussing statutory rape generally, however, the supreme court stated, however, that "there may be instances of consensual, nonviolent sex which nonetheless violate the statutory rape laws . . . ." *Id.*

¶8. By contrast, in *Bandy v. State*, 495 So. 2d 486, 492 (Miss. 1986) (superseded by rule on other grounds), the Mississippi Supreme Court, when confronted with the question of whether the attempted sexual assault of a child constituted a crime of violence, held that: "In

the absence of a legislative standard, we adopt the rationale that a separate standard of determining violence applies when the victim is a child. Thus . . . assault with attempt to commit sodomy . . . was . . . a crime that was violent, *per se*." Unlike in *Hughes*, this statement was not dicta; instead, it formed the basis for the supreme court's determination that Jordan Bandy's conviction was a per se crime of violence.

¶9. Although the pronouncements of the Mississippi Supreme Court have not been entirely consistent in regard to this question, this Court is required to follow the supreme court's rulings as closely as possible. *Miles v. State*, 864 So. 2d 963, 965-66 (¶8) (Miss. Ct. App. 2003). As such, we are bound by the supreme court's holding that "a separate standard of determining violence applies when the victim is a child." Although the supreme court later stated in dicta that statutory rape might be nonviolent, we choose to follow the supreme court's earlier non-dicta holding in *Bandy*. Thus, we find no error in the circuit court's determination that Taylor's prior conviction for statutory rape constitutes a crime of violence sufficient to sentence him as a habitual offender to life without eligibility for parole or probation.

¶10. Taylor also argues that his life sentence is disproportionate to his crime of marijuana possession in a correctional facility. In *Long v. State*, 33 So. 3d 1122, 1124 (¶1) (Miss. 2010), Charlie Long was sentenced to two mandatory life sentences for possession and sale of cocaine. Like Taylor, Long had previously been convicted of a crime involving violence. *Id.* at 1132 (¶¶32-33). In finding that Long's life sentence was not disproportionate to the crimes of possessing and selling cocaine, our supreme court stated that: "Long's sentence was in the statutory range[;] it was mandatory[;] and he has failed to establish that his

sentence is grossly disproportionate to his crime." *Id.* at (¶34). Similarly, Taylor was sentenced, within the statutory range, to a mandatory life sentence, and he has failed to show that his sentence is disproportionate.

¶11. Accordingly, we affirm the judgment of the circuit court.

¶12. **THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE IN A CORRECTIONAL FACILITY AND SENTENCE AS A HABITUAL OFFENDER OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITHOUT ELIGIBILITY FOR PAROLE OR PROBATION, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LEFLORE COUNTY.**

MYERS AND RUSSELL, JJ., CONCUR. BARNES, J., SPECIALLY CONCURS WITHOUT SEPARATE WRITTEN OPINION. CARLTON, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BARNES, J., AND JOINED IN PART BY RUSSELL, J. MAXWELL, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED IN PART BY RUSSELL, J. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, C.J., GRIFFIS, P.J., AND ISHEE, J.

CARLTON, J., SPECIALLY CONCURRING:

¶13. I specially concur. I agree with the majority's opinion that the circuit court did not err in determining that Carlos Taylor's prior conviction for statutory rape constitutes a crime of violence sufficient to sentence him to life without eligibility for parole or probation as a habitual offender. I submit that a review of current statutes and case law logically support this finding.

¶14. On appeal, Taylor argues that statutory rape is not necessarily a crime of violence. I note, however, that the law views statutory rape as a non-consensual sexual act against a child under the age of sixteen. Miss. Code Ann. § 97-3-65(1)-(2), (5) (Supp. 2011). Statutory rape is non-consensual because a child under the age of sixteen lacks the legal

capacity to consent to the physical sexual act that violates his or her body.[1]

¶15. Moreover, Mississippi Code Annotated section 45-33-47(d) (Rev. 2011) articulates that the following sex crimes that are subject to lifetime registration:

> (d) Tier Three requires lifetime registration, the registrant not being eligible to be relieved of the duty to register except as otherwise provided in this paragraph, and includes any of the following listed sex offenses:
>
> > (i) Section 97-3-65 relating to rape;
> > (ii) Section 97-3-71 relating to rape and assault with intent to ravish;
> > (iii) Section 97-3-95 relating to sexual battery;
> > (iv) Subsection (1) or (2) of Section 97-5-33 relating to the exploitation of children;
> > (v) Section 97-5-41 relating to the carnal knowledge of a stepchild, adopted child or child of a cohabiting partner;
> > (vi) Section 97-3-53 relating to kidnapping if the victim is under the age of eighteen (18);
> > (vii) Section 97-3-54.1(1)(c) relating to procuring sexual servitude of a minor;
> > . . . .
> > (xiv) Any conviction for violation of a similar law of another jurisdiction or designation as a sexual predator in another jurisdiction;
> > . . . .
>
> (e) An offender who has two (2) separate convictions for any of the offenses described in Section 45-33-23 is subject to lifetime registration and shall not be eligible to petition to be relieved of the duty to register as long as at least one (1) of the convictions was entered on or after July 1, 1995.
>
> (f) An offender, twenty-one (21) years of age or older, who is convicted of any sex offense where the victim was fourteen (14) years of age or younger shall be subject to lifetime registration and shall not be relieved of the duty to register.

See also Miss. Code. Ann. § 47-5-401(2) (Rev. 2011) (sex offenders ineligible to participate

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[1] Statute provides that neither the victim's consent nor the victim's lack of chastity constitutes a defense to a charge of statutory rape as defined by the statute.

in work programs since the statute prohibits participation by any one "convicted of any crime of violence, including but not limited to murder, aggravated assault, rape, robbery[,] or armed robbery."). The statutory registration requirement set forth above provides support for the conclusion that Legislature views statutory rape as a crime of violence. The lifetime-registration requirement provides a direct mandate by the Legislature for the exercise of police power and control over offenders convicted of statutory rape to protect society from these offenders by directing registration and authorizing enforcement of registration requirements by law enforcement. Indeed, this directive for lifetime registration for statutory rape offenders gives legal recognition to the Legislature's view of this crime as violent and the Legislature's view for the need for the protection of minors by the exercise of police authority to track these offenders for life.

¶16. As the majority acknowledges, the Mississippi Supreme Court has held that in cases involving a question of whether the sexual assault, or attempted sexual assault, of a child constituted a crime of violence, "a separate standard of determining violence applies when the victim is a child." *Bandy v. State*, 495 So. 2d 486, 492 (Miss. 1986) (superseded by rule on other grounds). Insightfully, the United States Fifth Circuit Court of Appeals has held that an act of sexual abuse could be violent if the offense inflicted psychological harm on the victim, even if the act involved no physical contact. *United States v. Izaguirre-Flores*, 405 F.3d 270, 274-75 (5th Cir. 2005). Additionally, in *United States v. Ramos-Sanchez*, 483 F.3d 400, 403 (5th Cir. 2007), the Fifth Circuit held that soliciting or enticing a minor to perform an illegal sexual act constitutes an act of violence "because of the psychological harm it can cause, even if [the] resulting sex is consensual." The Fifth Circuit explained that "minors,

because of their inexperience, are vulnerable to exploitation and coercion in their sexual interactions." *Id*. (citing Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. Rev. 703, 704 (2000)).

¶17. The law considers an assault to constitute a non-consensual touching, and the law finds harm occurring in assaults even where the forced used is slight. Miss. Code Ann. § 97-3-7 (Supp. 2011). *See also Griffith v. City of Bay St. Louis*, 797 So. 2d 1037, 1042 (¶21) (Miss. Ct. App. 2001). However, no requirement exists for evidence of any physical injury for a crime to constitute a crime of violence. *King v. State*, 527 So. 2d 641, 646 (Miss. 1988). Statutory rape consists of non-consensual battery or touching by sexual penetration through intercourse with a minor or either through lacerating or tearing the child's genitals, anus[,] or perineum in the attempt to engage in sexual intercourse. Miss. Code Ann. § 97-3-65(6). Section 97-3-65(5) provides that in cases where the child is under the age of sixteen, no evidence of penetration is necessary where proof shows that "the genitals, anus[,] or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child." Statutory rape clearly constitutes a crime against the person of a minor without legal consent and without requiring evidence of a battery. Moreover, the Legislature considers this crime against the person of a minor so severe that lifetime registration is warranted, and failure to comply with registration may result in criminal prosecution. Therefore, unless the Legislature speaks otherwise, statutory rape under current Mississippi law constitutes a crime of violence. As a result, I respectfully submit that Taylor's reference to *Hughes v. State*, 892 So. 2d 203 (Miss. 2004), wherein the opinion provides in dicta that instances of consensual, nonviolent sex with a minor may occur should not be construed to

mean that statutory rape should not be considered a crime of violence.

¶18. Other sex offenses against minors in Mississippi are considered crimes of violence even where bodily injury does not constitute an element of the crime or does not result from the crime. In *Holloway v. State*, 914 So. 2d 817, 820-21 (¶¶10-14) (Miss. Ct. App. 2005), this Court held that the circuit court properly sentenced James Holloway as a habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2000), which requires that any one of the prior felony convictions shall have been a crime of violence. In *Holloway*, the defendant possessed a prior conviction for oral sexual battery, a crime that involved no evidentiary requirement to show bodily injury as an element of the crime.

¶19. Similarly, in *Trigg v. State*, 759 So. 2d 448, 450 (¶¶3-4) (Miss. Ct. App. 2000), Kyle Trigg drugged his wife, rendering her unconscious, and made a videotape of himself orally and digitally penetrating her vagina while she was unconscious. This Court explained that "the more serious offense of sexual battery does not include all of the elements of simple assault" and noted that the element of bodily injury is missing from the statutory definition of sexual battery. *Id*. at 452 (¶9). *See also Wallace v. State*, 10 So. 3d 913, 918 (¶12) (Miss. 2009) (Supreme court pointed to this Court's analysis in *Trigg*, finding that simple assault fails to constitute a lesser-included offense of sexual battery of a minor). Construing precedent and the statutes together, I submit that statutory rape encompasses a physical intrusion of a minor's body without their consent, and such action constitutes a sexual violation of the minor. I therefore submit that statutory rape constitutes a crime of violence.

¶20. Accordingly, I concur with the majority. I submit that the crime of statutory rape encompasses a violation of the body of a minor and, therefore, clearly constitutes a crime

against the person of a minor without legal consent since a minor lacks the legal capacity to consent to a sexual act. Statutory requirements for lifetime registration for those convicted of this offense, coupled with sentencing restrictions such as a requirement to serve day-for-day time with no early release, reflect the Legislature's view that statutory rape constitutes a crime of violence.

BARNES, J., JOINS THIS OPINION. RUSSELL, J., JOINS THIS OPINION IN PART.

MAXWELL, J., SPECIALLY CONCURRING:

¶21. Mississippi courts have not squarely addressed whether statutory rape under Mississippi Code Annotated section 97-3-65 (Supp. 2011), constitutes a crime of violence for sentencing purposes. Considering this issue of first impression, I agree with the majority's conclusion. While I understand the dissent's reasoning—that there may be instances where no force is used during intercourse between an adult and a minor—I depart from this view and instead find section 97-3-65 was intended to protect children age fifteen or younger from the inherent dangers of sexual contact with both adults and older teenagers. Indeed, the Mississippi Supreme Court has explained the purpose behind our strict-liability statutory-rape law is "to protect [children] against exploitation and vulnerability." *Phillipson v. State,* 943 So. 2d 670, 672 (¶12) (Miss. 2006). Because I find that an adult's conduct in actually engaging in sexual intercourse with a minor in violation of section 97-3-65 presents, at a minimum, a serious *potential risk* that physical force will be used to coerce compliance and that physical injury will occur, I would classify statutory rape as a crime of violence.

¶22. Section 97-3-65 contains two distinct subsections driven by the relative ages of the

offender and victim, with an exception for spouses. Under section 97-3-65(1)(a), "[t]he crime of statutory rape is committed when . . . [a]ny person seventeen (17) years of age or older has sexual intercourse with a child who . . . [i]s at least fourteen (14) but under sixteen (16) years of age; . . . [i]s thirty-six (36) or more months younger than the person; and . . . [i]s not the person's spouse." Miss. Code Ann. § 97-3-65(1)(a). Alternatively, section 97-3-65(b), imposes criminal liability on persons who have "sexual intercourse with a child who . . . [i]s under the age of fourteen (14) years; . . . [i]s twenty-four (24) or more months younger than the person; and . . . [i]s not the person's spouse." Miss. Code Ann. § 97-3-65(1)(b). Unlike federal law,[2] Mississippi statutory law does not list separately or specifically define its requirements for an offense to qualify as a crime of violence. Because Mississippi law lacks definitive parameters for assessing what constitutes a crime of violence

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[2] Under the federal sentencing guidelines:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a). The commentary to section 4B1.2 clarifies:

> "Crime of violence" includes . . . forcible sex offenses . . . . Other offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e. expressly charged) in the count of which the defendant was convicted involved use of explosives . . . or, by its nature, presented a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2 cmt. n.1.

and since our supreme court has not clearly addressed whether statutory rape should be deemed a violent crime, I find it reasonable to consider how other courts have classified similar statutory-rape laws when deciding whether the covered conduct qualifies as a crime of violence.

¶23. In doing so, I note several federal circuit courts have found that statutory-rape laws quite similar to Mississippi's inherently involve the use of force and qualify as crimes of violence. In *United States v. Ivory*, 475 F.3d 1232 (11th Cir. 2007), the United States Court of Appeals, Eleventh Circuit, examined Alabama's second-degree-rape statute, which like Mississippi's statute criminalizes sexual intercourse based on similar age-related qualifiers.[3] Also like Mississippi's statutory-rape law, the Alabama statute did not permit consent as a defense. In determining whether a conviction under Alabama Code section 13A-6-62(a) qualified as a crime of violence for federal sentencing purposes, the *Ivory* court found that although Alabama's statute did not contain an explicit element of either actual, attempted, or threatened use of physical force, like Mississippi's statute, it prohibited "sexual intercourse with a person incapable of consenting to the act." *Id.* at 1236. And the court

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[3] In Alabama, a person commits second-degree rape if:

> (1) Being 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the member of the opposite sex.
>
> (2) He or she engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being mentally defective.

Ala. Code § 13A-6-62(a) (Rev. 2006).

reasoned: "A nonconsensual act of sexual penetration by its nature involves at least some level of physical force and pressure directed against another person's body." *Id.* Thus, it found a violation of Alabama's second-degree-rape law must involve "use of physical force against the person of another" as contemplated by federal sentencing guidelines. *Id.* (citation omitted). As an alternative and independent basis for its holding, the *Ivory* court concluded second-degree rape of a minor "at a minimum presents a serious risk of physical injury to another." *Id.* (citation and quotation omitted).

¶24. Earlier, in *United States v. Chavarriya-Mejia*, 367 F.3d 1249, 1250 (11th Cir. 2004), the Eleventh Circuit similarly concluded that a statutory-rape conviction under Kentucky law[4]—which like Mississippi's statutory-rape law precludes a minor from legally consenting to the physical contact of sexual intercourse—involves the use of physical force and

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[4] Kentucky Revised Statute Annotated section 510.060 (Supp. 2011) states:

(1) A person is guilty of rape in the third degree when:

. . . .

(b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old; [or]

(c) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020; [or]

(d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she engages in sexual intercourse with a minor under sixteen (16) years old with whom he or she comes into contact as a result of that position[.]

constitutes a "crime of violence" under federal sentencing guidelines. In deciding whether statutory rape involves the "use of physical force," the *Chavarriya-Mejia* court noted: "Statutory rape is a kind of battery: unlawful physical contact. Sexual offenses by adults against children inherently involve physical force against the children." *Id.* at 1251. And the existence of consent-in-fact was irrelevant because "the law presumes that the physical contact aspects of statutory rape were not lawfully consented to." *Id.*

¶25. But the Eleventh Circuit's reasoning is not the only view, as federal courts are divided on this issue. Some have concluded, as the dissent does in its promise-ring hypothetical, that statutory sex offenses do not inherently qualify as crimes of violence absent other aggravating factors. *See United States v. Sawyers,* 409 F.3d 732, 741-42 (6th Cir. 2005) (holding Tennessee's statutory-rape scheme did not inherently present a serious risk of physical injury); *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1997) (declining imposition of per se rule that Wisconsin law prohibiting either sexual contact or intercourse with a person under sixteen was a crime of violence). Other courts have reasoned similarly to the Eleventh Circuit that statutory sex offenses qualify as crimes of violence because they inherently involve a serious potential risk of physical injury. *See United States v. Daye*, 571 F.3d 225, 229-32 (2d Cir. 2009) (utilizing categorical approach to determine Vermont's statutory sexual-assault law prohibiting sex between adults and children younger than sixteen is per se a crime of violence); *United States v. Pierce*, 278 F.3d 282, 289 (4th Cir. 2002) (holding North Carolina law proscribing taking indecent liberties with a child presented a serious risk of physical injury and qualified as a crime of violence).

¶26. In *Daye*, the United States Court of Appeals, Second Circuit, examined Vermont's

statutory sexual-assault law,[5] which like Mississippi's applies a strict-liability approach to sexual acts committed on children age fifteen and younger. *Daye*, 571 F.3d at 229-31. The Second Circuit considered the conduct proscribed by Vermont law and determined, in the ordinary case, a sexual act committed on a child "presents a serious risk of injury to another," qualifying the offense as a crime of violence. *Id*. at 230. The court noted that "[p]hysical injury is both a serious and foreseeable risk in the ordinary course of such encounters." *Id.* at 231. It also recognized:

> The potential risks of serious physical injury flowing from violation of Vermont's sexual assault statute are not limited to the direct physical consequences of sexual contact. We must also consider the risk of injury traceable to the fact that the violation of statutes criminalizing sexual contact with victims who, for reasons of physical or emotional immaturity, are deemed legally unable to consent "inherently involves a substantial risk that physical force may be used in the course of committing the offense."

Id. at 231-32 (quoting *Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir. 2003)).

¶27. The *Daye* court further acknowledged that "[w]hen an adult inflicts a sexual act upon a child, the nature of the conduct and the child's relative physical weakness give rise to a substantial likelihood that the adult may employ force to coerce the child's accession, thereby

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[5] Under Vermont law:

> A person who engages in a sexual act with another person and . . .
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> (3) The other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual; shall be imprisoned for not more than 20 years, or fined not more than $10,000.00, or both.

Vt. Stat. Ann. tit. 13, § 3252(3) (1986) (since amended). The term "sexual act" was further defined to mean "conduct . . . consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another." Vt. Stat. Ann. tit. 13, § 3251(1).

creating a serious risk that physical injury will result." *Id.* at 232. *See Dos Santos v. Gonzales*, 440 F.3d 81, 85 (2d Cir. 2006) ("[B]ecause 'a child has very few, if any, resources to deter the use of physical force by an adult intent on touching the child[,] . . . there is a significant likelihood that physical force may be used to perpetrate the crime.'") (quoting *Chery*, 347 F.3d at 409)); *see also United States v. Eastin*, 445 F.3d 1019, 1022 (8th Cir. 2006) ("Even if the sexual act with a child were consensual, such conduct between individuals of differing physical and emotional maturity carries a substantial risk that physical force may be used, causing injury to the child.").

¶28. Given our supreme court's emphasis that our statutory-rape law exists "to protect against exploitation and vulnerability,"[6] and the significant gap in age and maturity inherent in this offense, I find that an adult's conduct in actually engaging in sexual intercourse with a minor in violation of section 97-3-65 presents, at a minimum, a serious potential risk that physical force will be used to coerce compliance and that physical injury will occur. Thus, I agree with the majority that a violation of our statutory-rape law qualifies as a crime of violence.

RUSSELL, J., JOINS THIS OPINION IN PART.

ROBERTS, J., DISSENTING:

¶29. The majority affirms the decision of the LeFlore County Circuit Court based on the judicial declaration that statutory rape is per se a crime of violence. With respect for the majority, I cannot reach the same conclusion. I would find that the prosecution proved that

[6] *Phillipson*, 943 So. 2d at 672 (¶12).

Carlos Taylor was a non-violent habitual offender. Taylor concedes that fact. In this case, the difference to Taylor is his freedom after seven mandatory years in prison versus dying there. I would find that the prosecution failed to prove beyond a reasonable doubt that Taylor had previously committed a crime of violence. By our statutes, statutory rape simply does not include violence or the threat of violence to a person as one of its essential elements. I would require the prosecution go further and prove beyond a reasonable doubt that violence to a person was, in fact, present in the crime before sentencing an offender to prison for the remainder of his life. My dissent is based primarily on the same rationale as was my dissent in *Brown v. State*, 2010-KA-00352-COA, 2011 WL 2449291 (Miss. Ct. App. June 21, 2011). I see no need to repeat it here. Because the majority concludes otherwise, I respectfully dissent.

¶30. Taylor was an inmate in the custody of the Mississippi Department of Corrections (MDOC) while serving concurrently three years for selling twenty dollars' worth of marijuana and six years for what is likely some conviction obtained under an unspecified provision of Mississippi's sex-offense statutes. The uncertain nature of the latter-mentioned conviction will be discussed below in greater detail. For brevity's sake, I refer to that conviction as, most likely, a statutory rape. While serving those sentences, Taylor was caught trying to flush less than half an ounce of marijuana down a toilet. Based on the record, it appears that one of Taylor's authorized visitors delivered the marijuana to him during a visitation period. As a result, he was charged with possession of a controlled substance in a correctional facility in violation of Mississippi Code Annotated section 47-5-198(1) (Rev. 2004).

¶31. The maximum sentence for possession of a controlled substance in a correctional facility is seven years in the custody of the MDOC. However, the prosecution charged Taylor as a habitual offender pursuant to Mississippi Code Annotated section 99-19-83 (Rev. 2007). Instead of a maximum of seven years in the custody of the MDOC, Taylor faced a life sentence.

¶32. This appeal hinges on whether the prosecution presented sufficient evidence to prove beyond a reasonable doubt that Taylor had previously been convicted of a crime of violence. During Taylor's sentencing hearing, Ricky Banks, the sheriff of LeFlore County, testified that Taylor had previously been convicted of "sexual intercourse of a child underage." However, during cross-examination, Sheriff Banks testified that "[i]t was a sexual assault." Unprompted, the prosecutor spoke up and corrected Sheriff Banks's testimony by volunteering that Taylor's crime involved some unspecified presumed sexual contact "[w]ith a child under age." Besides those two inconsistent statements, at no time during Sheriff Banks's testimony did he specify what particular sex offense Taylor had previously been convicted of committing.

¶33. Gloria Gibbs, the records custodian at the Mississippi State Penitentiary, testified that she reviewed Taylor's pen pack.[7] The prosecution asked Gibbs whether one cause number referenced in Taylor's pen pack "was . . . the offense of sexual intercourse with a child under age?" Gibbs responded, "[y]es, sir." Gibbs also sponsored the introduction of Taylor's pen

[7] "Pen packs are the records maintained on inmates sentenced to the custody of the [MDOC]." *Jasper v. State*, 858 So. 2d 149, 152 (¶11) (Miss. Ct. App. 2003) (citing *Russell v. State*, 670 So. 2d 816, 829 (Miss. 1995)).

pack into evidence. However, the pen pack does not contain a copy of the indictment for Taylor's sex offense. Likewise, it does not contain a copy of the sentencing order by which Taylor was sentenced for having committed a sex offense. Furthermore, the pen pack does not reference any Mississippi statute that Taylor had previously violated. Instead, the pen pack simply refers to Taylor's offense as a "sex offense" and "sex with an underage child."

¶34. Although the words "statutory rape" do not appear in the record, that is apparently the offense to which the prosecution's witnesses were referring when they testified that Taylor was convicted of having sex with a "child under age."[8] However, Mississippi Code Annotated section 97-3-65 (Supp. 2011) lists different circumstances in which one may be convicted of statutory rape. Primarily, the statutory-rape portion of section 97-3-65 is divided into two subparts based on the relative ages of the accused and the victim.

¶35. Mississippi Code Annotated section 97-3-65(1)(a) states that a person is guilty of statutory rape if he or she "has sexual intercourse with a child who: (i) [i]s at least fourteen (14) but under sixteen (16) years of age; (ii) [i]s thirty-six (36) or more months younger than the person; and (iii) [i]s not the person's spouse." Alternatively, a person of any age is guilty of statutory rape if he or she "has sexual intercourse with a child who: (i) [i]s under the age of fourteen (14) years; (ii) [i]s twenty-four (24) or more months younger than the person; and (iii) [i]s not the person's spouse." Miss. Code Ann. § 97-3-65(1)(b). We do not know

[8] The "sex with an underage child" could refer to our sexual-battery statutes set forth in Mississippi Code Annotated § 97-3-65 through -103 (Supp. 2011). "Sexual penetration" includes "any penetration of the genital or anal openings of another person's body." Miss. Code Ann. § 97-3-97(a) (Rev. 2006). However, the age restrictions and various penalties appear the same as for statutory rape.

whether Taylor was convicted under section 97-3-65(1)(a) or section 97-3-65(1)(b).

¶36. Under either provision, one may be convicted of statutory rape without the State having to present any evidence that violence or the threat of violence to a person occurred during the sexual intercourse. Stated differently, 97-3-65 simply makes felonious the act of sexual intercourse between two individuals based on their respective ages at the time of the act. There is no element of force or violence required in the statute. It is true that the statute states: "Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape." Miss. Code Ann. § 97-3-65(2). Statutorily prohibiting an accused from claiming the victim's consent or lack of chastity as a defense to the charge does not equate with the conclusion that the sexual intercourse was necessarily violent. Additionally, mistake of true age of the victim on the date of sexual intercourse is no defense for an accused. *Collins v. State*, 691 So. 2d 918, 923 (Miss. 1997). Even if the parties stipulate that the victim told the accused at the time that she was sixteen years old, if her true age when the sexual intercourse occurred was fifteen years old or younger, the intercourse was in fact felonious.

¶37. Based on the age of the person convicted of statutory rape and the victim, a sentence for statutory rape may vary significantly. The record demonstrates that Taylor was nineteen years old when he committed statutory rape on December 2, 1999. Since absolutely nothing appears in the record, we do not know the victim's age. However, we do know that Taylor was sentenced to six years in the custody of the MDOC.

¶38. If Taylor had been convicted under section 97-3-65(1)(a), he faced a sentence of "not more than five (5) years in the State Penitentiary." Miss. Code Ann. § 97-3-65(3)(a).

Because Taylor was sentenced to six years in the custody of the MDOC, he could not have been convicted under section 97-3-65(1)(a). Furthermore, because Taylor was nineteen years old when he committed the underlying offense, he could not have been sentenced pursuant to Mississippi Code Annotated section 97-3-65(3)(b), which only applies to offenders who were at least twenty-one years old at the time of the offense.

¶39. Mississippi Code Annotated section 97-3-65(3)(c) applies to circumstances in which a person convicted of statutory rape pursuant to section 97-3-65(1)(b) is at least eighteen years old at the time of the offense. Taylor met the age requirement, but his six-year sentence does not. Section 97-3-65(3)(c) requires that one convicted under section 97-3-65(1)(b) be sentenced to a term of incarceration that is no less than twenty years but no more than life. Finally, Mississippi Code Annotated section 97-3-65(3)(d) applies to sentencing people who were between thirteen and eighteen years old when they committed statutory rape. Clearly, Taylor did not fall within that range.

¶40. Thus, the record before us contains references to Taylor having been convicted of a crime that was probably statutory rape, although we have no idea what the age of the victim was because, given Taylor's age at the time, his six-year sentence did not fall within any of the possible sentencing parameters. It is possible that Taylor received an illegally lenient sentence as part of a plea bargain. An even more glaring omission is that we have absolutely no idea of the underlying circumstances of the crime. It is possible that the sexual intercourse that led to Taylor's conviction was factually consensual and that no violence or threat of violence occurred during the commission of the crime. More importantly, the record contains no evidence that violence or the threat of violence actually occurred during

the commission of the crime.

¶41. I humbly submit that because violence or the threat of violence to a person is not an element of the statute, the prosecution should have to prove beyond a reasonable doubt that the prior statutory-rape offense was in fact violent before a habitual offender can be sentenced to serve the remainder of his life in prison.

¶42. An example is appropriate to illustrate the unjust consequences of the majority's decision. Amanda was a fifteen-year-old ninth grader approaching her sixteenth birthday. She and her boyfriend, Ben, grew up on the same street. They have been dating for nearly a year with their parents' approval. They are both honor students, and their parents have been friends for years. Ben is a few years older than Amanda. When he was in the first grade, he struggled to cope with dyslexia. As a result, his parents held him back that year. Many years later, Ben has become a straight-A, honor roll student. He is also the senior class president, the captain of the football and baseball teams, and the salutatorian of his graduating class. They both profess that they love each other and they intend to be together forever. Ben has been attending church with Amanda and her family. Although Amanda's parents were somewhat wary of Amanda dating Ben, after many months of close supervision, they are convinced that Ben is a good young man who loves their daughter. Ben and Amanda profess to anyone who will listen that they love each other and they intend to be together forever.

¶43. Ben's nineteenth birthday was two days before the prom. He surprised Amanda by giving her a gift – a promise ring – on his birthday. Despite all of the excellent and well-advised reasons to abstain from premarital sex, they unfortunately failed to control

themselves after the senior prom. They were completely unaware that, for no other reason than the fact that Ben had factually consensual, if not legally consensual sexual intercourse with Amanda, who was more than thirty-six months younger than him and not yet then sixteen years old, Ben is a statutory rapist and a per se violent felony offender under the majority's reasoning. However, if Amanda had celebrated her sixteenth birthday on the day before Ben's birthday, no statutory rape would have ever occurred. What a difference two days makes.

¶44. Neither the Mississippi Legislature nor the Mississippi Supreme Court have concluded that statutory rape is a per se violent offense. In fact, the Mississippi Supreme Court has twice stated that statutory rape is not necessarily a violent offense. The majority and the author of one of the concurring opinions both recognize that in *Hughes v. State*, 892 So. 2d 203, 211 (¶19) (Miss. 2004), the Mississippi Supreme Court – the ultimate arbiter of the law in this state – held that "there may be instances of consensual, nonviolent sex which nonetheless violate the statutory rape laws." Nevertheless, both the majority and the author of one of the concurring opinions find that the supreme court's clear and direct statement was merely dicta that carries no weight or authority.

¶45. The Mississippi Supreme Court also addressed an almost identical question in *Holland v. State*, 587 So. 2d 848 (Miss. 1991). Gerald James Holland was convicted of capital murder and sentenced to death for the brutal murder and rape of fifteen-year-old Krystal D. King. One of the statutory aggravating factors to justify the death sentence used by the State was whether Holland had previously been convicted of another capital offense or of a felony involving the use or threat of violence to the person, as stated in Mississippi Code Annotated

section 99-19-101(5)(b) (Rev. 2007). To prove this statutory aggravator, the State relied on Holland's 1974 Texas criminal conviction for "raping a child." The *Holland* court stated:

> This may not constitute sufficient evidence of involvement of violence. This Court recognizes that, generally, rape is a crime inhering the element of violence. However, this Court also recognizes that consensual, non-violent intercourse with an individual under 18 years of age may constitute a violation of this and other states' statutory-rape statute.
>
> Although a trial court is not required to examine the underlying legal validity of the prior conviction, . . . determining whether a defendant's prior conviction was a felony involving the use or threat of violence requires that this state's statutes be construed and applied. Where as here the conviction occurred in a sister state, this Court does not look to how that state characterizes the question of whether the crime was one of violence, rather, the analysis must be done under Mississippi law. For a conviction to qualify as predicate for an aggravating circumstance under this state's statutes, the conviction from the sister state must have been acquired under a statute which has as an element the use or threat of violence against the person or, by necessity, must involve conduct that is inherently violent or presents a serious potential risk of physical violence to another. . . .
>
> The State has this burden of proving beyond a reasonable doubt the existence of each aggravating circumstance. . . . On retrial, the trial court should examine the evidentiary sufficiency of this aggravating circumstance.

Holland, 587 So. 2d at 874. In other words, the Mississippi Supreme Court held that a judgment of conviction for "raping a child" is not sufficient proof that a crime was violent because the offense could have been statutory rape. The only logical interpretation of the supreme court's decision in *Holland* is that statutory rape may or may not be a violent offense, depending on the underlying facts of the offense. Even so, the majority and the author of the concurring opinions conclude that Taylor committed a violent crime without any knowledge of the victim's age, the statutory offense violated, nor any of the underlying facts of the crime of "sexual intercourse with an underage child."

¶46. As for Taylor, because a new sentencing hearing on the same merits would give the State a "second bite at the apple" at a life sentence and would constitute double jeopardy, I would reverse and remand this case for the trial court to give Taylor a seven-year mandatory sentence in accordance with Mississippi Code Annotated section 99-19-81 (Rev. 2007). *See Ellis v. State*, 520 So. 2d 495, 496 (Miss. 1988). Where, as here, the State presents no evidence of the underlying offense beyond its existence, I would find that is insufficient to conclude beyond a reasonable doubt that the offense was violent when the essential elements of that offense do not include proof of violence or the threat of violence. Because the majority finds that no such determination or proof is necessary, I respectfully dissent.

LEE, C.J., GRIFFIS, P.J., AND ISHEE, J., JOIN THIS OPINION.