IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, et al. **PLAINTIFFS**

VS. **CAUSE NO: 3:16-cv-789-CWR-FKB**

JIM HOOD, Attorney General
of the State Of Mississippi, et al. **DEFENDANTS**

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, sued in their official capacities only, and submit this reply in further support of their motion for summary judgment as follows, to-wit:

ARGUMENT

I. ARTHUR DOE'S DEMAND FOR FACIAL RELIEF IMPLICATES THE CONVICTIONS OF NUMEROUS OTHER REGISTERED SEX OFFENDERS.

A. Mississippi's Unnatural Intercourse Statute Does Not "Target" Private Same-Sex Activity and Has Been Used Historically to Target Sexual Predators.

Despite Plaintiffs' assertion that Arthur Doe's conviction is now the only relevant issue, his facial claim jeopardizes the convictions of other sex offenders. Therefore, the circumstances of other offenders who would benefit from facial relief are relevant and material. Defendants offered evidence concerning other offenders to show three things: (1) the consequences of granting facial relief; (2) a rational basis to require registration for unnatural intercourse convictions; and (3) historically Mississippi's unnatural intercourse statute has been used to target sexual predators rather than adults engaged in private consensual sex. This distinction was important to the Supreme Court in *Lawrence v. Texas*:

Laws prohibiting sodomy do not seem to have been enforced against consenting

> adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law.

539 U.S. 558, 569 (2003).[1] This passage helped the Court distinguish salutary uses of anti-sodomy laws from the Texas statute at issue in *Lawrence*, which explicitly targeted same-sex conduct: "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06 (West. 1994). Mississippi's unnatural intercourse law does not "target" same-sex conduct. The language of Section 97-29-59 encompasses both same-sex and opposite-sex activities, and the state courts have interpreted it that way. The fact that the Mississippi law has been used to target sexual predators is shown by the examples of offenders who were convicted of unnatural intercourse involving children and/or the use of force. [*See* Doc. 92, Def. Mem., at 22-23]. And many of those convictions involved heterosexual, rather than homosexual, sodomy. [*Id.* Doc. 91-5, Ex. 5].

B. In 1978 the Unnatural Intercourse Statute Ensured Coverage for Sexual Assaults That Did Not Constitute Rape.

Plaintiffs fail to accurately describe the history of Mississippi's sexual assault statutes. In this regard, they attempted to distinguish Arthur Doe's situation from the circumstances in the

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[1] Plaintiffs accuse Defendants of attempting to rewrite history by asserting *Bowers* was an as-applied challenge. To the contrary, it is Plaintiffs who are the revisionists. Plaintiffs rely on a concurring opinion in *Bowers* by Justice Powell. [Pl. Mem. at 8 n.3]. Defendants rely on the majority option by Justice White, which stated: "[r]espondent then brought suit in the Federal District Court, challenging the constitutionality of the statute *insofar as it criminalized consensual sodomy*," and then added in a footnote: "[t]he only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute *as applied to consensual homosexual sodomy.* We express no opinion on the constitutionality of the Georgia statute *as applied to other acts of sodomy*." *Bowers v. Hardwick*, 478 U.S. 186, 188 & n.2 (1986) (emphasis added).

case of *State v. Music*, No. 33285-3-III, 193 Wash. App. 1039, 2016 Wash. App. LEXIS 862, 2016 WL 1704687 (Wa. Ct. App. Apr. 28, 2016). Plaintiffs allege that:

> The court grounded its decision in the fact that, prior to 1975, Washington's rape laws applied only to "instances of vaginal-penile intercourse." Prior to 1975, "sodomy was the only offense that applied" to anal rape in Washington. The Court reviewed the repealed sodomy statute's history to show that it was used exclusively to prosecute "cases of assaultive conduct." Because there was no other law prohibiting anal rape at the time of Music's crime, the state appeals court overturned the district court's order vacating Music's conviction.

[Doc. 115, Pl. Mem., at 17 (internal citations omitted]. Plaintiffs go on to say:

> Mississippi's rape and sexual assault laws were not historically and are not currently limited to vaginal-penile intercourse. When put to its burden of proving the elements beyond the simple sex, Mississippi has no trouble convicting anal rapists for crimes other than Unnatural Intercourse. For instance, the Mississippi Supreme Court unanimously upheld a 1990 conviction "on three counts of sexual battery under Miss. Code Ann. §§ 97-3-95 & 99-7-2 (1972)" for a man who anally raped his seven-year-old nephew. *Edwards v. State*, 594 So. 2d 587, 587 (Miss. 1992). Unlike Washington, Mississippi could and did try rapists under laws other than the Unnatural Intercourse law. The unpublished *Music* decision would not support Defendants' position even if it had precedential value.

[Pl. Mem. at 17-18].

Under *current* law, rape and sexual battery do apply to same-sex assaults. Otherwise, Plaintiffs are wrong. Mississippi's rape and sexual assault laws *were* historically limited to vaginal-penile intercourse, including 1978 when Arthur Doe was convicted. Because unnatural intercourse *was* the only sexual offense that Arthur Doe could be charged with in 1978, Plaintiffs' analysis of *State v. Music* and its applicability is incorrect.

Until 1985, the crime of forcible rape in Mississippi applied only to female victims and required evidence of vaginal penetration. Mississippi's historic rape statute, as re-codified in the Mississippi Code of 1972, stated:

> Every person who shall be convicted of rape, either by carnally and unlawfully knowing *a female child* under the age of twelve years, or by forcibly ravishing *any female* of the age of twelve years and upward, or who shall have been convicted of having carnal knowledge of *any female* above the age of twelve years without *her* consent . . . shall suffer death, unless the jury shall fix the imprisonment in the penitentiary for life as it may do in case of murder. In all cases where *the female* is under the age of twelve years it shall not be necessary to prove penetration of *the female's* private parts where it is shown that private parts of *the female* have been lacerated or torn in the attempt to have carnal knowledge of *her*.

Miss. Code Ann. § 97-3-65 (1972) (emphasis added) [Copied in Appendix I-A].

In 1977, the Legislature split the rape statute into two sections. At the time of Arthur Doe's offense and conviction in 1978, the statute provided, in relevant part:

> (1) Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing *a female child* under the age of twelve (12) years, upon conviction, shall be sentenced to death or imprisonment for life . . . In all cases where *the female child* is under the age of twelve (12) years it shall not be necessary to prove penetration of *the female's* private parts where it is shown the private parts of *the female* have been lacerated or torn in the attempt to have carnal knowledge of *her*.
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> (2) Every person who shall forcibly ravish *any female* of the age of twelve (12) years or upward, or who shall have been convicted of having carnal knowledge of *any female* above the age of twelve (12) years without *her* consent . . . shall be imprisoned for life in the state penitentiary.

Miss. Code Ann. § 97-3-65 (eff. Apr. 13, 1977) (Supp. 1977) (emphasis added) [Copied in Appendix I-B].

It was not until 1985 that the Mississippi Legislature reorganized the sexual assault statutes to render them applicable to both genders. *See* Laws, 1985, ch. 389 (eff. Jul. 1, 1985) [Copied in Appendix I-C). For the first time the statute used gender neutral language to define rape: "[e]very *person* who shall forcibly ravish *any person* of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of *any person* above the

age of fourteen (14) years without *such person's* consent . . . ." *Id.*[2]

Similarly, "sexual battery" did not exist as a crime under Mississippi law until 1980. See Miss. Code Ann. § 97-3-97 (eff. July 1, 1980) [Copied in Appendix I-E]. In 1978, the only sexual offense Arthur Doe could be charged with was unnatural intercourse under Miss. Code. Ann. § 97-29-59. Until the Legislature created the crime of "sexual battery" in 1980, unnatural intercourse "was the only offense that applied to anal rape in [Mississippi]." [Doc. 115, Pl. Mem., at 17 (internal quotation marks omitted)]. Even though the *Edwards v. State* case cited by Plaintiffs upheld the conviction for sexual battery of an adult man who anally raped his seven-year-old nephew, that crime did not exist until 1980. Prior to 1980, the applicable statute was Section 97-29-59, and the charge would have been "unnatural intercourse," not rape or sexual battery. Thus, the rationale of the Washington court in the *Music* case as described by Plaintiffs ("Prior to 1975, 'sodomy was the only offense that applied' to anal rape in Washington") applies with equal force to Section 97-29-59.

II. ARTHUR DOE HAS NOT SATISFIED THE REQUIREMENTS FOR FACIAL RELIEF.

A plaintiff bears a heavy burden when seeking to invalidate a statute in its entirety:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is

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[2] The current version of the rape statute continues the use of gender neutral language as to victims and perpetrators, although it does use the term "sexual intercourse." However, "sexual intercourse" is then defined to apply to both same-sex and opposite-sex activity, vaginal and anal. Miss. Code Ann. § 97-3-65(7) (eff. Apr. 6, 2017) [Copied in Appendix I-D]. It is not disputed that, *under the current statutes*, any person who performed forcible anal sodomy on another person could be convicted of either forcible rape or sexual battery. *See, e.g.*, *Harper v. State*, 463 So. 2d 1036, 1038-39 (Miss. 1985) (Sexual battery statute applies to both same-sex and opposite-sex activity, regardless of gender).

> insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987).

Plaintiffs assert that a facial challenge merely requires a plaintiff to "demonstrate that the invalid applications of the statute are 'substantial' when 'judged in relation to the statute's plainly legitimate sweep.'" [Pl. Mem. at 14, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)]. However, that is the First Amendment standard for a facial overbreadth claim. *See Serafine v. Branaman*, 810 F.3d 354, 364 (5th Cir. 2016) ("Under the First Amendment, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal quotation marks and citations omitted). Plaintiffs have not made a First Amendment challenge, so the overbreadth doctrine does not apply. The unnatural intercourse statute passes muster under that standard as well as *Salerno*.

The Fifth Circuit has on rare occasions referenced the "lacks any plainly legitimate sweep" issue: "[t]o succeed in a typical facial attack, [the plaintiff] would have to establish that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." *In re IFS Fin. Corp.*, 803 F.3d 195, 208 (5th Cir. 2015) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)). However, even when the Fifth Circuit has referred to that language, the Court has actually applied only the *Salerno* standard. *Id.*

> However, even assuming for the sake of argument that under [plaintiff's] hypothetical fact pattern the statute would be unconstitutional as applied, that condition fails to invalidate the statute on its face because [plaintiff] has not demonstrated that the statute is unconstitutional in all its applications. As we noted above, since [plaintiff] may not bring a First Amendment overbreadth claim, he must demonstrate in this facial attack "that no set of circumstances

exists under which [the statute] would be valid."

McKinley v. Abbott, 643 F.3d 403, 409 (5th Cir. 2011).

Here, Plaintiffs cannot satisfy either standard because there is only one set of circumstances in which the statute would be unconstitutional, whereas Defendants have identified multiple valid applications of the statute. The law has a legitimate sweep, as it prohibits sexual assaults that for many years were not covered by existing sexual assault statutes. Further, the one potentially unconstitutional application of the statue is not "substantial" compared with the valid applications within its legitimate scope.

The Fifth Circuit has rejected similar arguments made by others because it "turns the facial constitutionality inquiry on its head, by urging that if there is some set of circumstances where the law would be unconstitutional, it is facially unconstitutional." *In re IFS Fin. Corp*., 803 F.3d at 208. Plaintiffs identify one unconstitutional application of Section 97-29-59, ignore all the valid applications, and demand that the Court declare the statute "facially unconstitutional and unenforceable in any situation involving conduct between human beings." [Doc. 60 at 27]. Plaintiffs have utterly failed to meet their burden for facial relief.

III. THE CONSEQUENCES OF FACIAL RELIEF CANNOT BE IGNORED.

Plaintiffs' claim for facial relief is a dramatic overreach. The phrase "unenforceable in any situation involving conduct between human beings" is straightforward and requires no interpretation. However, according to Plaintiffs, that phrase does not include persons convicted of sodomy (if additional elements are required), nor does it include persons convicted of crimes that also constitute sexual battery. Yet these are unquestionably "situation[s] involving conduct between human beings." Plaintiffs' reimagining of their Amended Complaint contradicts the

demand for facial relief in Arthur Doe's motion for summary judgment.

The ramifications of facial relief cannot be ignored. If the Court were to determine that Arthur Doe's conviction (and registration) were invalid, the Court could grant as-applied relief as a cure. There is no need to jeopardize the valid convictions of rapists and child molesters simply because they were prosecuted under the unnatural intercourse statute. However, granting facial relief would have that effect. Plaintiffs say this is just an "obvious consequence of *Lawrence*" and accuse Defendants of fearmongering. [Pl. Mem. at 27]. Defendants have done nothing more than take the allegations of the complaint ("conduct between human beings"), analyze sex offenders actually registered on the MSOR to determine who would benefit from facial relief, and accurately report that information to the Court. That sexual predators like the examples given by Defendants might be removed from the registry should frighten any reasonable person. And that outcome could not have been intended or foreseen by the Supreme Court in *Lawrence*.

IV. PLAINTIFFS' EVIDENTIARY ARGUMENTS LACK MERIT.

Plaintiffs fall back on the argument that the Court may consider only the elements of the crime and argue that *some* of the offenders used as examples by Defendants of sexual predators were convicted of crimes in other states that had additional elements. [Pl. Mem. at 4]. Plaintiffs miss the boat, as this argument ignores the numerous offenders convicted of unnatural intercourse in Mississippi based on child abuse and rape described *infra*.

Plaintiffs' tunnel vision focuses solely on the fact that the language of Mississippi's unnatural intercourse statute could *theoretically* be used to prosecute consenting adults having private sex. Their argument is that of the dozens and dozens of offenders who are registered

because of sodomy "between human beings," they have identified three[3] as to which they believe the evidence is equivocal, and therefore argue that *Defendants* have not *proved* these offenders are not registered because of private consensual sex between adults. However, Plaintiffs bear the burden of proof, not Defendants. Plaintiffs have not offered any evidence that creates a genuine issue of material fact precluding summary judgment as to any offender, including Arthur Doe.

Arthur Doe has no right to any relief under the undisputed facts, either facial or as-applied. Whether the sodomy performed by or on Arthur Doe was forcible or consensual is immaterial. Arthur Doe does not dispute that he pled guilty to performing anal sex on another man while [*See* Pl. Mem. at 3 ("[O]n the 18th day of January, A.D., 1978, did then and there willfully, unlawfully and feloniously, with his intent, commit a crime against nature with to-wit: carnal copulation with a male human being, to-wit: by said , penetrating the anus of said with his penis.") (alterations in original)]; [*See also* Doc. 91-2 at 5 ("Arthur Doe was .")]. *See, e.g.*, *Morales v. Pallito*, 2014 WL 1758163, at * (D. Vt. Apr. 30, 2014) ("Consensual sexual intimacy between inmates in a correctional facility was not recognized as a constitutionally protected right in *Lawrence*."). Plaintiffs do not cite any cases stating that *Lawrence* provided That is because there are no such cases.

[3] Actually two. After summary judgment responses were filed, Offender No. 7 was determined to be a CANS Plaintiff and has been removed from the MSOR. [Pl. Mem. at 29-30].

Further, the records and documents relied on by Defendants are admissible, although absolute admissibility is not required at this stage. Rule 56 requires only that "a fact [may] be presented in a form that would be admissible in evidence." Fed. R. Evid. 56(c)(2). Plaintiffs cannot and do not make such an assertion or objection. Plaintiffs make only vague, conclusory allegations that some documents are hearsay. Many of the documents are not hearsay, or have been offered for a non-hearsay purpose. Further, there are numerous exceptions that would apply to the other documents, including the exceptions for records of regularly conducted activity, public records, and statements in ancient documents. *See* Fed. R. Evid. 803(6), (8), (16). Plaintiffs have not produced a shred of evidence in discovery (or in opposition to Defendants' motion) to support the claims of Arthur Doe.

Plaintiffs assert that Defendants have admitted that a person convicted under the Texas statute in *Lawrence* or the Georgia statute in *Bowers* would be required to register as a sex offender in Mississippi. That analysis is disingenuous at best. For example, one of the requests cited by Plaintiffs (the two are effectively identical) and Defendants' response read as follows:

> **REQUEST FOR ADMISSION NO. 6:** Admit that an individual with a conviction for Texas' Homosexual Conduct law (Tex. Penal Code § 21.06) who resides in Mississippi is required to register on the Mississippi Sex Offender Registry pursuant to Mississippi Code Annotated section 45-33-23(h)(xxi) regardless of the underlying facts giving rise to that conviction.
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> **RESPONSE TO REQUEST NO. 6:** Defendants object to the extent the Request seeks information protected by the attorney/client privilege, the work product doctrine, and/or which would otherwise disclose the mental impressions, conclusions, opinions, or legal theories of the Defendants' attorneys.
>
> Without waiving, and limited by those objections, Defendants admit only that, under Miss. Code Ann. § 45-33-23(h)(xxi), an individual with a conviction for violating Texas' "Homosexual Conduct" statute (Tex. Penal Code § 21.06) who resides in Mississippi must register with the MSOR regardless of the facts and

> circumstances underlying the conviction. However, Defendants deny that the facts and circumstances underlying such a conviction can be separated from the conviction itself, and further deny that the underlying facts and circumstances are not relevant to the question of whether the State is constitutionally required to remove an offender from the MSOR.

[Schwarz Decl. Ex. 1 (Defendants' Response to Plaintiffs' Request For Admission No. 6)]. As Defendants read the request, it presupposes a *valid* conviction, and that is the request that Defendants answered. The "underlying facts and circumstances underlying such a conviction" would include whether the conviction was based on private, consensual, adult sex such that it would have been invalidated by *Lawrenc*e. If any person still has a criminal conviction on their record for *Lawrence*-protected conduct, that person may return to the court of conviction to have that conviction nullified. However, it is incumbent on the person challenging the conviction, not the MSOR, to have their conviction vacated. The requests for admissions are based on a hypothetical situation, not actual sex offenders. Plaintiffs have not proven anyone is registered on the MSOR because of convictions for private consensual sex under either the Georgia statute from *Bowers* or the Texas statute from *Lawrence*.

V. *HECK* APPLIES EVEN THOUGH ARTHUR DOE IS NOT IN CUSTODY AND CANNOT FILE A HABEAS PETITION.

Plaintiffs' argument that the favorable-termination requirement established in *Heck v. Humphrey*, 512 U.S. 477 (1994) does not bar his claims, because he is not in custody and federal habeas relief is unavailable to him, must be rejected. [Pl. Mem. at 40-44]. Binding Fifth Circuit precedent holds that the *Heck* bar applies to § 1983 claims by former prisoners that, if successful, would imply the invalidity of their convictions or sentences.

To begin with, Plaintiffs fail to acknowledge that in *Heck*, which involved a prisoner in

state custody, the majority disagreed with Justice Souter's position that its holding should not apply to "former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." *Heck*, 512 U.S. at 490 n. 10. The Court stated: "We think the principle barring collateral attacks a longstanding and deeply rooted feature of both the common law and our own jurisprudence is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.*

The Fifth Circuit has expressly adopted this position. In *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam), a former prisoner asserted a § 1983 claim for damages, alleging that he had been unconstitutionally imprisoned for almost nine months while serving his sentence. *Id.* at 300-01. The prisoner argued that *Heck* did not apply because he was "no longer in custody and thus c[ould] not file a habeas petition." *Id.* at 301. The Fifth Circuit rejected this argument and held that the prisoner's claim was barred by *Heck* despite the fact that he filed suit after his incarceration ended:

> [*Heck*] unequivocally held that unless an authorized tribunal or executive body has overturned or otherwise invalidated the plaintiff's conviction, his claim "is not cognizable under section 1983." Because Randell is seeking damages pursuant to § 1983 for unconstitutional imprisonment and has not satisfied the favorable termination requirement of *Heck*, he is barred from any recovery and fails to state a claim upon which relief may be granted.

Id. (quoting *Heck*, 512 at 487; brackets and footnote omitted).[4] Although the Fifth Circuit noted

[4] Plaintiffs attempt to distinguish *Randell* on the grounds that the prisoner could have sought habeas or post-conviction relief while in prison, but did not. [Pl. Mem. at 43 n. 17]. Although it is true that in *Randell* the Fifth Circuit stated that the prisoner had not shown that he "lack[ed]" a "procedural vehicle" to challenge the length of his sentence, the court rejected the decisions of other circuits "relax[ing] *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction." 227 F.3d at 301. The Fifth Circuit held that it could not rule that the Supreme Court had overruled *Heck*'s "unequivocal" holding. *Id.* Regardless, *Randell* is on point because Arthur Doe has not shown that he lacked a procedural vehicle to challenge his conviction. He

that other circuits had reached a contrary conclusion "[b]ased on dicta from concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 . . . (1998),"[5] it "decline[d] to announce for the Supreme Court that it has overruled one of its decisions." *Randell*, 227 F.3d at 301.

Plaintiffs argue that *Randell* has no precedential value, as it was decided before the Supreme Court's decisions in *Muhammad v. Close*, 504 U.S. 749 (2004), and *Wilkinson v. Dotson*, 544 U.S. 74 (2005). [Pl. Mem. at 43 n.17]. However, neither case addresses, much less resolves, the issue of whether *Heck* bars § 1983 claims by plaintiffs already released from state custody.[6] A footnote in *Muhammad* merely notes the possible disagreement for future resolution. 540 U.S. at 752 n. 2 (citations omitted). The Fifth Circuit continues to recognize and enforce *Randell* as binding precedent. *See Black*, 616 Fed. Appx. at 653-54 ("*Muhammad* only stated that the . . . [issue] remains *unsettled*. *Muhammad* failed to effect a change in the law that would

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could have filed a motion for post-conviction for relief in the court where he pleaded guilty after registering with the MSOR. *See* Miss. Code. Ann. § 99-39-5(1).

[5] In *Spencer*, the Supreme Court held that a former prisoner's habeas petition was moot because he "ha[d] completed the entire term of imprisonment underlying the parole revocation." 523 U.S. at 3. The prisoner contended that his petition could not be moot because he had to prove that his parole revocation was invalid in order to assert a § 1983 claim for damages that was not barred by *Heck*. *Id.* at 17. The Court held that *Heck* would not bar a § 1983 claim that "did not necessarily imply the invalidity of the revocation." *Id.* at 17 (internal quotation marks and citation omitted). The Fifth Circuit has recognized that "[t]he majority opinion [in *Spencer*] did not address the application of *Heck*'s favorable-termination rule to an individual . . . who had been released from custody." *Black v. Hathaway*, 616 Fed. Appx. 650, 652-53 (5th Cir. 2015) (per curiam).

[6] *Wilkinson* involved two state prisoners who sought to challenge the constitutionality of Ohio's parole review procedures. 544 U.S. at 76. The Supreme Court held that *Heck* did not apply because "a favorable judgment w[ould] *not* necessarily imply the invalidity of their convictions or sentences." *Id.* at 82 (internal quotation marks, brackets, and citation omitted; emphasis added). Accordingly, that decision provides no support for Plaintiffs' arguments. In any event, *Randell* remains the law of the circuit.

allow this panel to revisit the court's decision in *Randell*.") (emphasis in original).[7]

Accordingly, that Arthur Doe is not in custody is of no consequence. Doe seeks a declaration that the unnatural intercourse statute is unconstitutional on its face and as applied to him. [Doc. 60, at ¶¶ 97-98, 107-09]. Because granting Doe such a declaratory judgment "would necessarily imply the invalidity of [his] conviction," his claims are not cognizable under § 1983.[8] *Heck*, 512 U.S. at 487.

VI. Arthur Doe Has Not Established a Violation of Equal Protection.

Plaintiffs argue that persons convicted of unnatural intercourse are similarly situated to persons convicted of prostitution because the statutes "contain no reference to minors or forcible sex acts" and do not limit their "prohibition[s] to adults or to consent." [Pl. Mem. at 34-35]. This argument fails to address Defendants' unrebutted summary judgment evidence that most sex offenders registered for Mississippi unnatural intercourse convictions have either sexually assaulted minors or committed forcible sodomy. [*See* Docs. 91-5, 92 at 22-23]. These offenders are not similarly situated to prostitutes. Plaintiffs have not offered any evidence that anyone has

[7] In *Black*, the Fifth Circuit held that *Heck* barred the plaintiff's § 1983 claims even though he argued "he [wa]s no longer in custody and therefore [could not] seek habeas relief to satisfy the favorable-termination rule." 616 Fed. Appx. at 652; *see Kelly v. State*, 2016 WL 879315, at *2 (S.D. Miss. Mar. 7, 2016) ("Even if [plaintiff] is not serving parole because he has completed his criminal sentence which is the subject of this civil action, and thus is no longer 'in custody,' the *Heck* bar still applies[.]") (citing *Black*, 616 Fed. Appx. at 652-54).

[8] Plaintiffs contend that even if Arthur Doe's substantive due process claim is barred by *Heck*, his equal protection and procedural due process claims are not, since success on those claims would not undermine the validity of his conviction. [Pl. Mem. at 43-44]. This claim is belied by the fact that in both counts of the Amended Complaint, Plaintiffs seek both facial and as-applied relief for Arthur Doe. [*See* Doc. 60, at ¶¶ 97-98, 107-09].

ever been convicted of prostitution in Mississippi for child molestation or forcible sodomy.[9]

Additionally, Plaintiffs argue that offenders with unnatural intercourse convictions and convicted prostitutes are similarly situated, because prostitution is not protected conduct under *Lawrence*, and because "individuals engaging in oral or anal sex for money" could theoretically be prosecuted under the unnatural intercourse statute. [Pl. Mem. at 35]. These arguments are unavailing. First, Defendants' argument is not based on an interpretation of *Lawrence*. Instead, Defendants contend that what distinguishes the groups is the evidence that most registered sex offenders with unnatural intercourse convictions engaged in forcible sodomy or sodomy with minors, compared with the absence of evidence that anyone has ever been convicted of prostitution for engaging in "identical conduct." [*Id.*]. Second, while it may be theoretically possible that a person who merely exchanged or attempted to exchange anal or oral sex for money could be convicted of unnatural intercourse (or attempted unnatural intercourse), there is no evidence in the record suggesting that has ever happened. If such a similarly situated person existed, that person might have standing to assert an equal protection claim, but Arthur Doe certainly does not. [*See* Doc. 92 at 6-7].

Plaintiffs also assert that the justifications for requiring Arthur Doe to register are

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[9] Plaintiffs suggest that there may be persons convicted of prostitution who may have engaged in sex acts similar to the ones committed by sexual predators registered with the MSOR based on unnatural intercourse convictions. [Pl. Mem. at 35]. Unsubstantiated assertions do not satisfy Plaintiffs' burden to prove that those convicted of unnatural intercourse are similarly situated to persons convicted of prostitution. *See, e.g.*, Sinclair v. Stalder, 78 Fed. Appx. 987, 988 (5th Cir. 2003) (holding a plaintiff must come forward with evidence to show that two groups are similarly situated at the summary judgment stage). Plaintiffs ignore the fact that felons convicted of soliciting sex from a minor under the age of 18 must register with the MSOR. Miss. Code Ann. 45-33-23(xix). Thus, Mississippi treats those who have been convicted of unnatural intercourse with minors the same as those who engage in prostitution with minors, so there is no equal protection issue.

insufficient to show that his registration is "not arbitrary." [Pl. Mem. at 36]. There is no evidence that Arthur Doe could have been convicted of prostitution, and therefore he is not similarly situated to those convicted of prostitution.[10] [Doc. 91-1 at MSOR.000375]. In any case, it is Plaintiffs' burden to prove that no rational basis exists for the legislative classification at issue.[11]

Plaintiffs have not even attempted to meaningfully rebut the rational basis offered by Defendants that offenders convicted of unnatural intercourse are more likely to be sexual predators than prostitutes, and therefore pose a greater threat to public safety.[12] Instead, Plaintiffs argue that it is not rational to require offenders with unnatural intercourse convictions to register because they have been convicted of a "wide range of conduct, including conduct" that was not "coercive" or "harmful." [Pl. Mem. at 37]. That is totally unproven. However, statutory classifications pass rational basis review "even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. Thus, even if some sex offenders with unnatural intercourse convictions did not use force or sexually abused minors, it would not render the registration

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[10] The fact that Arthur Doe could not have been charged with prostitution serves to distinguish this case from *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012), where the equal protection violation was based on the fact that persons who solicited sodomy for compensation could be charged under either Louisiana's prostitution statute or the CANS statute (in which case they would be required to register as a sex offender if convicted) depending on the whim of the prosecuting attorney. The equal protection analysis in *Jindal* was based on comparing apples with apples. The equal protection claim here is not.

[11] *See Harris v. Hahn*, 827 F.3d 359, 365 (5th Cir. 2016) ("[The State] is under no obligation to prove its reasons; it need only offer them. 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it' whether or not the basis has a foundation in the record.") (quoting *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)).

[12] *Cf. Johnson v. Dep't of Justice*, 60 Cal. 4th 871, 884, 341 P.3d 1075 (2015) ("[T]he Legislature could plausibly assume that predators and pedophiles engaging in oral copulation have more opportunities to reoffend than those engaging in sexual intercourse, and, for that reason, are especially prone to recidivism and require ongoing surveillance.").

requirement *irrational* because many of these offenders actually did so. Therefore, the laws under review are rationally related to the State's interest in protecting the public from sexual predators.

VII. ARTHUR DOE HAS NOT BEEN DENIED PROCEDURAL DUE PROCESS.

Plaintiffs contend that Defendants are requiring Arthur Doe to register based on "post-hoc assertions of underlying, never-proven facts," such that he has been denied notice and an opportunity to contest his registration. [Pl. Mem. at 37-38]. That is not correct. Defendants have presented evidence regarding the factual circumstances underlying Arthur Doe's unnatural intercourse conviction to demonstrate that his conviction was not invalidated by *Lawrence*. Arthur Doe is a registered sex offender because he was convicted of a registrable offense in 1978 and that valid conviction has not been vacated. *See* Miss. Code Ann. § 45-33-25(1)(a); Miss. Code. Ann. § 45-33-47(4).

Because Arthur Doe's registration was triggered by the fact of his conviction, he is not entitled to an administrative proceeding under binding Supreme Court precedent. *See Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (holding that a registered sex offender has no right to procedural due process when the registration law "turn[s] on an offender's conviction alone a fact that [the] convicted offender has already had a procedurally safeguarded opportunity to contest"). To the extent Arthur Doe asserts that he lacks a procedural vehicle to challenge his conviction, he is mistaken. As Plaintiffs' counsel is well aware, any convicted felon may return to the court where he or she was convicted and request that a

conviction be vacated as unconstitutional.[13] Under Mississippi law, the authority to determine whether Arthur Doe's unnatural intercourse remains valid after *Lawrence* is vested in the court of conviction. Arthur Doe has not availed himself of available methods to directly challenge the constitutionality of his conviction, so he has not been denied due process.[14]

CONCLUSION

For the foregoing additional reasons, Defendants' motion for summary judgment should be granted.

Respectfully submitted this the 15th day of June, 2018.

JIM HOOD, Attorney General of the State of Mississippi; ALBERT SANTA CRUZ, Commissioner of the Mississippi Department of Public Safety; CHARLIE HILL, Director of the Mississippi Sex Offender Registry; COLONEL CHRIS GILLARD, Chief of the Mississippi Highway Patrol; and LIEUTENANT COLONEL LARRY WAGGONER, Director of the Mississippi Bureau of Investigation

By: *s/Paul Barnes*
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[13] Indeed, one of Plaintiffs' counsel had the out-of-state unnatural intercourse conviction of another offender vacated by the out-of-state court that had convicted him. [Doc. 91-6 at MSOR.010859-60]. The order vacating the conviction relieved that offender of his duty to register. [*Id.* at MSOR.010864-65].

[14] *See Myrick v. City of Dallas*, 810 F.2d 1382, 1388 (5th Cir.1987) (holding that a plaintiff "cannot skip an available state remedy and then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy")

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Paul E. Barnes, Special Assistant Attorney General for the State of Mississippi, electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notice of such filing to the following:

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THIS, the 15th day of June, 2018.

s/Paul Barnes
PAUL E. BARNES

MISSISSIPPI CODE

1972

ANNOTATED

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE LEGISLATIVE SESSION 1971

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME TWENTY

TRUSTS AND ESTATES
DOMESTIC RELATIONS
TORTS
CRIMES
§§ 91–1–1 to 97–7–71

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THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY, ROCHESTER, NEW YORK

Research and Practice References—
40 Am Jur 2d, Homicide §§ 574, 575.
40 CJS, Homicide §§ 68, 75.
2 Am Jur Trials, Investigating Particular Crimes §§ 54–56 (homicide by poisoning).

JUDICIAL DECISIONS

Any duplicity in an indictment for violating this provision, as charging two offenses in the same count, is cured by a judgment of conviction. Randle v State, 105 M 561, 62 So 428.

Under a former statute making actual taking of the poison an element of the crime, word "taken" was held to mean any method by which the system is made to absorb poison designedly administered. State v Stuart, 88 M 406, 40 So 1010.

§ 97–3–65. Rape—carnal knowledge of female under twelve years of age, or, being over twelve, against her will.

Every person who shall be convicted of rape, either by carnally and unlawfully knowing a female child under the age of twelve years, or by forcibly ravishing any female of the age of twelve years and upward, or who shall have been convicted of having carnal knowledge of any female above the age of twelve years without her consent, by administering to her any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, shall suffer death, unless the jury shall fix the imprisonment in the penitentiary for life, as it may do in case of murder. In all cases where the female is under the age of twelve years it shall not be necessary to prove penetration of the female's private parts where it is shown the private parts of the female have been lacerated or torn in the attempt to have carnal knowledge of her.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (22); 1857, ch. 64, art. 218; 1871, § 2672; 1880, § 2942; 1892, § 1281; 1906, § 1358; Hemingway's 1917, § 1092; 1930, § 1122; 1942, § 2358; Laws, 1908, ch. 171.

Cross references—
As to abduction of females, see § 97–3–1.
As to enticing children for prostitution or marriage, see § 97–5–5.
As to seduction of female child, see §§ 97–5–21, 97–29–55.
As to violation of person of female child, see § 97–5–23.
As to report of certain convictions, see § 99–19–63.
As to limitations of prosecutions generally, see § 99–1–5.
As to effect of conviction of certain crimes as disqualification to hold office in labor union or to participate in labor management functions, see § 71–1–49.

Research and Practice References—
65 Am Jur 2d, Rape §§ 15 et seq.
75 CJS, Rape §§ 11, 13.
2 Am Jur Trials, Investigating Particular Crimes §§ 37–39 (rape).
18 Am Jur Trials, Handling the Defense in a Rape Prosecution §§ 1 et seq.

ALR Annotations—

Civil liability for carnal knowledge with actual consent of girl under age of consent. 45 ALR 780 and 79 ALR 1229.

Marriage subsequent to crime as bar to prosecution for rape. 9 ALR 339.

Impotency as defense to charge of rape or assault with intent to commit rape. 26 ALR 772.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 167 ALR 565.

Inclusion or exclusion of the date of birth in computing one's age. 5 ALR2d 1153.

Admissibility in rape prosecution, of evidence that accused is married, has children, and the like. 62 ALR2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix. 62 ALR2d 1083.

Intercourse under pretext of medical treatment as rape. 70 ALR2d 824.

Incest as included within charge of rape. 76 ALR2d 484.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 84 ALR2d 1017.

Rape by fraud or impersonation. 91 ALR2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape. 8 ALR3d 1100.

Requiring complaining witness in prosecution for sex crime to submit to psychiatric examination. 18 ALR3d 1433.

Statutory rape of female who is or has been married. 32 ALR3d 1030.

JUDICIAL DECISIONS

1. In general

Under this section [Code 1942, § 2358] the previous chaste character of a female is not an essential element of rape. Thames v State, 221 M 573, 73 So 2d 134.

In prosecution for rape under this section [Code 1942, § 2358], act must be committed against victim's will; initial force is not enough, but resistance must continue to end. Moss v State, 208 M 535, 45 So 2d 125.

It is not rape to have sexual intercourse with a woman over the age of consent whose resistance is passive and objection silent unless she be overcome by drugs or other means. Anderson v State, 82 M 784, 35 So 202.

If woman, though she resists at first, eventually gives in and consents to intercourse, it is not rape, provided that the consent be willing and free of the initial coercion. Rodgers v State, 204 M 891, 36 So 2d 155.

Absence of resistance on account of fear caused by assailant does not prevent attack being rape. Milton v State, 142 M 364, 107 So 423.

It is immaterial whether the rape of an eight-year-old child was accomplished by force or violence, or against the will of the victim; for a child of such tender years is obviously under the age of consent. Brooks v State, 242 So 2d 865.

A necessary element of the crime of rape is that some penetration of the female's private parts by the sexual organ of the assailant must occur and this is true in every case except where the female is under twelve years of age and even then it must be shown that her private parts had been lacerated or

1977
CUMULATIVE SUPPLEMENT
TO
MISSISSIPPI CODE
1972 ANNOTATED

Issued September, 1977

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI ENACTED DURING LEGISLATIVE SESSIONS 1972, 1973, 1974, 1975, 1976, 1977 AND CUMULATIVE INDEX

PUBLISHED BY AUTHORITY OF
THE LEGISLATURE

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By the Editorial Staff of the Publishers

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APPENDIX
I-B

crime of kidnapping, the victim must be unlawfully removed from a place where he has a right to be, to another place. Aikerson v State, 274 So 2d 124.

The legislature did not intend to inflict the death penalty for such minor offenses as seizing and holding another in a fist fight or seizing, hugging and kissing a woman without her consent. Aikerson v State, 274 So 2d 124.

A comma should have been placed in Code 1942 § 2238 after the words "or shall inveigle or kidnap another person (,)" so that the following clause "with intent to cause such person to be secretly confined or imprisoned against his or her will," is a part of the entire sentence and refers to "forceably seize and confine" as well as to the clause "or shall inveigle or kidnap any other person." Aikerson v State, 274 So 2d 124.

When one is forced at gunpoint to enter an automobile, and while confined therein is driven away against his will from a place where he has a right to be, en route and to a destination unknown to his friends and acquaintances, he is, within the meaning of § 2238, "secretly confined and imprisoned." Johnson v State, 288 So 2d 842.

Asportation was sufficiently proved to sustain a charge of kidnapping with respect to the actions of defendant, who, after his escape from jail, entered an automobile agency, demanded transportation, accosted two employees with a pistol and forced one of them to move from one part of the building to the other and held him prisoner there, since, though the employee was not removed from the premises of his employment, the asportation and confinement were intended by defendant to make good his escape and were not merely incidental to another and lesser crime; in such circumstances, the fact of confinement or asportation is sufficient to support kidnapping without regard to distance moved or time of confinement. Cuevas v State (Miss) 338 So 2d 1236.

§ 97–3–55. Libel—penalty.

JUDICIAL DECISIONS

Where the Mississippi criminal libel statute dealt merely with punishment and did not define the crime of libel, and where there had been no judicial definition of the crime since the United States Supreme Court declared that the First Amendment is applicable to the states by virtue of the Fourteenth Amendment, the elements of the crime were so uncertain and indefinite, that it would not be enforced as a penal offense. Boydstun v State, 249 So 2d 411.

§ 97–3–65. Rape—carnal knowledge of female under twelve years of age, or, being over twelve, against her will.

(1) Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a female child under the age of twelve (12) years, upon conviction, shall be sentenced to death or imprisonment for life in the state penitentiary; provided, however, any person thirteen (13) years of age or over but under eighteen (18) years of age convicted of such crime shall be sentenced to such term of imprisonment as the court, in its discretion, may determine. In all cases where the female child is under the age of twelve (12) years it shall not be necessary to prove penetration of the female's private parts where it is shown

the private parts of the female have been lacerated or torn in the attempt to have carnal knowledge of her.

(2) Every person who shall forcibly ravish any female of the age of twelve (12) years or upward, or who shall have been convicted of having carnal knowledge of any female above the age of twelve (12) years without her consent, by administering to her any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistence, upon conviction shall be imprisoned for life in the state penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the state penitentiary for any term as the court, in its discretion, may determine.

SOURCES: Laws, 1974, ch. 576, § 8; 1977, ch. 458, § 7, eff from and after passage (approved April 13, 1977).

Cross references—

Murder in the commission of rape as constituting capital murder, see § 97-3-19.

As to the requirement that an indictment for capital murder state specifically the section of the code defining the offense alleged to have been committed, see § 99-17-20.

As to separate sentencing procedure to determine punishment in capital cases, see §§ 99-19-101 et seq.

JUDICIAL DECISIONS

1. In general

A capital case is any case where the permissible punishment prescribed by the legislature is death, even though such penalty may not be inflicted since the decision of the United States Supreme Court in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726, reh den 409 US 902, 34 L Ed 2d 163, 93 S Ct 89. Hudson v McAdory, 268 So 2d 916.

Code 1942, § 2358, under which the defendant was sentenced for the crime of rape, was not unconstitutional as cruel and unusual in imposing a sentence of life imprisonment for the crime. Wilson v State, 264 So 2d 828.

Where the defendant in a rape prosecution gave the victim a pill which produced dizziness and a stupor that rendered the victim unable to resist the defendant's assault, the administering of the pill to the victim was an essential element of the crime alleged, and where the administration of the pill occurred in Forrest County, while the actual rape took place in Lamar County, the venue was properly laid in Forrest County. McKorkle v State (Miss) 305 So 2d 361.

Defendant was not entitled to resentencing under the terms of this section as amended in 1974 where his conviction became final prior to the date on which the amendment became effective. Lampley v State (Miss) 308 So 2d 87.

Under this section, the imposition of a life sentence is within the sole province of the jury, and the trial judge could not impose a life sentence on the defendant absent a jury recommendation. Lee v State (Miss) 322 So 2d 751.

The death penalty statute, § 97-3-21, would be construed so as to uphold its constitutionality under Gregg v Georgia, 428 US 153, 49 L Ed 2d 859, 96 S Ct 2909, reh den (US) 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198 and its companion cases: (1) a trial in which

the defendant could receive the death penalty will be conducted in two phases, the first being the guilt phase and the second being a separate sentencing hearing; (2) at the sentencing hearing, there will be a consideration of aggravating and mitigating circumstances, the former being in substance statutorily recognized circumstances in which the death penalty may be imposed (as they are in § 97–3–19(2)) and the latter, inter alia, permitting the defendant to introduce evidence that might not be admissible in the trial on his guilt; (3) before the jury shall return a death penalty verdict, they must unanimously find in writing that the mitigating circumstances do not outweight the aggravating circumstances; (4) all cases in which the death penalty is imposed will be automatically reviewed as preference cases. Jackson v State (Miss) 337 So 2d 1242.

4. Evidence

5. —Admissibility

In a prosecution for rape, photographs, the accuracy of which had been established and which showed a 5-strand barbed wire fence through which the complaining witness admitted having gone with the defendant, voluntarily accompanying him to the secluded spot where the incident occurred, should have been admitted on the issue of consent, and their exclusion was prejudicial error where the fact of intercourse had been admitted. Carr v State, 258 So 2d 417.

§ 97–3–67. Rape—carnal knowledge of chaste female over twelve and under eighteen years of age.

Research and Practice References—

6 Am Jur Proof of Facts 2d, Mistake as to Age of Statutory Rape Victim, §§ 7 et seq. (proof of defendant's reasonable belief that prosecutrix in statutory rape prosecution was over legal age of consent).

ALR Annotations—

Mistake or lack of information as to victim's chastity as defense to statutory rape. 44 ALR3d 1434.

§ 97–3–68. Rape—procedure for introducing evidence of sexual conduct of complaining witness; "complaining witness" defined.

(1) In any prosecution for rape under section 97–3–65, 97–3–67 or 97–3–71, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of said complaining witness, the following procedure shall be followed:

(a) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a closed hearing in chambers, out of the presence of the jury, if any, and at such closed hearing allow the

(5)(a) Any county or municipal law enforcement agency which seizes property, other than real property or property described in subsection (1) of this section, may maintain, repair, use and operate for official purposes all such property that has been forfeited if it is free from any interest of a bona fide lienholder, secured party or other party who holds an interest in the property in the nature of a security interest. Such county or municipal law enforcement agency may purchase the interest of a bona fide lienholder, secured party or other party who holds an interest so that the property can be released for its use. If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law, the law enforcement agency shall be deemed to be the purchaser, and the certificate of title shall be issued to it as required by subsection (7) of this section.

(b) All other property that a county or municipal law enforcement agency seizes, other than real property or property described in subsection (1) of this section and other than property which such law enforcement agency retains for use and operation for official purposes, shall, upon its forfeiture, be sold by such law enforcement agency in the same manner and subject to the same procedure for the sale of such property by the Bureau of Narcotics as provided for in subsection (4) of this section; provided, however, that the proceeds of such sale shall be delivered to the clerk of the county or municipality for disposal in the following manner:

(i) To any bona fide lienholder, secured party, or other party holding an interest in the property in the nature of a security interest, to the extent of his interest; and

(ii) The balance, if any, after deduction of all storage and court costs, shall be forwarded to the clerk of the county or municipality, as the case may be, and deposited with and used as general funds of the county or municipality.

(6) In the event that a local law enforcement agency is not responsible for such seizure, the Mississippi Bureau of Narcotics may maintain, repair, use and operate for official purposes all property, other than real property or such property as is described in subsection (1) of this section, that has been forfeited to it if it is free from any interest of a bona fide lienholder, secured party, or other party who holds an interest in the property in the nature of a security interest. In such case, the bureau may purchase the interest of a bona fide lienholder, secured party, or other party who holds an interest so that such property can be released for use by the bureau.

The bureau may maintain, repair, use and operate such property with money appropriated to the bureau for current operations. If the property is a motor vehicle susceptible of titling under the Mississippi Motor Vehicle Title Law, the bureau is deemed to be the purchaser and the certificate of title shall be issued to it as required by subsection (7) of this section.

(7) The State Tax Commission shall issue a certificate of title to any person who purchases property under the provisions of this section when a certificate of title is required under the laws of this state.

SECTION 6. This act shall take effect and be in force from and after July 1, 1985.

Approved: March 21, 1985

APPENDIX
I-C

CHAPTER 389
HOUSE BILL NO. 916

AN ACT TO AMEND SECTIONS 97-5-23, 97-5-21, 97-3-65, 97-3-67, 97-5-41 AND 97-3-95, MISSISSIPPI CODE OF 1972, TO CONFORM CERTAIN PENALTIES AND AGE PROVISIONS WITHIN CERTAIN CRIMINAL STATUTES RELATING TO CHILD FONDLING, CHILD SEDUCTION, RAPE AND CARNAL KNOWLEDGE; AND FOR RELATED PURPOSES.

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Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. Section 97-5-23, Mississippi Code of 1972, is amended as follows:

97-5-23. Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child under the age of fourteen (14) years, with or without the child's consent, shall be guilty of a high crime and, upon conviction thereof, shall be fined in a sum not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), or be imprisoned in the State Penitentiary not less than one (1) year nor more than ten (10) years, or be punished by both such fine and imprisonment, at the discretion of the court.

SECTION 2. Section 97-5-21, Mississippi Code of 1972, is amended as follows:

97-5-21. Any person who shall seduce and have illicit connection with any child younger than such person and under the age of eighteen (18) years, and which child is of previously chaste character, shall, upon conviction, be imprisoned in the penitentiary not more than ten (10) years, but the testimony of the person seduced alone shall not be sufficient for conviction.

SECTION 3. Section 97-3-65, Mississippi Code of 1972, is amended as follows:

97-3-65. (1) Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a child under the age of fourteen (14) years, upon conviction, shall be sentenced to death or imprisonment for life in the State Penitentiary; provided, however, any person thirteen (13) years of age or over but under eighteen (18) years of age convicted of such crime shall be sentenced to such term of imprisonment as the court, in its discretion, may determine. In all cases where the child is under the age of fourteen (14) years it shall not be necessary to prove penetration of the child's private parts where it is shown the private parts of the child have been lacerated or torn in the attempt to have carnal knowledge of the child.

(2) Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person's consent, by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

SECTION 4. Section 97-3-67, Mississippi Code of 1972, is amended as follows:

97-3-67. Any person who shall have carnal knowledge of any unmarried person of previously chaste character younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, upon conviction, shall be punished either by a fine not exceeding Five Hundred Dollars ($500.00), or by imprisonment in the county jail not longer than six (6) months, or by both such fine and imprisonment or by imprisonment in the penitentiary not exceeding five (5) years; and such punishment, within said limitation, shall be fixed by the jury trying each case, or by the court upon the entry of a plea of guilty.

SECTION 5. Section 97-5-41, Mississippi Code of 1972, is amended as follows:

97-5-41. (1) Any person who shall have carnal knowledge of his or her unmarried stepchild or adopted child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

(2) Any person who shall have carnal knowledge of an unmarried child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, with whose parent he or she is cohabiting or living together as husband and wife, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

SECTION 6. Section 97-3-95, Mississippi Code of 1972, is amended as follows:

97-3-95. A person is guilty of sexual battery if he or she engages in sexual penetration with:

(a) Another person without his or her consent;

(b) A mentally defective, mentally incapacitated or physically helpless person; or

(c) A child under the age of fourteen (14) years.

SECTION 7. This act shall take effect and be in force from and after July 1, 1985.

Approved: March 21, 1985

CHAPTER 390
HOUSE BILL NO. 943

AN ACT TO AUTHORIZE THE GOVERNOR'S OFFICE OF GENERAL SERVICES TO ACQUIRE CERTAIN LAND AND BUILDINGS IN THE GREATER JACKSON INDUSTRIAL PARK AT 6090 I-55 SOUTH FRONTAGE ROAD, JACKSON, MISSISSIPPI, ON BEHALF OF THE MISSISSIPPI BUREAU OF NARCOTICS; AND FOR RELATED PURPOSES.

Be it enacted by the Legislature of the State of Mississippi:

SECTION 1. (1) The Governor's Office of General Services, acting through the Bureau of Building, Grounds and Real Property Management, on behalf of the Mississippi Bureau of Narcotics, is hereby authorized and empowered, in its discretion, to acquire, purchase and/or negotiate irrevocable options to purchase the land and buildings or other structures which are located in the Greater Jackson Industrial Park at 6090 I-55 South Frontage Road, Jackson, Mississippi, described more particularly as: Commencing at the Southeast corner of the Northeast quarter of the southeast quarter of Section 23, Township 4 North, Range 1 West, Hinds County, Mississippi, and from this point run thence South 85 degrees 51 minutes West for a distance of 256.3 feet to the point of beginning of the property herein described. Run thence North 60 degrees 51 minutes West for a distance of 580.0 feet to a point on the East right-of-way line of Interstate Highway 55, as said right-of-way line exists this date; run thence North 29 degrees 07 minutes East along the said East right-of-way line for a distance of 64.8 feet to a point; run thence North 29 degrees 08 minutes 30 seconds East and parallel to the said East right-of-way line for a distance of 435.2 feet to a point; run thence South 60 degrees 51 minutes East for a distance of 580.0 feet to a point; run thence south 29 degrees 08 minutes 30 seconds West for a distance of 500.0 feet to a point of beginning. The herein described property lying and being situated in the Northeast Quarter of the Southeast Quarter and the Southeast Quarter of the Southeast Quarter of Section 23, Township 4 North, Range 1 West, Hinds County, Mississippi, and containing 6.658 acres, more or less.

(2) Consideration for the purchase of the above-described property shall not exceed the average of the fair market price for such tract as determined by three (3) professional property appraisers selected by the Governor's Office of General Services and approved by the seller or sellers, who shall be members of the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers. Appraisal fees shall be shared equally by the Governor's Office of General Services and the seller or sellers.

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2013, ch. 543, § 4; Laws, 2016, ch. 362, oved Apr. 6, 2016.)

Amendment Notes — The 2016 amendment deleted former (c)(iii), which read: "or (iii) expose any secret tending to subject any person to hatred, contempt or ridicule"; added (d) and therein included the definitions that formerly appeared in (g); redesignated former (d) through (r) as (e) through (s); in (h), substituted "maintained through coercion" for "maintained through an actor"; in (m)(ii), substituted "under subparagraph (i) of this paragraph (m)" for "under paragraph (k)(i)"; and made minor stylistic changes.

§ 97-3-54.8. Human Trafficking Act; Relief for Victims of Human Trafficking Fund; funding of expenses of Relief for Victims of Human Trafficking Fund Program; deposit of user charges and fees authorized under this section into State General Fund.

(1) There is hereby created in the State Treasury a special fund to be known as the "Relief for Victims of Human Trafficking Fund." The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) Monies appropriated by the Legislature;

(b) The interest accruing to the fund;

(c) Donations or grant funds received; and

(d) Monies received from such other sources as may be provided by law.

(2) The monies in the Relief for Victims of Human Trafficking Fund shall be used by the Mississippi Attorney General's office solely for the administration of programs designed to assist victims of human trafficking, to conduct training on human trafficking to law enforcement, court personnel, attorneys, and nongovernmental service providers, and to support the duties of the statewide human trafficking coordinator as set forth in this act.

(3) From and after July 1, 2016, the expenses of the Relief for Victims of Human Trafficking Fund program shall be defrayed by appropriation from the State General Fund and all user charges and fees authorized under this section shall be deposited into the State General Fund as authorized by law and as determined by the State Fiscal Officer.

(4) From and after July 1, 2016, no state agency shall charge another state agency a fee, assessment, rent or other charge for services or resources received by authority of this section.

SOURCES: Laws, 2013, ch. 543, § 8; Laws, 2017, 1st Ex Sess, ch. 7, § 41, eff from and after passage (approved June 23, 2017.)

Amendment Notes — The 2017 amendment, effective June 23, 2017, added (3) and (4); and made a minor stylistic change.

§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances; criminal sexual assault protection order.

(1) The crime of statutory rape is committed when:

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(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

(i) Is at least fourteen (14) but under sixteen (16) years of age;

(ii) Is thirty-six (36) or more months younger than the person; and

(iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

(i) Is under the age of fourteen (14) years;

(ii) Is twenty-four (24) or more months younger than the person; and

(iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under subsection (1) (a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars ($5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under subsection (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars ($10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under subsection (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years;

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under subsection (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4)(a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6)(a) Upon conviction under this section, the court may issue a criminal sexual assault protection order prohibiting the offender from any contact with the victim, without regard to the relationship between the victim and offender. The court may include in a criminal sexual assault protection order any relief available under Section 93-21-15. The term of a criminal sexual assault protection order shall be for a time period determined by the court, but all orders shall, at a minimum, remain in effect for a period of two (2) years after the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. Upon issuance of a criminal sexual assault protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance, with no exceptions for weekends or holidays as provided in Section 93-21-25, and a copy must be provided to both the victim and offender.

(b) Criminal sexual assault protection orders shall be issued on the standardized form developed by the Office of the Attorney General.

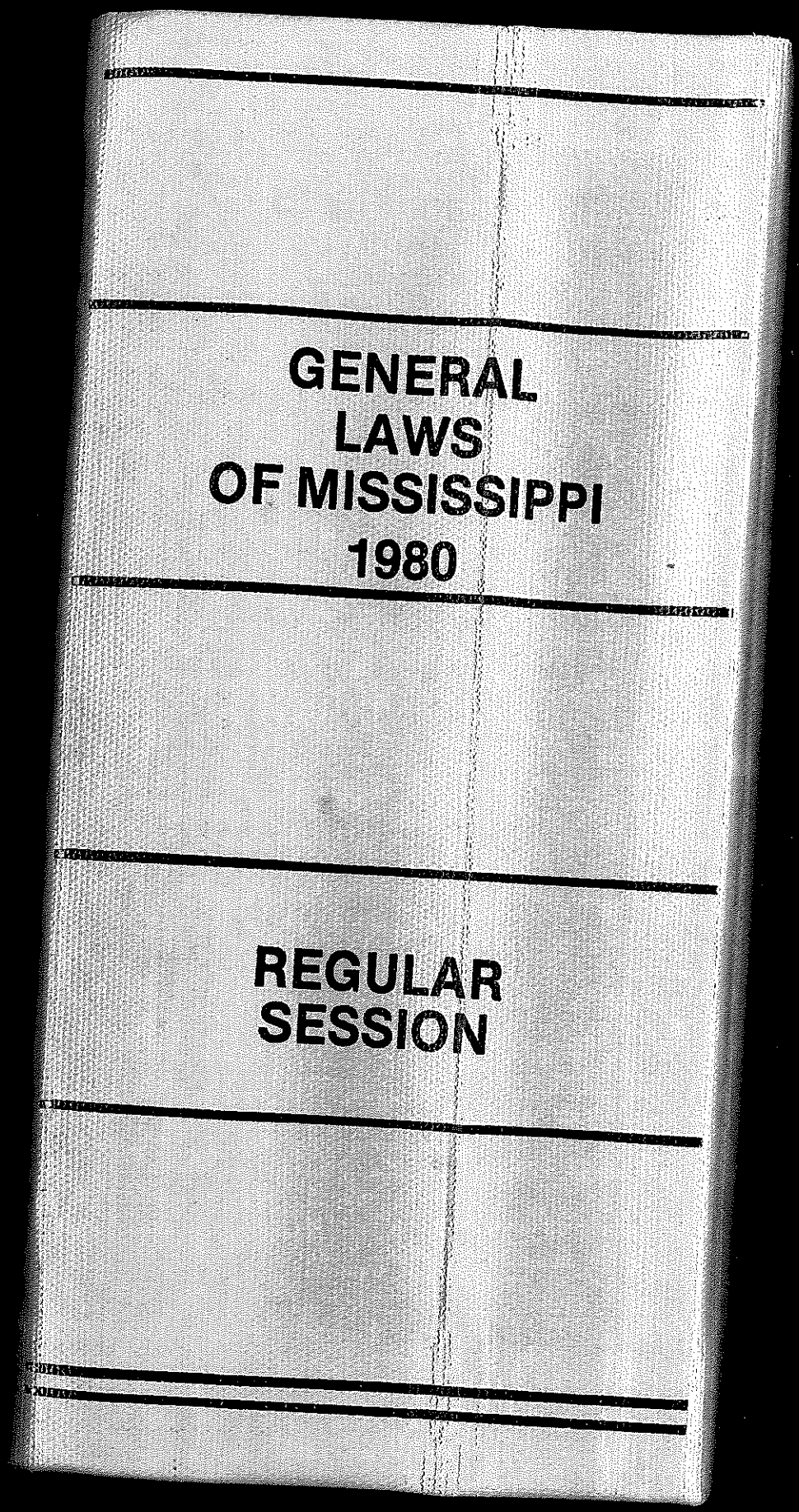
(c) It is a misdemeanor to knowingly violate any condition of a criminal sexual assault protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail for not more than six (6) months, or both. Any sentence imposed for the violation of a criminal sexual assault protection order shall run consecutively to any other sentences imposed on the offender. The court shall also be empowered to extend the criminal sexual assault protection order for a period of one (1) year for each violation. The incarceration of a person at the time of the violation is not a bar to prosecution under this section. Nothing in this subsection shall be construed to prohibit the imposition of any other penalties or disciplinary action otherwise allowed by law or policy.

(7) For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 3 (22); 1857, ch. 64, art. 218; 1871, § 2672; 1880, § 2942; 1892, § 1281; 1906, § 1358; Hemingway's 1917, § 1092; 1930, § 1122; 1942, § 2358; Laws, 1908, ch. 171; Laws, 1974, ch. 576, § 8; Laws, 1977, ch. 458, § 7; Laws, 1985, ch. 389, § 3; Laws, 1993, ch. 497, § 1; Laws, 1998, ch. 549, § 2; Laws, 2007, ch. 335, § 1; Laws, 2017, ch. 414, § 1, eff from and after passage (approved Apr. 6, 2017.)

Amendment Notes — The 2017 amendment, effective April 6, 2017, added (6), and redesignated former (6) as (7).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.



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(n) To service loans and investments for others;

(o) Upon application to and approval by the commissioner, to act as trustee, and to receive reasonable compensation for so acting, of any trust created or organized in the United States and forming part of a plan which qualifies for specific tax treatment under Section 401(d) of the Internal Revenue Code of 1954, including any Keogh or IRA plan, or any trust created or organized in the United States for the purpose of paying burial or cemetery expenses, if the funds of such trust are invested only in savings accounts or deposits in such association or in obligations or securities issued by such association. All funds held in such fiduciary capacity by any such association may be commingled for appropriate purposes of investment, but individual records shall be kept by the fiduciary for each participant and shall show in proper detail all transactions engaged in under the authority of this subsection;

(p) To acquire savings and pay earnings thereon, and to lend and invest its funds as provided in this chapter;

(q) To appoint a registered agent of the association upon whom any process, notice or demand required or permitted by law to be served on the association shall, if such agent is appointed, be served;

(r) To have and possess such of the rights, powers, privileges, immunities, duties and obligations of a federal savings and loan association located in this state as may be prescribed by the board by general regulation under the circumstances and conditions set out therein;

(s) To act as agent for others in any transaction incidental to the operation of the association's business;

(t) To issue, sell or negotiate or advertise for the issuance and sale of debt securities to the extent authorized by the board.

Section 3. This act shall take effect and be in force from and after its passage.

Approved: May 2, 1980

CHAPTER NO. 450

HOUSE BILL NO. 501

AN ACT to define the offense of sexual battery; to provide punishment for such offense; and for related purposes.

Be it enacted by the Legislature of the State of Mississippi:

Section 1. A person is guilty of sexual battery if he or she engages in sexual penetration with:

(a) Another person without his or her consent; or

(b) A mentally defective, mentally incapacitated, or physically helpless person.

Section 2. For purposes of this act the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

(b) A "mentally defective person" is one who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct.

(c) A "mentally incapacitated person" is one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting an act due to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent.

(d) A "physically helpless person" is one who is unconscious or one who for any other reason is physically incapable of communicating an unwillingness to engage in an act.

Section 3. A person is not guilty of any offense under this act if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart.

Section 4. Every person who shall be convicted of sexual battery shall be imprisoned in the State Penitentiary for a period of not more than thirty (30) years; provided, however, that any person convicted of a second or subsequent offense under this act shall be imprisoned in the penitentiary for not less than five (5) years nor more than thirty (30) years.

Section 5. This act shall not be held to repeal, modify or amend any other criminal statute of this state.

Section 6. This act shall take effect and be in force from and after July 1, 1980.

Approved: May 1, 1980