IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01834 COA

TONY AMES — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Tony Ames

THIS 13th day of August, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Tony Ames

By: George T. Holmes
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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER A DIRECTED VERDICT FOR THE ARMED ROBBERY CHARGE WAS REQUIRED AND WHETHER THE VERDICT UNDER BOTH COUNTS IS SUPPORTED BY THE WEIGHT OF EVIDENCE?

ISSUE NO. 2: WHETHER AMES WAS ENTITLED TO A LESSER INCLUDED OFFENSE SIMPLE ASSAULT JURY INSTRUCTION?

ISSUE NO. 3: WHETHER THE TRIAL COURT IMPROPERLY LIMITED THE CROSS EXAMINATION OF STATE WITNESS JAMES FARIS?

ISSUE NO. 4: WHETHER THE TRIAL COURT IMPROPERLY LIMITED THEORY OF DEFENSE EVIDENCE?

ISSUE NO. 5: WHETHER BEING TRIED IN JAIL CLOTHES PREJUDICED AMES?

ISSUE NO. 6: WHETHER THE STATE WAS ALLOWED TO IMPROPERLY ATTEMPT TO IMPEACH A DEFENSE WITNESS WITH PRIOR TESTIMONY?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi where Tony Ames was convicted of armed robbery and aggravated assault. A jury trial was conducted August 27-29, 2007, with Honorable James T. Kitchens, Jr., Circuit Judge, presiding. Ames was sentenced to sixteen years for the armed robbery and ten years, concurrent, for the aggravated assault, and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Preston Halbert got beat up in the Lowndes County town of Crawford on January 10, 2006. [T.112-14]. The incident was reported to law enforcement. [T. 116-17]. The officers who responded and initially investigated the incident told Halbert to go to Justice Court and file a misdemeanor simple assault complaint. [T.118-19 , 251-52]. Halbert said he did this after going to the emergency room the following day. *Id.*

Following his emergency room visit, Halbert had surgery to fix a broken check bone and fractures to sinus walls. [T. 117-18, 234-35]. Halbert told the nurse practitioner who testified at trial he was attacked by two men. [T. 238-39]. No mention was made of an attempted robbery nor of the use of any type weapons. *Id.*

When Halbert went to justice court, all bandaged up from his surgery, he for the first time apparently told a justice court judge a version of events which the justice court judge interpreted as involving a possible attempted robbery. [T. 118-19, 225 251-52, 333-35, 341-42]. The justice court judge sent Halbert to the sheriff's office where Halbert told investigator John Faris that on the night of the incident, the appellant, Tony Ames, and Ames' cousin Donnell Briggs, claimed they were owed money, threatened to knock Halbert's teeth out, then beat him up with brass knuckles and cut him with a homemade knife. [T. 110, 251-52]. Nothing was taken from Halbert and there was no description to the investigator nor the jury of any attempt whatsoever to take personal property from Halbert. [T. 120, 132].

At trial Halbert testified as he was walking down the street on the way to buy his sister some cigarettes, at about 8:00 p. m. on January 10, 2006, he ran into Carol Malone. [T. 104-05, 188-89]. The two proceeded down the street together and it started raining. *Id.* Carol and Halbert then asked the appellant Tony Ames and his cousin Donnell Briggs for a ride. [T. 188-90]. Briggs and Ames obliged, and drove Halbert and Carol to a nearby store. [T. 192].

Here the evidence diverged. According to Halbert, Ames and Briggs asked for payment of money for an alleged debt, when Halbert denied the debt, they beat him up, but did not take anything from Halbert even though they had ample opportunity. [T. 108, 114, 120, 132, 192]. Halbert lost his billfold running from the fight scene. [T. 120].

Halbert said Ames had brass knuckles and Briggs had a home made weapon rigged from a razor and a stick. [T. 111, 113, 154-55]. This version of events was partially corroborated by Carol who said she saw something shiny in Ames' hands but did not see the homemade device. [T.192-97, 216]. Carol did not call the police, nor seek help for Halbert. [T. 223]. She did check on Halbert the next day. *Id.*

Ames and Briggs were separately arrested and questioned some two weeks after the accident.[T.365]. Ames and Briggs both testified that Halbert attacked Ames with a large knife and they vigorously fought Halbert off until Halbert relinquished his weapon. [T. 282-88, 325-27]. Ames received a bad defensive wound, a cut to the inside and palm of one of his hands inflicted from stopping Halbert's violent homicidal knife attack. [T.

292, 315, 318-20, 331]. Both Ames and Briggs denied the possession or use of any weapon and denied any attempt to take any personal property from Halbert. [T. 282-93, 330-31]. When Investigator Faris interviewed Ames and Briggs, they both described how Halbert was the instigator of an attack on Ames with a knife. [T. 326]. No weapons were recovered. [T. 253].

As a result of Halbert's statements to sheriff's investigators after being sent to them by the justice court judge, Briggs and Ames were indicted for aggravated assault and armed robbery. Briggs was tried separately from Ames, and was acquitted of the armed robbery but convicted of the aggravated assault. [T. 10]. Ames was convicted of both armed robbery and aggravated assault. [R. 72-76].

SUMMARY OF THE ARGUMENT

There should have been a directed verdict on the armed robbery charge. As to both counts, the verdict is not supported by the weight of evidence. Ames was entitled to a lesser included offense simple assault jury instruction but did not receive one. The trial court improperly limited the cross examination of state witness James Faris. The trial court improperly limited defendant's theory of defense evidence. Being tried in jail clothes prejudiced Ames. The state was allowed to improperly attempt to impeach a defense witness with prior testimony.

ARGUMENT

ISSUE NO. 1: WHETHER A DIRECTED VERDICT FOR THE ARMED ROBBERY CHARGE WAS REQUIRED AND WHETHER THE VERDICT UNDER BOTH COUNTS IS SUPPORTED BY THE WEIGHT OF EVIDENCE?

Directed Verdict

As required, when reviewing a denial of a directed verdict, the Court has to decide whether the state's evidence, viewed in its best possible light, is sufficient to support a verdict of guilty and whether a reasonable jury could fairly reach a guilty verdict beyond a reasonable doubt on the evidence presented. *Nichols v. State,* 822 So. 2d 984, 989 (¶9) (Miss. Ct. App. 2002). In *Carr v. State*, 208 So.2d 886, 889 (Miss.1968), the court held that in considering sufficiency of the evidence to support a conviction under a motion for directed verdict or for judgment notwithstanding the verdict, the crux of the inquiry is whether the evidence establishes proof "beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction."

It is Ames' position here that as to count one, the armed robbery charge, there was no evidence of a robbery or attempted robbery. Looking at the state's evidence in the best possible light, there was simply a claim for money followed by a refusal to pay and denial of any debt and then an alleged assault.

Since no one claimed anything was taken, this should be considered an attempted armed robbery. Under common law, "an attempt to commit a crime consists of three elements: (1) an intent to commit a particular crime; (2) a direct ineffectual act done toward its commission; and (3) the failure to consummate its commission." *Henderson v. State*, 660 So. 2d 220, 222 (Miss. 1995). Mississippi's armed robbery statutes encompasses attempts.[1]

There are three elements of robbery: "(1) felonious intent; (2) force or putting in fear as a means of effectuating the intent; and (3) by that means, taking and carrying away the personal property of another from the person or in his presence."*Crocker v. State*, 272 So.2d 664, 665 (Miss.1973). See also *Garner v. State,* 944 So.2d 934, 939-40 (Miss. App. 2006). If a deadly weapon is used or displayed to effect the robbery, the offense becomes armed robbery under Miss. Code Ann. §97-3-79 (Rev.2006).

The reasoning in *Clayton v. State*, 759 So.2d 1169, 1172 (Miss.1999) is informative. In *Clayton* a lady's purse was snatched in the parking lot of the Piggly-Wiggly in Winona. The perpetrator came up from behind the victim so that the

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[1]§ Miss. Code Ann. 97-3-79. (Rev. 2006): Robbery using deadly weapon; punishment Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

victim was never put in fear. Clayton was indicted, and convicted of robbery. On appeal, Clayton argued that the state did not prove a causal connection between fear and the taking of the victim's property. The indictment did not charge that the taking was by force. *Id.*

The Court reversed Clayton's conviction recognizing that, "the State must have shown that Clayton took some action which was intended by him to intimidate or cause fear in the victim...," citing *Register v. State*, 232 Miss. 128, 132-33, 97 So.2d 919, 921-22 (1957). In *Register*, the court held

> If force is relied on in proof of the charge, it must be the force by which another is deprived of, and the offender gains, the possession. If putting in fear is relied on, it must be the fear under duress of which the possession is parted with. The taking, as it has been expressed, must be the result of the force or fear; and force or fear which is a consequence, and not the means, of the taking, will not suffice.

In *Clayton*, the victim did not know that she was being robbed until her purse was snatched. Here in Ames' case, there was not causal connection between any violence or weapon and a taking or attempted taking of personal property.

Since there was no causal connection in *Clayton,* the court was required to reverse the robbery conviction in that case. It follows, as a matter of law, that this Court now should reverse Ames' conviction because there was no causal connection as stated above.

The rational suggested to the Court now has been consistently applied. See *Jones v. State,* 567 So.2d 1189, 1192 (Miss. 1990), where the Court reversed a robbery conviction stating that a jury instruction was fatally defective because it did not "set out

the cause and effect relationship between the taking and the putting in fear." Citing *Crocker v. State*, 272 So.2d 664 (Miss.1973). The *Jones* court again made it abundantly clear that there must be force or fear of force which causes the owner to part with his or her possessions for a robbery to have occurred.

Under the evidence in this case, it could be said that Halbert did not know that there might have been an attempted robbery until two weeks later when he was in justice court. Under the state's version of events, it was after Halbert denied the debt that any alleged weapons were used. There was no display of a weapon in conjunction with an attempted robbery. During the alleged demand for money, there was no display of a weapon.. The alleged weapon associated with Ames was brass knuckles. The brass knuckles in this case were used allegedly only during the assault portion of the offense. No weapon was used as an instrument to separate Halbert from his money.

In *Gilmore v. State,* 772 So.2d 1095, 1099 (¶¶ 10-11) (Miss. Ct. App. 2000), there was no evidence that the defendant used a weapon to injure the victim's leg during an alleged armed robbery. It was dark, no one saw the defendant with any weapon and the injury to the victim "occurred during the course of a struggle" and could have resulted "from a stick or other instrumentality that was already there". *Id.* That the victim in *Gilmore* was purposely injured during a robbery was nothing more than a possibility and "convictions cannot be sustained upon mere possibilities." [citing *Westbrook v. State*, 202 Miss. 426, 32 So.2d 251, 252 (1947).] The *Gilmore* court, however, did find the

evidence supported a simple robbery so rendered a conviction for robbery with remand for resentencing.

Gilmore is analogous because the state there did not prove that the victim's injuries result directly from any instrumentality of an armed robbery. There was no proven causal connection between the alleged robber's tool and the injury. Here, similarly to *Gilmore,* Halbert's injuries were not proven to be causally connected to any robbery or attempted robbery.

Weight of the Evidence

A reversal and remand is required on a motion for new trial challenging the weight of the evidence when the trial court abuses its discretion in denying the motion. *Sheffield v. State*, 749 So.2d 123, 127 (¶15) (Miss.1999).

In *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005), the court said that in reviewing a denial of a motion for new trial the court will only reverse if the trial court verdict "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." [citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)]. The evidence is to be viewed in a light "most favorable to the verdict". *Id.*

In the best light to the state, the facts were that Ames and Briggs told Halbert that Halbert owed them money. [T. 108-09, 192] . Halbert denied owing any debt. Ames and

Briggs beat Halbert up, then left without taking or attempting to take anything. *Id.*

When Halbert was first interviewed, he did not mention anything about a robbery or attempted robbery. [T.118-19, 251-52]. Responding officers sent him to justice court to file a misdemeanor complaint for simple assault. *Id.* Halbert injuries must not have appeared very bad. [T. 116-17]. Halbert did not mention robbery to the nurse practitioner who treated him. [T. 238-39]. Nor was there any recorded reference to the use of any weapon noted from the nurse practitioner's intake and review of medical records. *Id.* The nurse practitioner did not describe any cuts or lacerations to Halbert. [T. 234].

It was not until Halbert appeared before the justice court judge, after his surgery, all bandaged up did he ever mention anything resembling a robbery attempt. [T. 118-19, 225 251-52, 333-35, 341-42]. At justice court, there was some discussion about Halbert wanting money for his "medical expenses" even though he was a Medicare recipient. [T. 101, 123-24, 226, 336]. Halbert's injuries were not life threatening. [T. 237].

The trial court should have granted Ames' directed verdict as to the armed robbery count. Viewing the evidence in the light most favorable to the state, there was a demand for payment of an alleged debt, a denial of the debt, and then a retaliatory assault. There was no taking or attempting taking of any personal property. No reasonable jury could have convicted Ames of armed robbery.

Appellant acknowledges the role usually relegated to juries to resolve questions of fact and resolve conflicting testimony and in so doing to render a verdict. However, there

is a dividing line when discrepancies are so conflicting, in the state's case in chief, that this court has to say that a verdict of guilty cannot be supported. *McClain v. State*, 625 So.2d 774, 778 (Miss.1993). In this case the testimony and evidence tending to support the verdict should not lead a reasonable person to conclude that a robbery or attempted robbery took place. Moreover, the evidence was unreliable.

There were ample opportunities in Halbert's version of events for Ames and Briggs to attack and rob him, there were numerous dark and deserted allies along the way to the store. [T. 148, 212]. When they arrived at the store, the parking lot was lit, people were in the store. [T. 149, 212]. Halbert said he was allegedly knocked unconscious; but, nothing was taken from him; and, there was no evidence of an attempt. [T. 114]. The state's evidence is totally inconsistent with a robbery scenario.

In *Edwards v. State*, 736 So. 2d 475, 484-85 (¶¶32-37) (Miss. Ct. App.1999), the court held that the evidence was sufficient to survive directed verdict but was too dubious for a guilty verdict. The overwhelming evidence did not however establish Edwards's innocence either. The *Edwards* court said even though "weighing evidence is solely the jury's function [citation omitted], ...[w]e are nonetheless here left with the firm belief that to allow this conviction to stand based on this evidence is an unconscionable injustice. *Id.* The same result should come in the present case.

ISSUE NO. 2: WHETHER AMES WAS ENTITLED TO A LESSER INCLUDED OFFENSE SIMPLE ASSAULT JURY INSTRUCTION?

Even though there was testimony that neither Ames nor Briggs had any weapons and that they had fought Halbert only to defend themselves from attack with a large knife, and even though Halbert's injuries were not life threatening, and even though Ames presented evidence of physical injury to his hand of a defensive nature, the trial court refused Ames' requested simple assault instruction. [JI D-3, R. 69] [T. 292, 315, 318-20, 331, 389-91].

The court in *Harbin v. State*, 478 So.2d 796, 799-800. (Miss.1985), reviewed the test to be used on appeal to decide whether a lesser included offense instruction should have been granted. A lesser included instruction should be given by a trial court when a hypothetical jury could have convicted the defendant of the lesser offense with the evidence viewed "in the light most favorable to the accused" with all "favorable inferences" reasonably drawn from evidence.

If a reasonable jury could find the defendant not guilty of the offense charged in the indictment, yet guilty of the lesser offense, a lesser-included instruction should be given. *White v. State*, 842 So.2d 565, 575(¶30) (Miss.2003). See also *Brown v. State*, 934 So. 2d 1039, 1042-43 (¶¶7-12) Miss. App. 2006). Only where the evidence could justify a conviction of the principal charge and not the lesser should a lesser offense instruction be refused. *Id.*

According to Miss. Code Ann. §97-3-7(1) (Rev.2006), "[a] person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm...."

Under Miss. Code Ann. §97-3-7(2)(a), "[a] person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life...."

In *Bright v. State,* --- So.2d ----, No. 2006-KA-01970-COA (Miss. Ct. App. March 4, 2008). Bright intentionally attacked the victim who had previously allegedly raped Bright's mother. Bright was found guilty of aggravated assault and argued on appeal that he was entitled to a lesser included offense instruction for simple assault. The *Bright* court pointed out that "Mississippi cases have explained on several occasions that aggravated assault under section §97-3-7(2)(a) and simple assault under §97-3-7(1)(a) are distinguished mainly by the extent of the victim's injury, i.e., whether the victim suffered 'bodily injury' or 'serious bodily injury' and the question of whether an alleged victim suffered "bodily injury" or "serious bodily injury" resulted is a question for the jury." [Citations omitted.].

The victim in *Bright* suffered "significant injury to his facial bones", his "eye socket bones and nasal bones were broken and cheek and jaw bones were 'sheared away

from the scull.'" (*Bright*, (¶ 8). There was "surgery to repair [the victim's] face using plates and wires to reconstruct the broken bones. At trial, the victim had "healed, but he was still experiencing numbness in his face." *Id.*

The *Bright* court distinguished the facts in that case from *Taylor v. State*, 577 So.2d 381, 383-84 (Miss.1991). In *Taylor*, an aggravated assault defendant repeatedly punched a victim's face while allegedly raping her. *Id.* at 381-82. This beating resulted in "bruising and bleeding to [the victim's] face" and nerve damage." *Id.* at 382-83. In *Taylor,* the Mississippi Supreme Court reversed the trial court's denial of a lesser included simple assault instruction, partially due to "the disparity in maximum punishments for rape and simple assault, respectively, life imprisonment and six months' imprisonment." *Id.* at 383.

The *Bright* court also distinguished its facts from *Taylor* as to " the extent of the injuries suffered by the respective victims." In *Bright*, the victim had multiple broken bones; the victim in *Taylor* suffered nothing more than bruising and bleeding to her face with some undetermined nerve damage. This led the *Bright* court to conclude " no reasonable juror could characterize [the victim's] injuries as less than serious. See also, *Harbin v. State*, 478 So.2d 796, 799-800. (Miss.1985), [no simple assault instruction required where "the nature and extent of [the victim's] injuries" left her "hospitalized for eighteen days and ran up medical bills in the vicinity of $13,000.00" which was sufficient proof of "serious bodily injuries."].

Back to the present case, putting aside for the moment the fact that Halbert's injuries could have resulted from self defense, the question would become, could a reasonable jury conclude that Halbert's injuries were less than serious? The answer is in the evidence. The officers initially responding to Halbert did not consider the injuries serious enough warrant a felony charge. [T.118-19 , 251-52]. Carol Malone did not think it was necessary to call an ambulance or insist on getting Halbert to a doctor. [T. 223]. Not even Halbert considered his injuries serious enough to go and seek medical attention until urged to do so by the officers. [T.118-19 , 251-52].

As to Halbert's injuries, just because he had a broken nose which required surgery to correct does not exclude simple assault and make the case automatic aggravated assault or nothing. See *Johnson v. State,* 754 So.2d 576, 578 (¶¶ 5,8), (Miss. Ct. App. 2000), [the defendant was convicted of simple assault on a law enforcement officer, who "testified as to his injuries, including that he required surgery to repair his broken nose."] Also, *Graves v. State*, 984 So.2d 1035, 1040 (¶13) (Miss. App., 2008), [victim of a simple assault had a broken leg.]

In *Taylor, supra*, the court stated "one factor to be considered is the disparity in maximum punishments between the offenses. 577 So.2d 383. A great disparity is a factor in favor of giving the lesser included offense instruction." [citation omitted]. *Id.* The maximum penalty for simple assault is six months in the county jail and a five hundred dollar fine; whereas the maximum penalty for aggravated assault is a twenty-year

prison term in the penitentiary. MCA §§ 97-3-7(1),(2) (Supp. 1989).

A defendant is entitled to jury instructions on his theory of the case whenever there is evidence that would support a jury's finding on that theory. *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994). Even the "flimsiest of evidence", if probative, requires a trial court to give an instruction on a defendant's theory. *Miller v. State*, 733 So.2d 846 (¶7) (Miss. App. 1998)." *Goff v. State*, 778 So.2d 779 (¶5) (Miss. App. 2000).

One fact that distinguishes the present case from *Bright* and *Harbin, supra,* is that the trial court here granted a self defense jury instruction. [R. 70; T. 393, 398-99]. It has been held that even where a defendant shows a meager imperfect self-defense, a lesser-included offense instruction should be allowed. *See Wade v. State,* 748 So.2d 771, 774 (¶¶ 11-12) (Miss.1999).

The denial of the simple assault instruction also violated Ames due process rights under the Fourteenth Amendment to the United States Constitution. *See Beck v. Alabama*, 447 U.S. 625 (1980). The standard in determining if a lesser included offense is warranted in a non-capital case is whether the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense. *Id.* at. 633-37. One purpose of granting a lesser included instruction is to provide other alternatives so the jury can accord the defendant the full benefit of the reasonable doubt standard. *Id.* at 634.

The trial judge erred in refusing Ames' requested lesser included offense

instruction and Ames is entitled to a new trial with a jury properly instructed on his theory of the case.

ISSUE NO. 3: WHETHER THE TRIAL COURT IMPROPERLY LIMITED THE CROSS EXAMINATION OF STATE WITNESS JAMES FARIS ?

During the cross examination of sheriff's investigator James Faris by Ames trial counsel, the state objected to a question about why Faris did not look for weapons nor obtain a search warrant. [T.262-63]. The trial court sustained the objection. *Id.* The basis of the trial court's ruling was that the question was irrelevant because the information about the weapon was two weeks old and hence, stale. *Id.*

This ruling by the learned trial judge was incorrect. In *U.S. v. Marbury*, 732 F.2d 390, 398 (Footnote 7) (5th Cir. 1984), the defendant suggested that the factual basis of a warrant "was stale because the equipment was reportedly" stolen 25 days before the officers obtained a search warrant. Pointing out that the argument was meritless, the *Marbury* court pointed to the following precedents: *United States v. Barfield*, 507 F.2d 53, 58 (5th Cir.1974), [a forty-day claim of staleness rejected], *United States v. Rosenbarger*, 536 F.2d 715, 719-20 (6th Cir.1976), [The assumption that stolen goods delivered to a particular place will be there 21 days later was "imminently reasonable."]. See also: *U.S. v. Laury*, 985 F.2d 1293, 1314(¶41) (5th Cir. 1993), [Over a month had elapsed from the date of a bank robbery to the issuance of the warrant. It

was reasonable for the magistrate to conclude that the information forming the basis of the warrant was not stale.].

With all of the testimony about the alleged weapons in this case, in all fairness the topic of what happened to the weapons and why the officer did not diligently search for them was fair game. The appellant's position is that the trial court's truncating the cross-examination of Investigator Faris on the relevant topic was an improper limitation of Ames' right to confront his accusers under Art. 3 §26 of the Mississippi Constitution and the Sixth and Fourteenth Amendment to the federal constitution which prejudiced the appellant. Mississippi has long followed the wide open cross-examination codified in Miss. R. Evid. 611(b).[2]

Ames was prejudiced by this ruling as in that he was foreclosed from arguing that a thorough search did not produce any brass knuckles. It also allowed the jury to infer that the investigator believed Halbert and did not search his house or Ames' and then conclude that if Faris believed Halbert we, the jury, should also. It added a false credence to the state's case.

Concerning cross-examination, the Mississippi Supreme Court in reversing a murder conviction in *Myers v. State*, 296 So. 2d 695, 700, (Miss. 1974), stated that:

> The right of confrontation and cross examination . . . extends

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[2] Miss. R. Evid611(b) Scope of Cross-Examination. Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

> to and includes the right to fully cross-examine the witness on every material point relating to the issue to be determined that would have a bearing on the credibility of the witness and the weight and worth of his testimony. [emphasis added].

In *Suan v. State,* 511 So. 2d 144, 146-48 (Miss. 1987), the Mississippi Supreme Court reversed an escape conviction because the trial court limited defense counsel's full cross-examine of a prosecution witness. The Supreme Court said, ". . . one accused of a crime has the right to broad and extensive cross-examination of the witnesses against him, . . . " *Id.* See also *Myers v. State*, 296 So. 2d 695, 700, (Miss. 1974) These rights of confrontation and cross-examination were not afforded to Ames as required, and a new trial should be granted.

See also *Sayles v. State*, 552 So. 2d 1383, 1387-88 (Miss.1989), [arbitrary curtailment of cross-examination on a proper subject of cross-examination grounds for reversal.]. See also *Hill v. State*, 512 So.2d 883 (Miss.1987).

Therefore, Ames is entitled to and respectfully request a new trial where he can fully exercise his rights to confront the state's evidence.

ISSUE NO. 4: WHETHER THE TRIAL COURT IMPROPERLY LIMITED THEORY OF DEFENSE EVIDENCE?

It was established early in the trial that Halbert had filed a misdemeanor affidavit against his alleged attackers in Justice Court. [T. 118-19]. It was confirmed again later during testimony of Investigator Faris, and mentioned all throughout the trial. [T. 225,

251-52]. What happened in Justice Court was crucial to the felony charges being brought against Ames, because, no one, not Halbert, not Carol Malone, not the sheriff's deputies who responded considered this case a felony until Halbert's and Ames' appearance in the Justice Court of Lowndes County.

Yet when it came time for Ames to be able to tell his side of what happened in Justice Court, the trial court sustained a prosecution objection claiming hearsay. [T. 334-36]. This prevented the defendant from testifying about what happened at justice court, what Halbert said, and what instructions Ames heard from the justice court judge. The testimony was offered as impeachment of Halbert who was present and had already testified. This forestalling of defense evidence wrongfully removed one of Ames' evidentiary arrows from his quiver.

Impeachment with hearsay is allowed. *Nalls v. State,* 651 So.2d 1074, 1076 (Miss. 1995). When a hearsay statement has been admitted into evidence, the credibility of the hearsay declarant may be attacked to the extent that is allowable had the hearsay declarant actually testified at trial." *Id.* See Miss. R. Evid. 806[3] and 801(d)(2). See also,

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[3]Rule 806. Attacking and Supporting Credibility of Declarant
When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Turner v. State, 573 So.2d 1335, 1339 (Miss.,1990). Incidently, "[w]here cross examination on a material issue is restricted, the party complaining of it on appeal need not make a proffer for the record." *Horne v. State*, 487 So.2d 213, 216 (Miss.1986).

Due process of law requires that Ames should have been allowed the opportunity to present evidence in his defense, which was not allowed in this case. In *Harley v. State*, 345 So. 2d 1048, 1050 (Miss. 1977) a murder conviction was reversed due to the trial court's exclusion of evidence relevant to the defense's self-defense theory. This is exactly what occurred here, and Ames should be afforded a new trial. See also The United States Constitution's 6th and 14th Amendments and Art. 3, § 26 of the Mississippi Constitution

In *Terry v. State*, 718 So. 2d 1115 (Miss. 1998), the defendant was charged with embezzling money from her employer. She wanted to present evidence that other people, including the business owners, were possible suspects, but was prevented from doing so by the trial court. *Id.* at 1120-21

The *Terry* court cited *Kennedy v. State,* 278 So. 2d 404, 406 (Miss. 1973) which held "when an accused is being tried for a serious offense, the jury is entitled to hear any testimony that the appellant might have in the way of an alibi or defense."

The *Terry* court also cited *Love v. State*, 441 So. 2d 1353, 1356 (Miss. 1983), where the court ruled "that litigants in all cases, including defendants in criminal

prosecutions, are entitled to assert alternative theories, even inconsistent alternative theories."

> A criminal defendant is entitled to present his defense to the finder of fact, and it is fundamentally unfair to deny the jury the opportunity to consider the defendant's defense where there is testimony to support the theory. citing *Keyes v. State*, 635 So. 2d 845, 848-49 (Miss. 1994).

When faced with a refusal to allow a defendant to present a defense, the *Terry* court reversed. 718 So. 2d p. 1123. Ames is entitled to, and respectfully requests, the same relief.

In *Chambers v. Mississippi*, 410 U. S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), Chambers was convicted of murdering a police officer trying to execute an arrest warrant at a night club. A melee broke out when the officer arrived, shots were fired and the officer was fatally wounded and Chambers was shot by the officer before he died, a witness testified he saw Chambers shoot 93 S. Ct. at 1041.

Testimony offered by Chambers conflicted with the state's version. The trial court prevented Chambers from presenting hearsay evidence of a state witness' confession as impeachment evidence. 93 S. Ct. 1042.

There were three witnesses to whom the state witness purportedly admitted shooting the police officer but the trial court excluded these witnesses under the old "voucher rule". Chambers was prevented from presenting witnesses on his own behalf who could discredit the state's witness. 93 S. Ct. 1044-45.

> The right of an accused in a criminal trial to due process is, in

> essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross examine witnesses and to call witnesses on one's behalf have long been recognized as essential to due process. 93 S. Ct. 1045.
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> * * *
>
> Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . We conclude that the exclusion of this critical evidence, coupled with the state's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. 93 S. Ct. 1049.

The *Chambers* court reversed saying he was denied a fair trial. *Id.* If Chambers should have been allowed to present evidence, so should Ames. Since the state presented evidence of what transpired in justice court, Ames should have been allowed to respond. It is the opportunity to do so at a new trial which Ames respectfully requests. See also *United States v. Delk*, 586 F.2d 513 (5th Cir.1978); *Roney v. State*, 167 Miss. 827, 150 So. 774 (1933).

ISSUE NO. 5: WHETHER BEING TRIED IN JAIL CLOTHES PREJUDICED AMES?

This issue on its own would not necessarily warrant a reversal. Nevertheless, appellant Ames respectfully asks the Court to consider it in connection with other issues for commutative error purposes. See, *Hansen v. State*, 592 So. 2d 114, 142 (Miss. 1991) and *Griffin v. State*, 557 So .2d 542, 553 (Miss. 1990).

Since this is a case of conflicting evidence, corroborated on both sides with direct

and circumstantial evidence, Ames' credibility was a crucial aspect of the case. It is very likely that Ames being tried in jail attire made him less believable that he would have been if dressed in street clothes. The subjective effect of the jail attire was likely enough to tip the scale away from believing Ames.

Ames wanted to go to trial in regular clothes. [T. 7-13]. Arrangements had been made for his mother to bring clothes to him in the jail; but, she failed to appear. *Id.* The trial court did afford a small amount of time for Ames' mother to arrive and for a search for clothes around the courthouse all to no avail. *Id.* The trial court wanted to push the case forward and, thus, forced Ames to go to trial dressed as an jail inmate. *Id.*

A criminal defendant cannot be forced to go to trial in jail attire. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 1696-97, 48 L.Ed.2d 126 (1976) and *Puckett v. State* 737 So.2d 322, 339-40 (Miss.,1999). In *Rush v. State*, 301 So. 2d 297, 300 (Miss 1974) the court said:

> It is a common-law right of a person being tried for the commission of a crime to be free from all manner of shackles or bonds, whether of hands or feet, when in court in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner. Whether that ought to be done is in the discretion of the court, based upon reasonable grounds of apprehension. But, if this right of the accused is violated, it may be grounds for the reversal of a judgment of conviction.

The *Rush* court did not reverse because the defendant was only brought into the

courtroom with handcuffs on. He was not brought in with any other shackles or in jail clothes. *Id.* .

Case law indicates the Mississippi Supreme Court is loath to reverse a defendant's conviction just because a jury catches a glimpse of him in prison attire. *Davenport v. State*, 662 So.2d 629, 632-33 (Miss.1995) (a jury's chance siting of defendant in shackles during transport was not reversible error); *Wiley v. State*, 582 So.2d 1008, 1014 (Miss.1991) (chance viewing defendant in shackles in the hallway was not more prejudicial than defense counsel's reference to defendant being in jail); *Coleman v. State*, 378 So.2d 640, 645 (Miss.1979) (there must be a showing of prejudiced)

In *Hickson v. State,* 472 So. 2d 379, 380 (Miss. 1985), the defendant was brought into the courtroom during voir dire in handcuffs and sat at counsel table for about 30 minutes before counsel objected. The defendant was then lead out of the courtroom where the cuffs were removed and the defendant was brought back in. *Id.*

The *Hickson* court recognized and explained the irreparable prejudicial effect of displaying a defendant to the jury in "prison garb. . . hand-cuffed or otherwise shackled" is that the display destroys the presumption of innocence. *Id.*

The *Hickson* court reversed on other grounds, but strongly admonished the trial court on remand to "respect" the defendant's presumption of innocence and not allow him to appear before the jury in handcuffs, unless there was some threat to security. *Id.* at 384. See also *U.S. v. Hamilton*, 444 F. 2d 81 (5th Cir. 1971) and Miss. Const. Art. 3 §§

14 and 16, and the 6th and 14th Amendments to the U. S. Constitution.

Here the prejudice was to Ames' credibility. In connection with all of the other errors claimed herein, a new trial is requested in the interest of justice.

ISSUE NO. 6: WHETHER THE STATE WAS ALLOWED TO IMPROPERLY ATTEMPT TO IMPEACH A DEFENSE WITNESS WITH PRIOR TESTIMONY?

Ames' codefendant Donnell Briggs testified at his trial previously and in Ames' trial. [T. 360-61; Ex. S-1]. The prosecutor attempted to impeach Briggs with a transcript of his prior testimony on some minor discrepancies and went through the regular process of showing Briggs' a transcript of his previous testimony. [T. 306-10]. Briggs was impeached on some points, and on others, not so much. Nevertheless, over objection, the state was allowed in its rebuttal to introduce a portion of the transcript Briggs' trial which was used in the impeachment, and not only that, was allowed to have a stand-in read the transcript to the jury. [T. 363-65]. Objections by the defense were made to this approach. [T.362, 369]

The appellant's position is that there was no material contradiction between Briggs' testimony from his trial and Ames' trial. In Briggs' trial, Briggs said that as he came back from urinating at the side of the store where the fight took place, he observed Halbert attacking Ames with a knife at the back of the car. [T. 363-65; Ex. S-1, p. 3]. Briggs said, "It shocked me because Tony was laying on the ground." *Id.* Again, Briggs

confirmed in his trial that Ames was "on the ground" when Briggs returned to the car. [Ex. S. 1. p. 8]. Briggs assumed that Tony was pushed or slipped. [Ex. S. 1. p. 9].

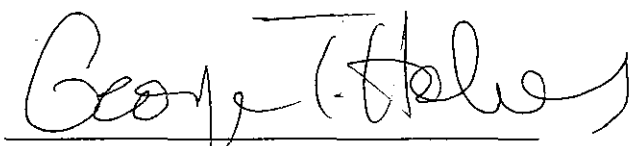
At Ames' trial, Briggs said on direct that he came around the corner from urinating and saw Halbert attacking Ames with a knife and that Ames slipped and was on the ground. [T. 283-85].

There is no material contradiction between Briggs' testimony in these two trials. Later the prosecutor tried the same trick on the topic of how much Briggs had had to drink. At the previous trial, Briggs said three or four beers where at Ames' trial he said "a few beers". [T. 299-301]. Then the prosecutor moved on to whether Briggs and Ames were moving or standing still when Carol and Halbert asked for a ride. [T. 301]. Then there was some follow up on whether Briggs saw Ames slip. [T. 305-06]. Defense counsel raised a new objection to the impeachment attempts but was overruled. [T. 307].

In *Gray v. State*,921 So.2d 393, 395 (¶¶ 6-7) (Miss. Ct. App. 2006) the defense argued that they should have been allowed to impeach a state witness under Miss. R. Evid. 613. The *Gray* court said that a prerequisite to impeach a witness with prior testimony under Rule 613 is that there has to be "an actual contradiction in fact between the testimony and the prior statement." [Citing *Ratcliff v. State*, 752 So.2d 435, 439 (¶ 17-18) (Miss. Ct. App.1999)]. The general rule is that "a prior statement is inconsistent if under any rational theory its introduction might lead to a conclusion different from the witness' testimony." *Id.*

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 13th day of August, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. James T. Kitchens, Jr., Circuit Judge, P. O. Box 1387, Columbus MS 39703 , and to Hon. Forrest Allgood, Dist. Atty. , P. O. Box 1044, Columbus MS 39703, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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