IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-KA-01706-SCT

CHARISE FORD — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF ON THE MERITS BY APPELLANT

Appellant Seeks Oral Argument

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and the judges of the Supreme Court may evaluate possible disqualification or recusal.

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So certified, this the 23rd day of May, 2007.

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I. The Court acted improperly and violated the fundamental rights of equal protection and due process of law secured under both federal and state constitutions to Ms. Ford, a young mother of three with no prior criminal history, when it gave her an excessive sentence of seventeen (17) years;

A. The sentence significantly exceeds other sentences this Court gave to similarly situated defendants during the October 2004 term of court;

B. The sentence significantly exceeds other sentences handed down against similarly situated defendants in two other Mississippi jurisdictions, and

C. The Court abused its discretion, as it failed to make sufficient on-the-record findings to support the severe sentence it handed down against Ms. Ford, particularly when considered with sentences handed down against similarly situated defendants at the same time;

II. The Court erred when it accepted Instruction S-2 and S-3, an incorrect and confusing instruction on self-defense that placed a burden on Ms. Ford not authorized by Mississippi law and in violation of Ms. Ford's fundamental right to a fair trial and due process of law;

III. The Court erred in denying Ms. Ford's request for a jury instruction on the lesser offense of simple assault and further erred in its failure to use the appropriate standard in evaluation of Ms. Ford's request for a jury instruction on simple assault;

IV. The Court abused its discretion in permitting irrelevant, highly prejudicial and inflammatory testimony by Dr. Wafapor

A. The Court erred in denial of the Motion in Limine by Ms. Ford prior to trial to bar testimony by Dr. Wafapoor regarding the extent of injury to Misty Gaddy, as such testimony was irrelevant to whether or not Ms. Ford committed aggravated assault; T. 31-32; RE 21-22

B. Testimony on the extent of Misty Gaddy's injury was completely irrelevant to the charge against Ms. Ford, particularly since it was also testimony admitted in violation of the Court's own pre-trial order(s); T. 219;

C. The Court abused its discretion in permitting the opinion testimony of Dr. Wafapor regarding whether particular objects could have caused injury to Misty Gaddy, not only because it was speculative and outside his area of expertise but also because the State failed to provide the opinion in pre-trial discovery to Ms. Ford; T. 242; 248-249; RE

V. The Court abused its discretion in the admission of photographs of injury to Misty Gaddy in violation of the Mississippi Rules of Evidence and long-standing Mississippi case law;

VI. The Court erred when it permitted admission into evidence of two photographs of hotel doors made more than a year after the incident occurred, thus misrepresenting substantive evidence to the jury;

VII. The Court abused its discretion in denial of Ms. Ford's objections to highly prejudicial closing remarks by the prosecutor, and for improperly sustaining objections by the prosecutor to closing arguments by Ms. Ford, thus prejudicing her case before the jury in violation of her fundamental right to a fair trial, effective assistance of counsel and due process of law, and

VIII. The Court erred in denial of the Motion of Ms. Ford for a New Trial or alternatively, Judgment Non Obstante Verdicto (JNOV), as the verdict of the jury was contrary to law and against the overwhelming weight of the evidence.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Charise Ford was arrested and charged with aggravated assault in connection with the stabbing of Misty Gaddy on July 6, 2003. She was indicted for aggravated assault with a deadly weapon in violation of MISS. CODE ANN. § 97-3-7(2) (1972) by the September 2003 term of the Hinds County Grand Jury in Indictment No. 03-956. CP 4. Ms. Ford proceeded to trial and on Wednesday, September 15, 2004, she was found guilty and sentenced to seventeen (17) years. T. 439; 447; CP 41-43; RE 9-13. After denial of all post-trial motions, she took appeal of her conviction, which has been deflected to this Court. CP 137; 140; RE 14.

B. STATEMENT OF FACTS

Charise Ford was 23 on July 6, 2003. T. 311. She had a job at the Comfort Inn in South Jackson, she was working to complete her high school equivalency requirements, she was busy as a mother to her three young children. T. 454-455; 461-462. She had a fiancé, Purnell Stevenson, with whom she had a steady, seven-year relationship. T. 462. Charise Ford had never even garnered a parking ticket or traffic violation citation, much less any involvement with the criminal justice system. T. 455; 464.

On the morning of July 6, 2003, Ms. Ford was working at her job as breakfast hostess for the Comfort Inn. T. 312. Her position required her to keep the motel breakfast bar fully stocked during the morning hours and to clean the breakfast bar area, including the small front lobby, at its conclusion. T. 312. She was good at her job, so much so that manager Sonny Patel was training Ms. Ford for other work, including work in the laundry room and on the front desk. T. 341.

Misty Gaddy was 17 on July 6, 2003. T. 158. She, too, worked at Comfort Inn at the front desk in the small lobby of the motel. T. 158. Unlike Charise, a petite black woman, Gaddy, who

was white, was also larger. T. 161; 415. While the past relationship of the two women is unclear from the record, Ms. Ford testified that in the past, she had gone to get food and paid for it herself when Gaddy's job duties prevented her from leaving the front desk. T. 328. Whatever their past relationship, however, on the morning of July 6, 2003, it boiled over with tragic consequences for both Ms. Ford and Gaddy.

Upon mopping the front lobby area, Ms. Ford testified she politely asked Gaddy to refrain from walking across the wet floor by taking the back entrance to which Gaddy replied that Ms. Ford should "shut up," that Ms. Ford "was not [Gaddy's] m----- f------g boss." T. 315. Ms. Ford called Gaddy a bitch, telephoned her boyfriend to come get her early hoping to avoid further confrontation with Gaddy then completed her mopping. T. 316; 317. Gaddy, by her own admission, heard Ms. Ford call Stevenson. T. 158;179.

Ms. Ford returned to the kitchen, the entrance to which was near the entrance to the laundry room and bathroom in a narrow hallway right off the front lobby to finish washing pans before Stevenson arrived. T. 316 Then Ms. Ford heard rather than saw Gaddy at the kitchen door, saying something to the effect that Gaddy "was fixing to go crazy on somebody's ass." T. 315. Ms. Ford was going to the kitchen door to watch for Stevenson's arrival, watching through the motel's glass exterior doors for Stevenson. T. 319. Gaddy blocked the door, so Ms. Ford returned to cleaning up. When Ms. Ford again approached the kitchen door to check for Stevenson, she testified that Gaddy screamed "Get out of my face" then grabbed Ms. Ford by the neck, choking and kicking. T. 319-320. Unable to free herself, Ms. Ford groped in her uniform pocket, found the steak knife she carried about to perform her work and stabbed once to free herself from Gaddy. T. 321-322. Ms. Ford testified she did not know where she stabbed Gaddy, but after standing still in shock for a moment, she threw the knife in a kitchen cabinet and left. T.

T. 322. She remained home all day, but went to the police station the following day when Det. Denson telephoned where she was arrested after giving her statement. T. 323.

Gaddy's testimony was predictably different. Gaddy admitted the verbal altercation earlier in the day, admitted she overhead Ms. Ford telephone someone for a ride home and admitted she did not have to go to the laundry room to seek her boss, as she had his cellular telephone number. T. 159; 160; Gaddy also acknowledged that she could have easily ignored Ms. Ford and returned to her work at the front desk, rather than standing the door to the laundry room, which was apparently adjacent to the kitchen door, giving out onto the lobby and front desk area. T. 185; 186; 189

Gaddy testified on direct examination that Ms. Ford came to the door of the kitchen as Gaddy stood in the dooway of the laundry room, talking to Willie O'Quinn. T. 160. Gaddy testified that Ms. Ford asked her "do you want to kick somebody's ass?" and that Gaddy then saw the knife and a physical altercation ensued in which Gaddy kicked and pushed until Ms. Ford stabbed her in the eye "that last time I kicked her." T. 161.

Willie O'Quinn, however, testified she never saw Gaddy come into the laundry room; that all she heard was "noise," but no distinguishable words. T. 206. At the noise, O'Quinn entered the lobby area from the laundry and saw Gaddy had been cut and Ms. Ford standing close to her with a knife in her hand. T. 207. O'Quinn said Ms. Ford threw the knife in a cabinet and ran out through the lobby to a waiting car. T. 207. And, O'Quinn testified on re-direct that from where she usually works in the laundry room, one can see the lobby and the front door. T. 213.

SUMMARY OF THE ARGUMENT

The sentence the trial court handed down against Ms. Ford upon conviction was excessive under both state and federal constitutions, as well as a denial of due process and equal protection of law under the 14th Amendment to the Constitution, because the trial court rejected her request for a pre-sentence investigation and sentenced her to seventeen (17) years. Ms. Ford, a 22-year-old black woman and mother of three, had never even had a parking ticket. T. 455. Ms. Ford contends her sentence is excessive when compared to sentences to other felons during the same term of court by the same judge for some arguably more egregious circumstances. Her sentence is also disproportional when compared with sentences in other jurisdictions. CP 55-136.

The trial court erred in the granting of instructions on self-defense prepared by the state, holding Ms. Ford to the same self-defense standard as one facing a charge of murder. Ms. Ford contends this is a denial of due process, as well as a structural error in the operation of the trial itself, requiring reversal and remand.

In addition, Ms. Ford claims serious prejudice from the erroneous admission into evidence of photographs of the motel exterior made the day before trial and purporting to show the jury what the doors looked like on the day of the incident, which occurred about mid-morning. The reason this is important is because Ms. Ford claimed she kept returning to the kitchen door not to confront Gaddy but to watch for her ride home, a fact somewhat corroborated by O'Quinn's testimony that she could see the lobby and front door from her work station in the laundry room. The photographs essentially presented a false picture to the jury of how the doors looked that morning, and prejudiced Ms. Ford's fundamental right to mount a defense in her own behalf.

ARGUMENT

I. The Court violated the fundamental rights of equal protection and due process of law secured under both federal and state constitutions to Ms. Ford, a young mother of three with no prior criminal history, when it gave her an excessive sentence of seventeen (17) years;

A. The sentence significantly exceeds other sentences this Court gave to similarly situated defendants during the October 2004 term of court;

B. The sentence significantly exceeds other sentences handed down against similarly situated defendants in two other Mississippi jurisdictions, and

C. The Court abused its discretion, as it failed to make sufficient on-the-record findings to support the severe sentence it handed down against Ms. Ford, particularly when considered with sentences handed down against similarly situated defendants at the same time;

"As a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal." *Towner v. State*, 837 So.2d 221, 227 (Miss.Ct.App. 2003). Nevertheless, this Court has not hesitated to remand when the trial court imposed a disproportionate sentence, as Ms. Ford contends is the case here. Towner received thirty (30) years for cocaine sale as a first offender, without any additional findings in the record to justify such a harsh sentence. *Id.* "A court's proportionality analysis [of a sentence] under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id., at 227, citing Solem v. Helm,* 463 U.S. 277, 291 103 S.Ct. 3001, (1983) (writ of habeas corpus).

Following the *Solem* analysis as did the *Towner* Court, no one will attempt to denigrate the offense of aggravated assault or what Ms. Gaddy endures. The offense, however, though grave, still failed to merit the sentence the trial court meted out, particularly when compared with

the sentences received by others charged with aggravated assault during the October 2004 term of court in the 7th Circuit District. Ms. Ford demonstrated as much in her *Amended and Supplemental Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial*, which also contains certified sentencing orders from the cases cited in request for a new trial. CP 55-135.

In particular, Ms. Ford would call the attention of the Court to the incorporated sentencing hearing transcript for Cedric Stewart, who entered an open plea of guilty to aggravated assault in the ambush shooting of Calvin Buchanan. CP 66-95. Stewart, who was represented by privately retained counsel, armed himself with a nine millimeter handgun, lay in wait with his brother Ray Stewart to ambush Calvin Buchanan. Cedric Stewart fired at Buchanan in the buttocks with a shot that exited through his penis. CP 81. Buchanan's injury is irreparable. Stewart fired his weapon in a neighborhood street crowded with people, including children. CP 88. Buchanan was unarmed. CP 88.

Although the trial court refused to order a sentencing hearing for Ms. Ford, despite requests to do so by defense counsel (T. 446), the court apparently *sua sponte* ordered a pre-sentence investigation report for Stewart, after which Cedric Stewart received a sentence of fourteen (14) years, and his brother sixteen (16) years. CP 56. In *Stapleton v. State*, 790 So.2d 897 (Miss. Ct.App. 2001), the Court of Appeals reversed Derrick Stapleton's thirty (30) year sentence for participation in a drive-by shooting that left a Jackson police officer seriously wounded, in part due to the trial court's refusal to accede to the request for the pre-sentencing report. *Id.*, at 902. "Because of the lack of a presentencing report, we are unaware if there might be matters in the defendant's background that suggested the imposition of the maximum sentence." *Id.* The Court of Appeals cited this Court's decision in *Davis v. State*, 724 So.2d 342, 344 (Miss. 1998) for its authority in ordering remand for sentencing when the maximum was

imposed without a pre-sentence report. The maximum sentence was not imposed in this case; nevertheless, it was far greater than some sentences handed down by this same Court for circumstances just as egregious if not more so.

Mississippi courts still resort to the three-pronged analysis when the issue of excessive sentences arises. *Towner, supra*. Once a showing of gross disproportionality been shown between the gravity of the offense and the sentence, the analysis proceeds to the second and third prongs: Comparison of the penalty with sentence(s) imposed on other criminals in the *same* jurisdiction and sentences for same or similar crime in *other* jurisdictions. *Towner, supra*, at 227; *Solem, supra,* at 291. Ms. Ford addressed this issue in her *Amended and Supplemental Motion for Judgment Notwithstanding the Verdict or, in the alternative, a New Trial* (CP 56; 58).

[include charts here]

Defendant	**Cause No.**	**Sentence**	**To Serve**
Blocker, Judge Jr.	04-0-010	5 yrs	**0**
Brown, Frederick L.	04-0-812	7 yrs	**7 yrs**
Chambers, Ronnie	03-0-953	10 yrs	**3 yrs**
Chapman, Patricia	04-0-049	5 yrs	**1**
Collins, Terry Kavara*	04-0-031-01	10 yrs	**10**
Davis, Ricky T.	04-0-054-01	8 yrs	**3 yrs**
FORD, CHARISE	**03-0-956**	**17 yrs**	**17 yrs**
Garrett, Justin	03-0-012	10 yrs	**10 yrs**
Hemphill, Freddie Lee III*	03-0-444-01; 02; 03	20	**20 yrs**
Johnson, Mario	04-0-822	20 yrs	**8 yrs**
Kelly, Reddrick	04-0-131	15 yrs	**5 yrs**
Ledbetter, Mario	04-0-258	7 yrs	**3 yrs**
Lewis, Larry Joe Jr.	04-0-260	20 yrs	**10 yrs**
Liddell, David L.	03-0-345	6 yrs	**6 yrs**
Lindsey, Phillip	03-0-331	8 yrs	**4 yrs**
McCoy, Jamie	03-0-963	15 yrs	**5 yrs**
Moak, Gary Shane	03-0-595	15 yrs	**5 yrs**
Shields, Belinda	03-0-792	15 yrs	**5 yrs**
Simms, Robert D.	04-0-266	15 yrs	**0**
Stewart, Cedric	03-0-257	14 yrs	**14 yrs**
Stewart, Ray	03-0-258	16 yrs	**16 yrs**
Turnage, Charles	03-0-455	10 yrs	**10 yrs**
Wilson, Oscar	04-0-271-01/02	15 yrs	**8 yrs**
Wilson, Quincy*	04-0-369-03	Remand	**N/A**
Young, Jerry	04-0-272-01	15 yrs	**5 yrs**

- **Freddie Hemphill III** also pleaded guilty in 04-0-846-03 to shooting in an occupied dwelling in violation of Miss. Code Ann. § 97-25-47 (1972). His twenty-year sentence runs concurrent to the sentence for aggravated assault.
- **Terry Kavara Collins** pleaded guilty to aggravated assault with a gun and armed robbery. Collins received three (3) years for the armed robbery to be served concurrently with his aggravated assault sentence in Ct. 1.
- **Quincy Wilson** pleaded guilty to one count of Armed Robbery (04-0-369-03); Count 01 of aggravated assault with a gun was remanded to files in exchange for his plea of guilty to the charge of Armed Robbery in Count 03, along with charges of convicted felon in possession of a firearm and receipt of stolen goods.

County	Name	Docket No.	Sentence	To Serve
Washington				
	Emmett Lee Wright (Revocation)	01-452	3 yrs	3 yrs
	Kenneth Brown	03-228	10 yrs	1 yr
	Clarence Pettis III	04-138	7 yrs	2 yrs
	Kelvin Lamar Sanders	04-170	20 yrs	20 yrs
	Kenny Charles Dillard	04-191	10 yrs	5 yrs
	Kenneth Louis Harper	04-211	10 yrs	5 yrs
Harrison				
	Jeffrey Penman (initial) (Revocation)	95-474	10 yrs 10 yrs	5 yrs 7 yrs
	Anthony Charles Bosarge Jr. (initial	98-297	8 yrs 5 yrs	3 yrs 5 yrs
	Vincent Lee Kittrell * (Revocation)	97-427	7 yrs	7 yrs
	Joshua James Jerde (initial) (Revocation)	01-166	7 yrs 7 yrs	0 time 7 yrs
	Joseph D'Von Rayborn (initial) (Revocation) (Revocation)	01-928	5 yrs 5 yrs 5 yrs	5 yrs 1 yr/1 mo 5 yrs

* No information available on the initial sentence of Mr. Kittrell.

During the same term of court, Terry Kavara Collins pleaded guilty to armed robbery and aggravated assault with a gun; he received only a sentence of ten (10) years on the aggravated assault charge, to be served *concurrently* with his sentence for armed robbery. CP 98. And Robert D. Simms, sentenced to fifteen (15) years for aggravated assault with a gun, netted zero time to serve behind bars from the same judge who presided over the trial of Ms. Ford. CP 124. From other jurisdictions (Washington and Harrison counties) within the state of Mississippi, only one defendant, Kelvin Lamar Sanders, received the maximum sentence of twenty (20) years allowed under MISS. CODE ANN. § 97-3-7(2) (1972). T. 480. The Hon. William R. LaBarre, Hinds County Public Defender, represented Kelvin Sanders while serving as public defender for

Washington County and LaBarre referred to the prior criminal history of Mr. Sanders, who was also charged with armed robbery. T. 480.

In contrast, Ms. Ford was 22 at the time of the incident. She had no prior criminal record whatsoever. T. 455. Furthermore, her asserted defense was self-defense. Ms. Ford stabbed only once, although she certainly had the opportunity to do more. T. 320. She left her workplace as soon as the incident occurred, but telephoned and spoke with police shortly after her departure. T.322 Ms. Ford willingly went to the police station to speak with Det. Denson on July 7 as soon as Denson called her. T. 323.

This record demonstrates that Ms. Ford was the victim of "invidious discrimination" in violation of her right to equal protection under the 14th Amendment to the U. S. Constitution. The United States Supreme Court has reversed cases on equal protection grounds due to discrimination among similarly situated classes, as in *Rinaldi v. Yeager*, 384 U.S.2d 305 (1966). In *Rinaldi*, the Court struck down a statute that required only those sentenced to prison to reimburse the state for the cost of providing a court-appointed attorney as invidious discrimination. *Id.* In this case, the trial judge improperly sentenced Ms. Ford in comparison with other criminal defendants similarly situated in violation of her federal constitutional right to equal protection under law, as amply demonstrated herein and by the trial record.

It was also an abuse of sentencing discretion and a violation of the constitutional right of Ms. Ford to due process of law under the Sixth and Fourteenth amendments as the trial court summarily sentenced her in the absence of specific findings of egregiousness, under an evolving line of cases beginning with *Apprendi v. New Jersey,* 530 U.S. 466 (2000) in which the United States Supreme Court held that every fact used in sentence enhancement must be proved beyond a reasonable doubt to a *jury*. Under MISS. CODE ANN. § 97-3-7 (1972), the trial court could have given as little as one year or up to twenty (20) years. Ms. Ford submits that the trial court *sua*

sponte made particularized findings of egregiousness in violation of *Blakely v. Washington* [cite]. Most recently, in *Cunningham v. California*, --- U.S. ----; 127 S.Ct. 856 (Jan. 27, 2007), the United States Supreme Court struck down California's determinate sentencing law, which vested sentencing discretion upon the trial judge, not the jury, upon a judicial fact finding of certain aggravating circumstances. Cunningham was convicted of "continuous sexual abuse of one under fourteen (14) years" under a jury finding that permitted a sentence of six years. Nevertheless, the trial court in a separate hearing without the benefit of the jury found the existence of certain aggravating circumstances, the finding of which obligated the trial judge to sentence Cunningham to sixteen (16) years. *Id.*, --- U.S. ---, at ---; 127 S.Ct. at 860-861. In this case, although vested with a range of one (1) year to twenty (20) years, the court essentially acted on its own, referencing the horrific nature of the crime as one of the worst over which he had presided. T. 447. Nevertheless, Ms. Ford would submit that permanent mutilation of one's genitalia after being ambushed on a public street – in the presence of children and other individuals - is just as egregious if not more so. See *Sentencing hearing for Cedric Stewart*, CP 66-96

Finally, Ms. Ford would argue that her sentence, admittedly not the maximum, is a violation of ART. III, § 28 MISS.CONST. against "cruel or unusual punishment." Unlike the 8th Amendment ban on cruel *and* unusual punishment, which is conjunctive, Mississippi's restriction is written in the *disjunctive*. Given the circumstances of this case, the absence of any previous criminal behavior, and the disproportional sentence she received when considered with others similarly situated, there is no question that the seventeen (17) year sentence Ms. Ford received is cruel.

Therefore, the trial court violated the substantial rights of Ms. Ford to equal protection and due process of law under the U.S. Constitution, suffering the prejudice of an unjust sentence,

necessitating vacation of her conviction and remand for a new trial consistent with fundamental constitutional guarantees.

II. The Court erred when it accepted Instruction S-2 and S-3, an incorrect and confusing instruction on self-defense that placed a burden on Ms. Ford not authorized by Mississippi law and in violation of Ms. Ford's fundamental right to a fair trial and due process of law;

The charge against Ms. Ford was aggravated assault in violation of Miss. Code Ann. § 97-3-7(2) (1972), not murder. The problem with Instruction S-2 and S-3 is use of the phrase "to kill," in violation of established Mississippi case law. In *Simmons v. State*, 568 So.2d 1192 (Miss. 1990) and relied upon by Ms. Ford at trial, the state Supreme Court approved language absent the requirement "to kill." Ms. Ford contends that such an instruction places an unauthorized burden to prove self-defense against a murder charge. RE 19-20; 28-30; 31-34; CP 36-37; T. 352-353; 367; 382-384; 397.

The disputed instructions read:

> **Instruction S-2.** The Court instructs the Jury that to make an assault justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim *to kill* her to do her some great bodily harm, and in addition to this she must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts. CP 36 [emphasis added]

> **Instruction S-3.** The Court instructs the Jury that a person may not use more force than reasonably appears necessary *to save her life* or protect herself from great bodily harm. The question of whether she was justified in using the weapon is for determination for the jury.[sic]
>
> The law tolerates no justification and accepts no excuse for an assault with a deadly weapon on the pleas of self-defense except that the assault by the defendant on the victim was necessary or apparently *so to protect the defendant's own life* or her person

> from great bodily injury and there was immediate danger of such design being accomplished. The danger *to life* or of great personal jury must be or reasonably appears to be imminent and present at the time the defendant commits the assault with a deadly weapon. The term "apparent" as used in "apparent danger" means such overt, actual demonstration by conduct and acts of a design to take life or do some great personal injury as would make the assault apparently necessary to self-preservation. CP 37 [emphasis added]

Nevertheless, this trial court repeatedly uses the same or similar self-defense instruction, essentially requiring the accused to prove a murderous intent on the part of the complainant before asserting the defense of self-defense. The prosecutor in this case essentially makes the case for Ms. Ford, arguing that *Montana v. State*, 822 So.2d 954, 958-959 (Miss. 2002) is the law on self-defense in Mississippi. There are several fallacies with the argument as applied in this case, first and foremost being the fact that *Montana* is a murder case. Second, the prosecutor consistently fails to read *all* of Montana, which quotes with approval several instructions sought by Montana and given by the trial court regarding evaluation of self defense. ... Considering the five self-defense instructions together, we find that the jury was properly instructed." [emphasis added] *Montana*, 822 So.2d 954, 960. Therefore, even assuming the state's insistence on "to kill" language, regardless of whether murder to aggravated assault is the issue, the trial judge in this instance issued far less than the five self-defense instructions submitted by Montana and noted with approval by this Court. None of the instructions sought by Ms. Ford on self-defense, copied from instructions approved by this Court in *Simmons, supra*, were given. T.394. Indeed, this Court in *Fleming v. State*, 604 So.2d 280 (Miss. 1992), an aggravated assault case, held the trial court properly denied the defendant's proffered jury instruction "[t]he Court instructs the jury that serious bodily injury means injuries involving great risk of death."

Our constitutional scheme of criminal justice also views as anathema anything that can be construed as a mandatory or peremptory instruction, creating an unauthorized burden of proof

upon the accused or cutting off a clear right of the accused. For instance, this Court in *Reddix v. State*, 731 So.2d 591 (Miss. 1999) reversed and remanded an aggravated assault conviction for failure to notify the jury of its duty to acquit upon finding the accused acted in self-defense. *Id.*, at 594-595. *Reddix* also criticizes the submitted instruction as lopsidedly written in favor of the prosecution. Ms. Ford contends that at the very least, Instruction S-3 is tailored more to the case of the prosecution. Rejection of her proffered instructions in favor of those submitted by prosecutors severely hampered her ability to put her theory of self-defense before the jury. T. 353-353; 382-384; 397; RE 28-34.

Furthermore, Instruction S-3 is written in a confusing manner regarding what the jury must find. This Court has repeatedly held, as it did in *Berry v. State*, 728 So.2d 568 (Miss. 1999) that the giving of confusing jury instructions is plain error affecting substantial rights. No argument is made here for application of the plain error rule, as counsel for Ms. Ford vehemently objected to the use of Instructions S-2 and S-3. T. 382-383; RE 31; 32.

The instructions as given denied Ms. Ford her fundamental right to a properly instructed jury, a structural error in the mechanism of the trial itself and thus incapable of harmless error analysis. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Therefore, her case requires vacation of sentence, reversal and remand for a new trial held in accord with generally accepted constitutional principles.

III. The Court erred in denying Ms. Ford's request for a jury instruction on the lesser offense of simple assault and further erred in its failure to use the appropriate standard in evaluation of Ms. Ford's request for a jury instruction on simple assault;

The failure to use the long-established standard for evaluation of jury instructions submitted by a criminal defendant is a continuing problem in the 7th Circuit District. Ms. Ford contends the trial judge erred in rejecting her request for a less offense instruction on simple

assault. The trial court compounded the error by is failure to use the appropriate legal standard in evaluating the request. T. 352-353; 367; RE 28

Defendants are entitled to have the jury instructed on theories which present his or her theory of defense, "certainly so where the defense is self-defense." *Anderson*, 571 So.2d 961, at 964 (Miss. 1990). The record must contain an evidentiary basis for the requested instruction and may be denied only when "taking the evidence in the light *most favorable to the accused*, and *considering all reasonable inferences* that may be drawn from the evidence *in favor of the accused*, that no hypothetical reasonable jury could find the fact as the accused suggests." *Id.* "[emphasis added] [When] there is serious doubt as to whether a requested instruction should be given, doubt should ordinarily be resolved in favor of the accused." *Wadford v. State*, 385 So.2d 951, 955 (Miss. 1980) (Reversible error in aggravated assault case to deny jury instruction on self-defense). Finally, trial courts should also consider the sentencing disparity between the lesser offense and the charged offense."Where [sic] the defendant requests a lesser-included offense instruction, one factor to be considered is the disparity in maximum punishments between the offenses. A great disparity is a factor in favor of giving the lesser included offense instruction." *Taylor v. State,* 577 So.2d 381 (Miss. 1991) quoting *Boyd v. State*, 557 So.2d 1178, 1181 (Miss. 1989).

An adequate evidentiary basis existed in this record for the giving of a simple assault instruction. Ms. Ford testified that she did not intend to stab Gaddy in the eye, that she was attempting to pull Gaddy, who was choking and kicking Ms. Ford, away from her and groped in her uniform pocket for something to prod Gaddy into letting Ms. Ford free. T. 320Her fingers found the knife she carried as part of her duties as breakfast bar hostess and she used it once, trying to free herself from the larger Gaddy's grasp. As such, her offense qualifies as simple assault under Miss. Code Ann. § 97-3-7(1). Based on Ms. Ford's testimony she did not willfully

or intentionally cause injury to Gaddy, providing sufficient basis for the granting of Instruction D-7 on simple assault. T. 367; RE 30. Instead of a maximum six months incarceration and $500 fine, Ms. Ford is now serving a sentence of seventeen (17) years, a disparity of tremendous significance.

IV. The Court abused its discretion in permitting the irrelevant, highly prejudicial and inflammatory testimony by Dr. Wafapoor

A. The Court erred in denial of the Motion in Limine by Ms. Ford prior to trial to bar testimony by Dr. Wafapoor regarding the extent of injury to Misty Gaddy, as such testimony was irrelevant to whether or not Ms. Ford committed aggravated assault; T. 31-32; RE

B. Testimony on the extent of Misty Gaddy's injury was completely irrelevant to the charge against Ms. Ford, particularly since it was also testimony admitted in violation of the Court's own pre-trial order(s); T. 219;

C. The Court abused its discretion in permitting the opinion testimony of Dr. Wafapoor regarding whether particular objects could have caused injury to Misty Gaddy, not only because it was speculative and outside his area of expertise but also because the State failed to provide the opinion in pre-trial discovery to Ms. Ford, and T. 243; 249

What a jury hears and considers in the evaluation of evidence is controlled not only by the relevance requirements of the Mississippi Rules of Evidence, but statutes and the rights of the parties including, in the case at bar, the defendant, Ms. Charise Ford. Under MISS. CODE ANN. § 97-3-7 (1972), the prosecution had only to prove the fact of injury, which they did with the testimony of Misty Gaddy. T. 161. The prosecutor, however, did not stop there.

A. **The Court erred in denial of the Motion in Limine by Ms. Ford prior to trial to bar testimony by Dr. Wafapoor regarding the extent of injury to Misty Gaddy, as such testimony was irrelevant to whether or not Ms. Ford committed aggravated assault; T. 31-32; RE 21-22**

B. **Testimony on the extent of Misty Gaddy's injury was completely irrelevant to the charge against Ms. Ford, particularly since it was also testimony admitted in violation of the Court's own pre-trial order(s); T. 219; RE 24**

In *Jackson v. State*, 594 So.2d 20, 24 (Miss. 1992), the Court held that on an indictment under MISS. CODE ANN. § 97-3-7(2) it was not "necessary under this section for the State to prove the victim suffered "serious" bodily injury. Mere "bodily injury" is sufficient so long as it was caused with "other means likely to produce death or serous bodily harm." *Id.* In *Russell v. State*, 924 So.2d 604, ¶ 6, (Miss.Ct.App. 2004), the Court of Appeals held "that a defendant can be found guilty of aggravated assault if, with the aid of a deadly weapon, he attempts to cause or purposely or knowingly causes *any degree* of "bodily injury."

Considering this requirement with the rules of evidence on relevance (Miss.R.Evid 401; 402; 403), Ms. Ford respectfully submits that the trial court's denial of her *Motion in Limine* (CP 21) was an abuse of discretion affecting her substantial right to an impartial and fair trial free of prejudicial and inflammatory material that had absolutely no bearing on whether or not she committed an aggravated assault on Misty Gaddy on the morning of July 6, 2003. T. 31-32; 219 RE 21-22.Furthermore, the trial court failed to abide by its own pre-trial ruling to restrict Dr. Hussein Wafapoor from discussion of rehabilitation for Gaddy after her injury. T. 32; 256-261. RE

In *Carpenter v. State*, 910 So.2d 528 (Miss. 2005), this Court held it was an abuse of discretion for this trial judge to grant a pre-trial *Motion in Limine* regarding an identification made to police in violation of the safeguards in *Miranda v. Arizona*, then at trial permit a law

enforcement officer to testify about the very same, highly prejudicial identification. *Carpenter*, at ¶¶22-24. While this assignment of error does not involve a *Miranda* violation, Ms. Ford respectfully contends that it involves a serious abuse of discretion that prejudices her right to a fair trial free of inflammatory and prejudicial information regarding minute detail about the Gaddy's injury, all in violation of existing Mississippi case law.

C. The Court abused its discretion in permitting the opinion testimony of Dr. Wafapoor regarding whether particular objects could have caused injury to Misty Gaddy, not only because it was speculative and outside his area of expertise but also because the State failed to provide the opinion in pre-trial discovery to Ms. Ford, and T. 243; 249;

Ms. Ford respectfully contends questions by the prosecutor to Dr. Wafapoor as to the instrument which could have inflicted the injury runs afoul of MISS.R.EVID. 401, 402 and 403 as analyzed in *Foster v. State,* 508 So.2d 1111, 1117-1118 (Miss. 1987) overruled on other grounds by *Powell v. State*, 806 So.2d 1069 (Miss. 2001). T. 242; 248-249; T. 253. RE .

In *Foster*, this Court reversed Foster's conviction based in part on the admission of ultimately marginally relevant testimony by a physician that a knife *could have* caused the lethal wounds. *Id.* 1118. "In the view of the majority, the use of that language, which connoted only a possibility, minimized the evidence's probative value and maximized its tendency to mislead the jury. The latter so outweighed the former that the admission of this testimony constituted an abuse of discretion." *Id.*

As recently as May 4, in the case *Tyler Edmonds v. State*, 2004-CT-02081-SCT (May 4, 2007), this Court held that testimony by a forensic pathologist that lethal wounds consistent with two persons having pulled the trigger was sufficient to reverse the conviction due to prejudice to the substantial fair trial right of Tyler, 13 at the time of the murder of his brother-in-law, Joey Fulgham. "Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. ...

Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness." *Edmonds, at ¶9.*

Furthermore, it was a violation of Uniform Rule of Circuit and County Court Practice 9.04 to fail to disclose the use of such opinion testimony before trial. Ms. Ford contends the opinion testimony by Dr. Wafapoor was prejudicial to her cause, particularly when considered with the lengthy questions the prosecutor went through to establish the severity of Gaddy's injury which was Ms. Ford acknowledges was very serious with permanent consequences.

V. The Court abused its discretion in the admission of photographs of injury to Misty Gaddy in violation of the Mississippi Rules of Evidence and long-standing Mississippi case law; T. 170; RE 23

Much of the authority cited in Issue IV applies to this assignment of error, for there was no necessity to prove "serious" injury. See *Russell* and *Jackson, supra.* Without this requirement the evidence because irrelevant under MISS.R.EVID. 402, which forbids the use of irrelevant evidence. Gaddy had already testified about sustaining the injury. T. 161. Therefore, the only possible reason prosecutors could seek to introduce the photographs would be to inflame and prejudice the jury against Ms. Ford.

VI. The Court erred when it permitted admission into evidence of two photographs of hotel doors made more than year after two years after the incident occurred, thus misrepresenting substantive evidence to the jury; T. 281; 300; RE 26;27

The trial court abused its discretion in permitting into evidence two photographs of the motel's exterior doors allegedly to demonstrate that one could not view through the clear glass motel front doors from the doorway into the kitchen where this incident occurred. T.281; 30 RE 26;27. Exh. 8; 9. Prosecutors failed to lay the appropriate foundation under Miss.R.Evid. 401-403 that the photographs were what was purported to be. As a result, the trial court's abuse of discretion permitted the admission into evidence of misleading photographs essentially destroyed the ability of Ms. Ford to present her theory of defense to the jury. Thus it was a

ruling on evidence affecting her substantial, as well as her and fundamental right, to mount a defense. T. 281; 30; RE 26; 27.

Ms. Ford advanced at trial a defense of self-defense. Ms. Ford said she kept coming to the kitchen door to check for the arrival of her ride, for she wanted to avoid further conflict with Gaddy. T.316. When Gaddy left her duty station at the lobby's front desk and entered the area in which the kitchen, laundry and bathroom doors converged on a small hallway leading to the lobby, Ms. Ford testified she came doorway to check for her ride, not to entice Gaddy into physical conflict.

Det. Denson testified, however, that he visited the scene at mid-day and that he could not see to or through the motel doors from the kitchen doorway due to glare and window tint. T. 278. To substantiate his point, prosecutors introduced through Denson's testimony two photographs of the exterior doors purporting to confirm his testimony. T. 279. RE 26; 27 ; Exhibits 8; 9. Under cross-examination, Denson admitted that he did not take the photographs nor could he say who did take them or when or what time of day. T. 283. Denson also admitted he had never seen the photographs before the morning of trial in mid-September 2004, more than year after the incident occurred about 9:30 am in July. T. 283. It developed that one of the prosecutors took the photographs about 5 p.m. the evening before trial. T. 293; 298. Counsel for Ms. Ford objected vehemently to admission of the photographs for they were not taken at or near the same time of day as the incident occurred nor even near the same time of year, and as such was essentially false information for the jury – and crucial to Ms. Ford's defense that she did not seek to engage Gaddy in a physical confrontation. Furthermore, Willie O'Quinn testified on re-direct that from where she worked in the laundry room, one could see the lobby and the motel front doors. T. 213.

Ms. Ford contends the photographs were irrelevant because they were not taken at or near the same time of day or year as the incident occurred and thus could not depict how the scene looked at the time of the subject events. Under the balancing required under Miss.R.Evid. 403, the evidence was far more prejudicial than probative because the photographs were not what they purported to be, only what the detective said he say at a different time of day.

The principle of *Miller v Pate*, 386 U.S. 1, 87 S.Ct. 785 (1967) is illuminating here. In *Miller*, the prosecutor referred repeatedly to bloody shorts when the prosecutor in fact knew that the substance was paint. The shorts were vital evidence in a brutal sexual attack on an 8-year-old girl, but the U.S. Supreme Court held that the Fourteenth Amendment will not permit convictions secured through false testimony. Ms. Ford respectfully submits that the admission of the photographs (Exh. 8 & 9) did not accurately depict the view from inside the motel because they were not taken at the same time of day or year as when the incident occurred and thus were highly prejudicial against her in efforts to present a defense.

VII. The Court abused its discretion in denial of Ms. Ford's objections to highly prejudicial closing remarks by the prosecutor, and for improperly sustaining objections by the prosecutor to closing arguments by Ms. Ford, thus prejudicing her case before the jury in violation of her fundamental right to a fair trial, effective assistance of counsel and due process of law, and

Once again, counsel regretfully brings the error of improper closing remarks by these prosecutors before the Court. Furthermore, in this it appears the prosecutors were aided by the trial court, who sustained virtually every objection made by prosecutors during defense counsel's closing and overruled virtually every defense objection made on the same point. T. 422-427; 432-435. RE 36; 37; 38; 39.

During closing remarks by Mr. Fortner on behalf of Ms. Ford, the prosecution objected on the basis that his arguments were outside the evidence. T. 422-423 (state objection as to what

prosecutors expected to show with testimony by witness Willie O'Quinn; sustained) T. 424 (state objection to possible job loss by Ms. Ford for leaving work early that day; sustained) T. 425-426 (state objection to Ms. Ford's argument that one defends self when set upon; sustained). Yet when defense counsel, Mr. Fortner, objected to improper argument by Ms. Wooten Mansell, his objections were overruled. T. 427; RE 36 (Prosecutor's reference to defense counsel's dissection of state's opening argument; overruled); T. 431-432; RE 37 (Defense objection to state's discussion of retreat, which was not a fact in issue or evidence; overruled); T. 432-433; RE 38 (Defense objection to state's argument that one may not respond with a knife if kicked as invasive of jury determination and mis-statement of law; overruled); T. 433; RE 38 (Defense objection to mis-statement of law in jury instruction; overruled); T. 434 (Defense objection to prosecutor's improper reference to flight, not in issue or evidence "[L]et me tell you what guilty people do. Guilty people flee the scene –"; only partially sustained). In *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*Flowers II)*, the capital murder conviction of Curtis Giovanni Flowers was reversed in part for an attempted impeachment by facts not in evidence, facts the state *knew* were not in evidence. When "incompetent" and "inflammatory" statements are heard by the jury, prejudice to the defendant will be presumed." *Horne v. State*, 487 So.2d 213, 215 (Miss. 1986). Although the conviction in *Horne* was reversed and remanded on other grounds, the Court went on to reiterate that reversal will be had unless it can be shown that the inflammatory material had no harmful effect on the jury. *Id.* Ms. Ford submits the same cannot be said here, for in *Horne*, the trial court sharply rebuked the prosecutor for improper remarks and admonished the jury, *sua sponte*, doing all that was possible to avoid a harmful effect. Such is not the case here, where the prosecutor was essentially aided by the trial court, showing a dangerously biased position, a fundamental deprivation of Ms. Ford fair trial right to an unbiased judge.

Due to the prosecutorial misconduct during closing by the state, Ms. Ford respectfully requests reversal of her conviction, as it cannot be said that improper remarks, sanctioned as they were by the trial court, had no harmful effect on the jury.

VIII. The Court erred in denial of the Motion of Ms. Ford for a New Trial or alternatively, *Judgment Non Obstante Verdicto* (JNOV), as the verdict of the jury was contrary to law and against the overwhelming weight of the evidence.

The testimony of Misty Gaddy and Willie O'Quinn undergird this assignment of error, for Gaddy admits she may have tracked across freshly mopped floor T. 177; conveniently cannot remember whether she tried to reach her boss to complain about the earlier verbal confrontation by cellular phone before leaving her duty station to look for him; T. 179 acknowledges she heard Ms. Ford telephone someone for a ride home, T. 179.

Under cross-examination, Gaddy stubbornly insisted that rather than call her boss on his cellular phone, as she frequently did, she walked back to the laundry room/kitchen area to look for him. T. 180. Gaddy acknowledged that she knew Ms. Ford was in the kitchen working, waiting for someone to give her a ride home and that Gaddy knew she spoke loudly enough for Ms. Ford to hear her threat to "kick somebody's ass." T. 182-183. And Gaddy acknowledges there was nothing to keep her near the door to the kitchen where Ms. Ford was working. T. 186. Gaddy admitted to kicking Ms. Ford in the stomach and pushing Ms. Ford as hard as possible and that after all, she could have simply ignored Ms. Ford's presence. T. 189. Finally, Gaddy acknowledged that Ms. Ford had ample opportunity to stab again and did not do so. T. 192.

And the testimony of Ms. O'Quinn does nothing to corroborate Gaddy's testimony that she left her place of work at the front desk to go speak to O'Quinn in the laundry room, with its entrance adjacent to the kitchen doorway. O'Quinn testified she had no recollection of whether Gaddy was in the laundry room before the incident (T. 208), only that she heard "noise," but

could not distinguish words. T. 206. She entered the lobby to find Gaddy at the bathroom door, clutching her eye. T. 206. She saw Ms. Ford standing still close to Gaddy, before running into the kitchen, pitching knife into a cabinet and running out the front door. T. 207. And O'Quinn unequivocally testified she heard no one come into the laundry room threatening to "kick someone's ass." T. 212.

Under *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005), in assessing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Ms. Ford submits that the state failed to prove that she "unlawfully and feloniously, purposely or knowingly" cause bodily injury to Gaddy or, in other words, that she acted only to defend herself. Her defense of self-defense was severely prejudiced by the introduction of photographs which gave jurors a misleading if not downright false *exterior* view of the motel doors at a different time of day and different time of year. Her defense was also prejudiced by the trial court's improper instruction of the jury on self-defense which placed upon her a higher burden that Mississippi law allows.

For all these reasons and the authority and assigned errors discussed herein, Ms. Ford submits that insufficient credible evidence was adduced at trial to undergird this verdict. Ms. Ford humbly beseeches the Court to reverse her conviction and remand for a new trial.

CONCLUSION

Ms. Ford submits that based on the assignments of error and authority cited herein, this Court is well within its power to reverse and remand this cause. The sentence was excessive without any findings of fact to support the egregiousness of her sentence, particularly when compared with others similarly situated. The evidence rulings complained of herein, and the improper jury instructions, all combined to severely hamper the ability of Ms. Ford to mount an adequate defense.

Therefore, for all the issues and errors cited herein, Ms. Ford asks this honorable Court to vacate this conviction and reverse and remand for a new trial.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing BRIEF OF APPELLANT ON THE MERITS to the following:

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