

In the Supreme Court of Mississippi

Wanda Clark

APPELLANT

Vs.

Action No.2008-KA-00549-SCT

State of Mississippi

APPELLEE

APPELLANT'S BRIEF

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Certificate of Interested Persons in

Action No.2008-KA-00549-SCT

Wanda Clark

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/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Wanda Clark and

Cheryl Ann Webster, Attorney of record for Wanda Clark

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IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

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Statement of Issues

1. The Court erred in failing and refusing to grant a motion for mistrial made by the defendant's counsel during the course of the trial due to a violation of the Code of Judicial Conduct Canon Three when the Court congratulated the complaining witness and alleged victim of the purported crime for her testimony thereby commenting on the witnesses testimony and lending the weight of the bench to the State and greatly prejudicing Wanda Clark in front of the jury and prohibited her from getting a fair trial.
2. The court allowed illegal testimony from the witness Shumpert. Over the objections of Clark to suppress the testimony of Shumpert, an employee of the State by virtue of her position with DHS, she was allowed to testify and bolster the testimony of a competent witness, 18 year old Johnson. Further, Shumpert, gave opinion evidence concerning confidential matters; further, the State was allowed to cross examine the defendant with regards to Clark's statements during an unlawful search of her home. Two law enforcement officers accompanied Shumpert to Clark's residence. Both entered her home without

authority of law. Both failed to advise Clark of her Miranda rights, as DHS took statements and both helped while DHS searched the Clark home without benefit of a search warrant or exigent circumstances or any other exception to guarantees of the 4th Amendment to the US Constitution or Article three, Section 23 of the Ms. Constitution. At the time of the illegal entry into the home, Johnson, Clark's step-child was in DHS custody. Shumpert was allowed to testify that she concluded the child had to be placed in DHS custody due to the severity of the injuries as a criminal act committed by Wanda Clark which usurped the province of the jury.

3. Further that during the testimony of Latonya Johnson, the Defense made a proffer of items marked D 3, D 4, D 5 and D 6 which were not allowed into evidence which should have been since they would have been weighed by the jury concerning the credibility of the witness, Latonya Johnson. The Court did not allow Clark to cross examine Johnson about such matters.
4. The Court denied D 7 jury instruction offered by Wanda Clark which was a correct statement of the law and should have been granted, thereby failing to instruct the jury upon all questions of law necessary for guidance. The defendant is entitled to have her theory of the case presented to the jury. This denied Clark a fair trial.

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Statement of the Case

Latonya Johnson, herein after known as Johnson, is the step daughter of Wanda Clark. (T.238) On March 29th, 2005, Clarksdale High School officials realized that Johnson had sustained injuries to her person (T.267) after her grandmother (who has wanted custody of her for years (T. 209)) brought it to the school administrator's attention. (T.199) Johnson made accusations that Clark along with her father had abused her on more than one occasion. (T. 267)

School administrators called Department of Human Services. (T.201) After a cursory interview with Johnson, DHS made a decision to take Johnson into custody and begin an investigation into the allegations of abuse. Police department show up at the school also. (T. 201) DHS requested Law enforcement to accompany Shumpert to the home of Clark. (T. 392)

Without a search warrant or any authority of law, Shumpert and two police officers crossed the threshold of Clark's home, and interrogated each member of the household who was present. (T. 652) Then DHS and the two police officers, then made a search of the premises without authority of law. Present at the Defendant Clark's home , without invitation, were two police officers as well as one DHS

representative. Clark had been threatened that if she ever wanted to have her child back she had to cooperate with DHS.(T.653) The police officers and the DHS representative separated the children present in the home from each other and their Mother and proceeded to interrogate each of them under Clark's roof without authority of law. Clark's three biological minor children, who were not the subject of any allegations of abuse, were taken to the police station by the representative of DHS and the two policemen and stripped searched without Clark's permission and without authority of law. (T. 678) Clark was told that they had to be stripped searched at the police department. (T.678) and they were.

Two policemen stood by and let DHS question Clark without giving her Miranda rights, with full knowledge that the abuse allegations had been made against Clark.

Clark was arrested within two weeks of the March 29, 2005 incident.

Clark was indicted June 1, 2005, in a three count indictment. All counts were charging felonious abuse/battery of a child in violation of MCA 97-5-39 (2) . (C.P. 4)

June 7, 2005, Clark was arraigned and pled not guilty. (CP 1)

November 27, 2007, the trial began and was concluded on November 30, 2007. During the trial the first count of the indictment was dismissed as to Wanda Clark leaving her to defend only two counts. (CP 1)(T.649)

During the trial Johnson, then 18 years of age, testified about how bad her life was with her parent and step mother and the defense tried to introduce a letter written to her School Counselor Ross, wherein she praised her family and her home life. (T. 284). The defense offered this letter into evidence, however, this letter was not introduced in to evidence even though Johnson stated she wrote it and it was in her

handwriting. (T. 281) (Exhibit D-1)

Following or trying to adhere to the defense's theory of the case that Johnson came home with these bruises and cuts from school and that Clark was innocent of these charges, Clark attempted to introduce several reports indicating a troubled child, who got into fights at school which could have produced such bruises and cuts upon her person. (T. 334) (T. 354) These reports are namely Exhibit D-3, Exhibit D-4, and Exhibit D-6.

At the end of Johnson's testimony, the Judge made an improper comment to the child in front of the jury saying, " You may be excused. Thank you. I think you held up nicely." (T. 344) To which Johnson replied, " Your welcome." Defense then moved for a mistrial (T.345) because it showed bias on the part of the Judge against Clark and for Johnson before the jury. The Court then instructed the jury which even made the ringing bell louder.(T. 356) You can't un-ring a bell. The court denied the mistrial. (T. 347)

The Court denied the jury instruction D 7 of Wanda Clark's which should have been read to the jury. (T. 718)

The jury returned a verdict of guilty in Count two and three of the indictment.

February 19, 2008, the sentencing judgment was filed. (CP 39)
February 26, 2008, the Amended Motion for a new trial was filed. (CP3) (CP 45) and the Order denying the same was entered on March 3, 2008. (CP 3 (CP 51)

Feeling aggrieved by the decision, Clark appeals this case.

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Summary of the Argument

1. Clark submits that she was denied a fair trial first and foremost because the Judge violated Ms. Code section 99-17-35 as well as Canon Three of the Judicial Code by congratulating Johnson the alleged victim in this case. Commenting on the evidence and lending the prestige of his bench, position of authority and power, to the State's witness Johnson. This was a devastating blow to Clark's case since it sent a message to the Jury to believe her testimony. In his further explanation in the record by the Court of why he said what he said Johnson, not only confirms his bias but further gives evidence that he should have declared a mistrial. The jury is the sole judge of the testimony and the courtroom, and particularly the bench is not the place to be congratulating people on their testimony.
2. The second argument will be DHS's role in the investigation and the how

their actions cost Clark a fair trial. The Clark had asked the Court to suppress all of Shumpert's testimony as is indicated by the DA's comments to the Court concerning his decision to let her testify although the actual motion is not in the record. It has somehow gone missing. However, the Court said that before DHS could offer opinion evidence the State would have to lay a proper foundation and it was not done. DHS gave an opinion as to Johnson's abuse under questioning by the State after the court ruled that they could not. Further they were allowed to go into confidential matters with regards to Youth court proceedings. All of this irrelevant to the charges in the indictment and used for the sole purpose of bolstering the State's case and inflaming the jury against Clark. Under a threat levied at Clark that in order to Johnson back into her home, DHS entered Clark's home with two law enforcement officers without benefit of a search warrant. DHS claims it has authority to use law enforcement under a Ms. statute: Ms. Code Section 43-27-113. Clark concedes that Law enforcement may be used by DHS but they cannot go around or subordinate the United States Constitution's fourth amendment guarantees under the guise of protection of a DHS personnel.

So here DHS violated this woman's 4th amendment rights by hauling two law enforcements officers in to her home for an unlawful search and inquiry first without authority of law then by threats that were not true. Just because DHS takes a person's child it is not up to DHS to give the child back. A court of law decide that. And Wanda Clark was not this child's natural mother so , the threat made to her carried no weight in a Court of law, because she had no custody of Johnson. So on a DHS threat which can only be characterized as illegal, DHS violated Clark's 4th amendment right. Law Enforcement is not allowed to throw away the rule book just because DHS calls.

Further, am I the only one offended that Clark's biological three children, upon whom no reports had been made of abuse, were then hauled to the police station and not a medical facility, to be stripped searched to be examined by non medical persons. Shumpert is no expert in child abuse. Those two law enforcement personnel are not experts in child abuse.

DHS claimed that they had no part in the law enforcement side of the investigation yet a letter to the District attorney's office exist and is included in the Clerk's papers wherein they took an active role in the prosecution of

this case. DHS cannot create a subterfuge claiming rights that they do not have, using ill gotten evidence, and pretend to be only interested in the welfare of the child and stand in the shoes of law enforcement or by keeping people under their thumbs by false threats

3. The third argument lies in the fact that the Court refused to allow Clark to examine Johnson concerning incident reports which all included claims of violence and misconduct on the part of Johnson. The defense maintained that Johnson had these bruises as a result of her own violence; that she got them somewhere else by someone else's hand and yet were denied the right to cross examine the witness Johnson about these. The Court's ruling to keep these from the jury denied her a fair trial.
4. The fourth error is the denial of the D-7 jury instruction . It stated the law correctly and the defendant has a right to have its theory of the case put to the jury. The denial of this instruction caused Clark to be denied a fair trial because the jury was not properly instructed.

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Argument

1. The Court erred in failing and refusing to grant a motion for mistrial made by the defendant's counsel during the course of the trial due to a violation of the Code of Judicial Conduct Canon Three when the Court congratulated the complaining witness and alleged victim of the purported crime for her testimony thereby commenting on the witnesses testimony and lending the weight of the bench to the State and greatly prejudicing Wanda Clark in front of the jury and prohibited her from getting a fair trial.

What exactly did the court say? At the conclusion of the complaining witness, Johnson, the alleged victim, the only accuser of Wanda Clark, the Trial court leaned over to Johnson in front of the jury, within hearing distance, and said "You may be excused. Thank you..... ***I think you held up nicely.***"

And to make matters worse, in front of the jury and in hearing distance, Johnson replied to the compliment or congratulations: ***Your welcome.***

The Court ended the private conversation between him and the witness Johnson, Clark's nemesis, the Government's key witness , the only witness pointing the

finger at Wanda Clark, and in front of the jury and the audience and everyone in the courtroom, said **"Okay"**. (T.344)

Then in chambers, Clark's attorney joining in with Kenneth Clark's attorney moved for a mistrial. (T. 346) The Court then chastised the attorneys for having had a heavy hand laid on her (Johnson) by the two defense attorneys and further accused the two attorneys of having brow beaten the child, indicating his bias and sympathy even more. (T. 347) There was nothing further to say at this point. He had evidence his sympathy for Johnson his displeasure with the methods of the defense and had indicated the same to the jury. Counsel had incurred the wrath of the Court. The court then lectured on how a child was to be encouraged and my not being heavy handed with a witness who was accusing my client of criminal acts. The Court then tried to correct his error the following morning, (T. 356) but what was done was done and the words could not be taken back. The bell had rung and to attempt to un-ring a bell, makes the sound louder and louder. To further deny that his was bias, in front of the jury added nothing more than fuel to the fire in Clark's humble opinion.

Clark believes that the Judge violated Canon Three of the Code of Judicial conduct in that he failed to conduct himself in an impartial and fair manner.

In attempting to correct himself the Court repeated to the jury, that he thought she did well. He should have granted the mistrial and set the case for another day.

After testifying, Judge did not thank Clark. He summarily dismissed her with a **"You may step down"** (T. 644) and she underwent a vigorous cross. No sympathy or encouragement shown for her. He did not give any sympathy or encouragement for Storme Washington, a minor child much younger than Johnson, who had her mother

taken away from her. Judge Thomas said "**You are finally discharged.**" (T. 596) No sympathy there for a much younger child. For his closing comments to Angelique Washington, a much younger child who testified for and on behalf of her mother, he said "**You may be excused.**" (T.542) No sympathy or congratulations for the witnesses for Clark came forth from the Judge's mouth. For Jacqueline Scott, the sister of the accused Clark, he commented, "**Thank you. You may step down.**" (T. 502) No encouragement for a young woman who has had her sister taken away from her. For Mary Hooper, a social worker with DHS, who testified for the defense and against Johnson he said, "**You may step down.**" All this was said in front of the jury and the parties to the case as well as the audience.

In contrast, evidencing bias for the government, for Shumpert the social worker that testified for the Government, once again, he had a private conversation with her from the bench in front of the jury. The Court said, "**All right, Ms. Shumpert, thank you very kindly, You may leave.**" To which Ms. Shumpert replied, "**Thank you , Sir.**" And the Court then in response to Ms. Shumpert, stated, in front of the jury, "**You came down after having been on the airplane.**" (T. 395-396) Clark knows that this implied that a greater weight was to be given by the jury to Shumpert's testimony since the Court advised the jury that she had to fly to Clarksdale. That the government had to or was making great efforts to be sure her testimony was heard by the jury. That her testimony was of such great weight that the government took extra special attention to get her to the trial. An improper comment, highly suggestive, and it included facts interjected by the court giving undue weight to Shumpert's testimony. This lawyer was not about to incur the wrath of the Court again, so no objection was made however,

a pattern had developed or come to light of a bias for the government in this case by Judge Thomas.

Judge Thomas, a normal person, was affected, and clearly was or became one-sided in his bias for the witness Johnson and the government, and in doing so exhibited a bias against the Defendant Clark. Judge Thomas showed his heart on his sleeve so to speak but as a Judge, he is not to do so, and for that reason a mistrial should have been granted. Having called the error of his ways to him, he did as a normal person generally does, he was insulted. Now the Judge is not only biased, but insulted.

In Thompson v. State, 468 So.2d 852, 854 (Miss.1985), the Court said:

"It is a matter of common knowledge that jurors ... are very susceptible to the influence of the judge ... jurors watch his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party.

See also Norman v. State, 385 So.2d 1298 (Miss.1980); Stallworth v. State, 310 So.2d 900 (Miss.1975); Shore v. State, 287 So.2d 766 (Miss.1974); Green v. State, 97 Miss. 834, 53 So. 415 (1910)."

Continuing,

"We have recognized the danger that a trial judge generates by indicating or showing his attention to certain matters in the trial which may communicate to the jury the impression that such evidence or testimony is important or unimportant, and the very position of a judge during trial makes each comment unusually susceptible of influencing a juror or the jury. Shelton v. Puckett, 483 So.2d 354 (Miss.1986); Hannah v. State, 336 So.2d 1317 (Miss.1976); Thompson v. State, *supra*; Stubbs v. State, 441 So.2d 1386 (Miss. 1983); Fulgham v. State, 386 So.2d 1099 (Miss.1980); Myers v. State, 99 Miss. 263, 54 So. 849 (1911)."

This Court has addressed this issue before.

"The great danger, particularly in a criminal case, is that the weight and dignity of the court accompanies each question or comment, although not so intended by the judge, and are very likely to be interpreted by the jury as the court's approval ... thus diverting the jurors' attention from their responsibility of deciding the case from the evidence...." *Thompson v. State*, 468 So.2d 852, 854 (Miss.1985). "There can be no doubt the statute and cases enjoin comment by a judge upon the evidence because the very position of a judge during trial makes each comment unusually susceptible of influencing a juror or the jury." *Hannah v. State*, 336 So.2d 1317, 1321 (Miss.1976).

Ms. Code section 99-17-35 is quoted herein :

The judge in any criminal cause, shall not sum up or ***comment on the testimony***, or charge the jury as to the weight of evidence;

This is exactly what happened. For whatever reason, Judge Thomas felt a bias for a witness who testified for the Government. He continued to exhibit this bias by his concerned and his attentive remarks to the witness Shumpert and with his cursory dismissals of the Defendant's witnesses. He exhibited this bias to the jury causing the Defendant Clark to be denied a fair trial. The mistrial should have been granted.

2. The court allowed illegal testimony from the witness Shumpert. Over the objections of Clark to suppress the testimony of Shumpert, an employee of the State by virtue of her position with DHS, she was allowed to testify and bolster the testimony of a competent witness, 18 year old Johnson. Further, Shumpert, gave opinion evidence concerning confidential matters; further, the State was allowed to cross examine the defendant with regards to Clark's statements during an unlawful search of her home. Two law enforcement officers accompanied Shumpert to Clark's residence. Both entered her home without authority of law. Both failed to advise Clark of her Miranda rights, as DHS

took statements and both helped while DHS searched the Clark home without benefit of a search warrant or exigent circumstances or any other exception to guarantees of the 4th Amendment to the US Constitution or Article three, Section 23 of the Ms. Constitution. At the time of the illegal entry into the home, Johnson, Clark's step-child was in DHS custody. Shumpert was allowed to testify that she concluded the child had to be placed in DHS custody due to the severity of the injuries as a criminal act committed by Wanda Clark which usurped the province of the jury.

There was a motion that has gotten lost and is not reported in the transcript however, the DA makes reference to it in the transcript. (T. 169) There was an objection by the defense to allow Shumpert as a witness. The basis of the argument was that her testimony was irrelevant. She can add nothing to the facts for the jury to decide the guilt of innocence of Clark. The Court ruled she could testify. Her only job as a fact witness was to bolster witness Johnson's case against her Step- Mother, Clark.

Shumpert's testimony does nothing to prove or disprove that Clark committed the acts of which she is charged. She claims she was not part of the law enforcement investigation (T. 693) although she took an active role with Johnson, the accuser, evidenced by her letter of July 1, 2005. (CP 17)

DHS maintained that they could enter into this woman's home to do an investigation. I maintain that they cannot enter into the home with law enforcement without a search warrant. Anything gathered in furtherance of this investigation is illegal, including any statements made by the defendants. The US Constitution's fourth amendment controls as well as the Ms. Constitution:

ARTICLE 3 BILL OF RIGHTS

Section 23. Searches and seizures.

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

Sources: 1817 art I § 9; 1832 art I § 9; 1869 art I § 14.

Just because DHS relies on Ms. Code section 43-27-113 which states:

43-27-113. Law enforcement assistance in department investigations of child abuse or neglect.

In any investigation by the Department of Human Services of a report made under Section 43-21-101 et seq. of the abuse or neglect of a child as defined in Section 43-21-105, the department may request the appropriate law enforcement officer with jurisdiction to accompany the department in its investigation, and in such cases the law enforcement officer shall comply with such request.

Sources: Laws, 1994, ch. 649, § 23, eff from and after July 1, 1994.

doesn't mean you throw out the US Constitution or the Mississippi Constitution.

DHS gained entrance into her home by threatening Clark with the non-return of Johnson. (T.653) There was no justification for entrance by two law enforcement officers. Shumpert claims she entered for and on behalf of the government for purposes of a DHS home investigation. However, the most offensive matters remained to come, quoting from T.687, speaking of DHS:

Q. Then did they strip search the children?

A. Not in my home.

Q. Where did she search?

A. She told me they had to be removed from the home and that she had to take them to the police department.

Q. And is it there that your children were strip searched?

A. Yes, ma'am.

This is un rebutted testimony. DHS took three children to a jail where there are no experts in child abuse and had these three children strip searched. These children were not taken to a hospital or had any medical personnel called in who are experts in child abuse, but to a jail where there was a female dispatcher so that DHS could look at these children's nakedness. Am I the only one embarrassed by the government's actions? And this testimony serves the government in proving that Clark did the acts she accused of in what manner? How prejudicial is this testimony for Clark? I submit this is highly inflammatory against Clark.

Clark testifies that they entered her home without telling her why (T. 652) Two law enforcement officials and a social worker barge into her home without a search warrant, without being invited in, making threats. She was separated from all of her children, while undergoing an interrogation by DHS with Law enforcement. How illegal is that? Law Enforcement and DHS get to circumvent the US constitution and the Ms. Constitution, to do strip searches of minors, to search Clark's home, to get her to make statements that are then used against her, to disclose confidential Youth Court information with regards to Johnson , (T.691) to make remarks as if a social worker for DHS has a right to give her opinion, which clearly the government, knew she did not, and which the DA had advised the Court that Shumpert knew she could not give an opinion.

Quoting from Clark's un-rebutted testimony:

Q. And when she came to your house, tell me what happened?

A. They came in my home. She told me she needed to talk to my kids and myself. And she told me if I wanted to see Latonya, she didn't tell me her whereabouts and what was going on at that time. If I wanted to see my child again, I needed to answer her questions and move in the direction that she instructed me to. She put my children in a

certain area and myself in a certain area, including my seven year old son, Tyler.

Q. And then what happened?

A. And she proceeded to ask questions.

Q. And did she ask questions of your children in your presence?

A. No.

Q. Did you answer those questions?

A. Yes.

(T. 653)

And here we have the basis for the entering of the house, the questions, the strip search, all under threats by DHS.

All of this testimony is so very prejudicial that the introduction of it caused Clark to be denied a fair trial as both constitutions guarantee her.

The Court allowed Shumpert in her direct examination by the DA prior to Clark taking the stand, to put before the jury the matter of the Youth Court proceedings, which are suppose to be confidential in nature. DHS was also allowed to testify to the conclusion, determination, opinion held by DHS that Johnson was to be taken into DHS custody. (T. 391) How this is relevant to whether or not Clark committed the acts, she is charged with in the indictment, is beyond me other than to rubber stamp the government's case and bolster Johnson's testimony. The Defense had already objected on two or three occasions with regard to Shumpert, and still the government saw fit to put her and her opinions before the Jury. This denied Clark a fair trial as guaranteed by the Constitutions.

3. Further that during the testimony of Latonya Johnson, the Defense made a proffer of items marked D 3, D 4, D 5 and D 6 which were not allowed into evidence which should have been since they would have been weighed by the jury concerning the credibility of the witness, Latonya Johnson. The Court did not allow Clark to cross examine Johnson about such matters.

The Defendant Clark's theory of the case is that the bruises and injuries to Johnson were done by someone else because 1) Johnson had come home with bruises on her face before (T. 562) 2) Johnson had fought with a previous boyfriend. (T.576) 3) Johnson was known to get into fights at school (T.577) and 4) Clark didn't do it (T. 662) and did not know how they came about on her, but that she had come home from school with bruises from time to time according to one of the daughters.

There are incident reports that indicated Johnson fought, threatened and took part in activities and in fights which caused the bruises for which Clark was convicted. Clark was not allowed to ask her about these reports on cross examination much less have them introduced by a school official later on. These reports were not offered to make Johnson seem less in the eyes of the jury but to put forth the theory of Clark's defense.

When the Defendant Clark was denied the ability to cross examine about these acts and the exhibits which corroborated what would have been her theory of the case in that her right to confrontation, the 6th amendment and Section 26 rights of the accused ,was illegally limited. Clark submits that she should have been allowed to prove that the bruises for which she was convicted were placed on the body of the

accuser by someone else or that someone else had the ability to put them on Johnson's body. The court ruling the exclusion of such evidence, Exhibit D 3, is found at (T.334) wherein Judge Thomas ruled that the Defendant could not question the Accuser about an intimate act. Further the remaining exhibits, D4, D5, and D6, were refused by the Court in the a proffer made to Johnson's testimony (T. 354)

Clark is entitled to have her theory and the evidence that supports her theory of the case placed before the jury. Here you have an accuser who has pointed the finger at Clark and said she did these terrible things to me yet on prior occasions defended the same Clark when others attacked Clark and even went so far as to write a letter to the Counselor Ross defending Clark. All of which was disallowed by the Court.

So much for evidence of prior inconsistent statements. The right to a cross examination is a substantial right.

"The appellant argues that she had a constitutional right to cross-examine the witness offered by the State. She cites section 26, Mississippi Constitution, and other cases from this and other jurisdictions. There can be no successful contradiction of this thesis. The Sixth Amendment to the United States Constitution established the right of a citizen to be confronted by the witness against him in the federal courts. Odom v. State, 205 Miss. 572, 37 So.2d 300 (1948); Caldwell v. State, 176 Miss. 80, 167 So. 779 (1936). Most of the states have added the "Confrontation Right" to their constitutions. The right to be confronted by one's accuser has now been made applicable to the states under the interpretation of the Fourteenth Amendment by the Supreme Court of the United States. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). Crapps v. State, 221 so2d 722 (Ms. 1969)

Clark should have been able to cross examine Johnson on these exhibits and the court should have allowed all into evidence to support the Defendant's theory of the case.

4. The Court denied D 7 jury instruction offered by Wanda Clark which was a correct statement of the law and should have been granted, thereby failing to instruct the jury upon all questions of law necessary for guidance. The defendant is entitled to have her theory of the case presented to the jury. This denied Clark a fair trial.

D-7 was refused by the Court and it was the only instruction which put forth the Defendant's theory of the case. It said " ...if you can determine from the evidence that the alleged abuse of Latonya Johnson could have been or was caused by something else other than the intentional acts of Wanda Clark then you shall find Wanda Clark not guilty of the charges against her. " CP 75

" A defendant is entitled to submit instructions that present his theory of the case to the jury, while a trial judge is entitled to refuse instructions that incorrectly state the law, are without foundation in evidence or are stated elsewhere in other instructions. Manuel v. State, 667 So.2d 590, 591 (Miss.1995). The general rule observed when reviewing a court's denial of a jury instruction is that reversal is not required when the jury has been properly, fully, and fairly instructed by other instructions. Catchings v. State, 684 So.2d 591, 599-600 (Miss.1996)." Henry v. State, 816 So.2d 443 (Ms. 2002)

No where in the transcript is there a reason given by the Court for denying D7 Clark's jury instruction which sets forth the theory of her case that someone else did it because she did not. "[W]here there is serious doubt as to whether a requested instruction should be given, doubt should ordinarily be resolved in favor of the accused." Lenard v. State, 552 So.2d 93, 96 (Miss.1989)

Clark submits that the jury was not instructed fully and that a reading of the jury instructions indicates that the jury was not instructed on the theory of Clark's defense. By denying this jury instruction Clark was denied a fair trial.

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

Wanda Clark

APPELLANT

Vs.

Action No.2008-KA-00549-SCT

State of Mississippi

APPELLEE

Conclusion

Clark asserts that she did not receive a fair trial. She submits that the Judge was not impartial and his comments before the jury to the two witnesses for the State, Johnson and Shumpert, denied her a fair trial.

Further, Shumpert being able to testify in the government's direct examination and not in rebuttal about the Youth Court action denied her a fair trial. Two police officers walking in on her home without a search warrant violated the constitution of our nation and of our state. It is not a voluntary admittance if it is made under duress. To hold entry gained as the key to having your child returned when that is not the law, is certainly illegal on the part of the government.

Further, Clark submits that she was denied the opportunity to put before the jury her theory of defense in that someone else inflicted these injuries on Johnson and that she did not do it. That she was not allowed to introduce exhibits which indicated that she had on a occasion fought at school, defended her family life at school, defended Clark at school and was subsequently suspended for inappropriate actions. All to Johnson's own detriment. The court

allowed none of it.

Finally the Court did not instruct the jury concerning Clark's theory of the case. There was only one jury instruction tendered which held her theory of the case and it was denied. No reason given by the Court. Clark submits that the Court did not instruct the jury fully on the law in this case.

Clark asks this Court to reverse her conviction and remand this matter to the Trial Court for further action.

Respectfully submitted,

_____, Cheryl Webster


CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing :

Appellant's Brief, and Record of Excerpts on Circuit Court Judge Kenneth Thomas , at Post Office Box 548, Cleveland, Ms. 38732 and District Attorney Laurence Mellen, at Post Office Box 848, Cleveland, Ms. 38732, Jim Hood, the Attorney General of Mississippi at Post Office Box 220, Jackson, Ms. 39205.

by hand delivering, mailing , faxing, or otherwise delivering electronically a copy of the same, postage prepaid, to the above stated addresses.

On this Tuesday, 27th of October, 2009.

By: 
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Ms. Bar No. 