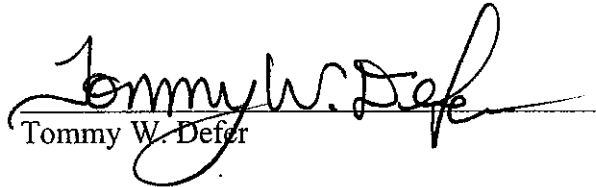


## CERTIFICATE OF INTERESTED PERSONS

I, Tommy W. Defer, Counsel for the Appellant, hereby certify that the following individuals have an interest in the outcome of this appeal:

1. Timothy Wayne Wallace, MDOC, Parchman, Mississippi;
2. Tommy W. Defer, Counsel for the Appellant, Water Valley, Mississippi;
3. John L. Dolan, Jr., Trial Counsel for Appellant, Southaven, Mississippi;
4. Rhonda Amis, Assistant District Attorney, Batesville, Mississippi.

This the 24th day of October 2008.

  
Tommy W. Defer

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### **STATEMENT OF THE ISSUES**

1. Whether the trial court erred in denying Appellant's proposed jury instruction D-3.

## **STATEMENT OF THE CASE**

### **PROCEDURAL HISTORY**

Timothy Wayne Wallace ("Appellant") was indicted on March 7, 2007, by the Grand Jury of Tate County, Mississippi for two counts of Sexual Battery. A Co-Defendant, David Dewayne Croney was indicted on Count 2 only.

The Tate County Grand Jury indicted the Appellant for the alleged Sexual Battery of Michael Woolfolk between the 1st day of January, 2002 and the 22nd day of January, 2003. Appellee tried Appellant separately from his Co-Defendant. Appellant's trial in Tate County Circuit Court commenced on April 29, 2008. The jury returned a verdict of guilty of Sexual Battery on two counts. The trial sentenced the Appellant to serve twenty (20) years per count to be served consecutively in the Mississippi Department of Corrections. Appellant's trial counsel was suspended from the practice of law in the State of Mississippi immediately following the Appellant's conviction. The trial court therefore appointed Tommy W. Defer as appellate counsel for the Appellant. Appellant's new counsel filed with the permission of the trial court an amended motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial. The trial court denied Appellant's JNOV motion, and Appellant subsequently filed his Notice of Appeal to this Court.

## **APPELLEE'S TRIAL WITNESSES**

### **WILLIAM MICHAEL WOOLFOLK**

William Michael Woolfolk, a male born January 23, 1989. R. at 80. Mr. Woolfolk spent several weekends with his first cousin, Shanna Ennis and Shanna's boyfriend, Timothy Wayne Wallace at Yellow Dog Road in Senatobia, Mississippi. R. at 81. Mr. Woolfolk was watching television one night in Shanna's bedroom, and Mr. Wallace entered the room and they began wrestling. R. at 82. Mr. Wallace allegedly got on top of Mr. Woolfolk putting his knees on Mr. Woolfolk's shoulders and penetrated Mr. Woolfolk's mouth with his penis and touched him on his body. R. at 82-83. About one to two months later Mr. Woolfolk along with Mr. Wallace, Ms. Ennis, and David Dewayne Croney (aka Snapper) were at Motel 6 in Senatobia to use Mr. Woolfolk's father's girlfriend Ann Outlaw's shower because the water was out at their house. R. at 86. While at Motel 6 Mr. Wallace and Mr. Croney joked about Mr. Woolfolk being slapped with a penis while Ms. Ennis encouraged the joking. R. at 97. Then Mr. Croney allegedly grabbed and held down Mr. Woolfolk so Mr. Wallace could slap and penetrate Mr. Woolfolk's mouth and ear with his penis while Ms. Ennis and Ann Outlaw were present. R. at 86. Mr. Woolfolk left the motel room to sit in the car while leaving the door open to the motel room as he could see Mr. Wallace and Mr. Croney tearing the motel room up. R. at 99.

## **TINA TURNER**

Tina Turner is employed with the Mississippi Department of Human Services, Family and Children Services in Panola County. R. at 108. Ms. Turner was contacted by Mr. Woolfolk's therapist, at Communicare in Sardis, Mississippi, and asked to meet with Mr. Woolfolk at her office. R. at 109. Ms. Turner as mandated by law made a report to law enforcement in Tate County. R. at 110. Ms. Turner then notified Mr. Woolfolk's Aunt Joanna Thompson Ennis to keep Mr. Woolfolk safe and away from Mr. Wallace and Shanna Ennis. R. at 116.

## **SHANNA ENNIS**

Shanna Michelle Ennis is Mr. Woolfolk's 25 year old cousin to whom he has lived with. R. at 120. Mr. Woolfolk often stayed with Ms. Ennis and Mr. Wallace in their home on Yellow Dog Road. R. at 121. The water was out at her house so she, Mr. Woolfolk, Mr. Wallace, and Mr. Croney (Snapper) went to Motel 6 to Mr. Woolfolk's father's girlfriend's motel room at Motel 6 in Senatobia to take showers. R. at 123. Mr. Wallace and Mr. Croney began tearing everything in the motel room upside down and began joking about hitting Mr. Woolfolk in the face with Mr. Wallace's privates. R. at 123. Mr. Croney allegedly held Mr. Woolfolk's arms behind his back while Mr. Wallace hit Mr. Woolfolk in the face with his penis and on his lip then penetrated his mouth. R. at 123. Ms. Ennis told Mr. Wallace and Mr. Croney to stop and that is when Mr. Croney let go of Mr.

Woolfolk's arms. R. at 124. Mr. Woolfolk told Ms. Ennis not to report anything to the police. R. at 124.

### **HARRY FLOATE**

Harry Floate was employed with the Tate County Sheriff's Department as an investigator to investigate the allegations against Mr. Wallace. R. at 151-152. Mr. Floate established the age of Mr. Wallace at the time of the incident. R. at 152. Appellee rested its case in chief at the conclusion of Investigator Floate's testimony. Appellant accordingly made a motion for a directed verdict, but the trial court denied the motion. R. at 167-173.

### **APPELLANT'S TRIAL WITNESSES**

#### **JOANNE THOMPSON**

Joanne Thompson is the mother of Shanna Ellis and the aunt of Mr. Woolfolk. R. at 176. Ms. Thompson was notified of the incident by the Panola County Family and Children's Services. R. at 176. Mr. Woolfolk never lived at Yellow Dog Road as he lived with Ms. Thompson's father. R. at 180. Ms. Thompson was informed to not allow Mr. Wallace to be around Mr. Woolfolk. R. at 182.



### **DAVID DEWAYNE CRONEY, JR.**

David Dewayne Croney, Jr. is charged as a co-defendant in the indictment with Mr. Wallace. R. at 198. Mr. Croney has never been to a Motel 6 with Mr. Woolfolk, Mr. Wallace, or Ms. Ennis. R. at 200.

### **TIMOTHY WAYNE WALLACE**

Timothy Wayne Wallace lived with his girlfriend, Shanna Ennis, off and on for almost nine years. R. at 219. Mr. Wallace denied ever sexually assaulting Mr. Woolfolk or forcibly putting his penis in Mr. Woolfolk's mouth. R. at 222. Mr. Wallace was arrested while living at Ms. Thompson's home located at 360 Camille Street in Sardis, Mississippi. R. at 225.

Following Appellant's testimony Appellant rested his case in chief, and Appellee finally arrested. R. at 241-242.

## **SUMMARY OF THE ARGUMENT**

1. The trial court erred in denying Appellant's proposed jury instruction D-3, a lesser offense instruction for simple assault. Appellant was entitled to a simple assault jury instruction in accordance with the facts of the case as presented at trial. The alleged victim testified as to Appellant using his penis to physically "slap" him about his body and becoming "defensive." The alleged victim also testified to being physically held down by Appellant. Appellant maintains there were three instances whereby the jury could have found him guilty of simple assault. The jury should have had the opportunity to consider whether Appellant was guilty of the lesser offense of simple assault. The trial court therefore committed reversible error when it denied Appellant his proposed simple assault instruction.

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S PROPOSED JURY INSTRUCTION D-3.**

During the jury instruction conference Appellant tendered for the trial court's consideration a proposed simple assault jury instruction. The said instruction was numbered D-3. The trial court denied the said proposed instruction on the basis that the instruction was not supported by the evidence and therefore lacked an evidentiary basis. R. at 244-245. Appellant made the issue apart of his amended post-trial motions, thus raising his final challenge to the denial of his proposed jury instruction with the trial court. Accordingly, Appellant is not procedurally barred raising the issue on appeal. Fears v. State, 779 So.2d 1125, 1127 (Miss. 2000).

Appellant's proposed jury instruction D-3 stated in pertinent part as follows:

If you find from the evidence, beyond a reasonable doubt, that:

1. The individual identified as Timothy Wallace,
2. Attempted to cause, or purposely, knowingly, or recklessly caused bodily injury to Michael Woolfolk,
3. Or, that Timothy Wallace attempted by physical menace to put Michael Woolfolk in fear of imminent serious bodily harm,
4. By striking or hitting Michael Woolfolk with any part of his body,
5. And that Timothy Wallace was not acting in self-defense or was not acting in defense of another,

Then you should find the Defendant Timothy Wallace guilty of the crime of Simple Assault.

Clerk's papers at 23.

A person is guilty of committing the crime of simple assault under Mississippi law if:

- (a) he attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another;
- (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm;
- (c) attempts by physical menace to put another in fear of imminent serious bodily harm.

Mississippi Code § 97-3-7(1).

The standard of review regarding the denial of a proposed jury instruction is as follows:

Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

Bryom v. State, 863 So.2d 836, 874 (Miss. 2003) (quoting Heidel v. State, 587 So.2d 835, 842 (Miss. 1991)).

A lesser included offense instruction should be granted unless the trial judge and ultimately this court can say, taking the evidence in the light most favorable to the accused, and considering all reasonable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one element of the principle charge).

Spicer v. State, 921 So.2d 292, 313-314 (Miss. 2006) (quoting Agnew v. State, 783 So.2d 699, 702-703 (Miss. 2001)).

“Lesser included offense instructions should be given if there is any evidentiary basis in the record that would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater offense.” Sanders v. State, 781 So.2d 114, 119 (Miss. 2001) (quoting Welch v. State, 566 So.2d 680, 684 (Miss. 1990)).

The alleged victim Michael Woolfolk testified at trial that Appellant, along with his indicted co-defendant, slapped him about his body with his (Appellant’s) penis.

Q. (By the Prosecutor) And I believe you said they were joking around about slapping you?

A. (Mr. Woolfolk) Yes, ma’am.

Q. Slapping you with what, Michael?

A. Their private.

Q. Okay. What happened after they joked around about slapping you.

A. They told me they were going to do it, and I got defensive and told them no, they weren’t; and that’s when Timothy told Snapper (indicted Co-Defendant) to grab me and hold me down.

Q. And did Snapper grab you and hold you down?

A. Yes, ma’am.

Q. And what happened after that?

A. They said they was going to do.

Q. They slapped you with their privates?

A. Yes, ma'am.

R. at 85-86.

In Boyd v. State, 557 So.2d 1178 (Miss. 1989), this Court found that the Defendant was entitled to a lesser offense instruction as to a simple assault in accordance with the facts of the case as presented at trial. In Boyd the alleged victim testified that the Defendant raped and physically assaulted her. Specifically, the testimony showed as follows:

Q. Did he strike you with an open hand or a closed fist?

A. A closed fist.

Q. Did you hit you with hard force or light force?

A. Yeah, he rung my bells.

Boyd, 557 So.2d 1178 at 1179.

Boyd, like Appellant, requested a simple assault instruction, and the trial court denied the requested instruction. This Court found that the trial court in Boyd committed reversible error in denying the requested lesser offense instruction.

For some unknown reason, our competent and able trial judges continue to refuse instructions on lesser included offenses when the evidence warrants them. This in essence allows the jury to hear the Defendant's side of the story; however, it also bars that same jury from using that evidence during its deliberations. This forces the jury, when it has the choice between finding the Defendant guilty of something or allowing him to go free, to convict a Defendant of a

greater offense when he could possibly only be guilty of a lesser crime.

Id., at 1181.

Evidence presented at Appellant's trial provided an evidentiary basis for a simple assault instruction. The alleged victim testified as to Appellant using his penis to physically "slap" him about his body. Moreover, the alleged victim testified as to becoming "defensive" when Appellant and his indicted Co-Defendant joked about slapping the alleged victim and grabbing and holding him down. Shanna Ennis testified to observing Appellant hitting the alleged victim in the face and on the lip with his (Appellant's) penis. See R. at 123.

In order to "hold him down" against his will Appellant placed his knees on the alleged victim's body thereby committing the crime of simple assault. According to the alleged victim's testimony Appellant also placed his penis in his mouth, which is an offensive touching, placing the alleged victim in fear and thereby committing simple assault. Appellant maintain declares that based upon the testimony presented at trial there were at least three instances the jury could have found that Appellant committed the crime of simple assault.

In considering whether an evidentiary basis exists this Court must view the evidence of record in the light most favorable to Appellant. Spicer, 921 So.2d at 313-314. In the instant case the evidence of record viewed in the light most favorable to the Appellant supports the lesser offense instruction of simple assault.

Therefore, the trial court should have given the instruction permitting the jury an opportunity to consider whether Appellant was guilty of the lesser offense of simple assault.

In sum, the jury should have had the opportunity to consider whether Appellant was guilty of the lesser offense of simple assault. The trial court therefore committed reversible error when it denied Appellant his proposed simple assault instruction. Failure to give a lesser offense instruction, when it is warranted, means the trial court did not properly instruct the jury and in failing to do so denied Appellant due process of law and fundamentally fair trial as guaranteed by the United States and Mississippi Constitutions. Boyd, 557 So.2d at 1178.

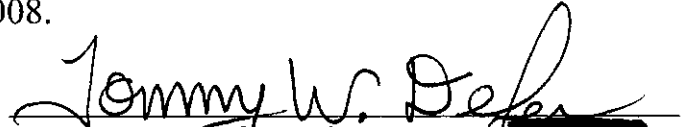


### CONCLUSION

For the foregoing reasons and authorities, Appellant's convictions and sentence should be reversed and a new trial should be ordered.

Respectfully submitted,

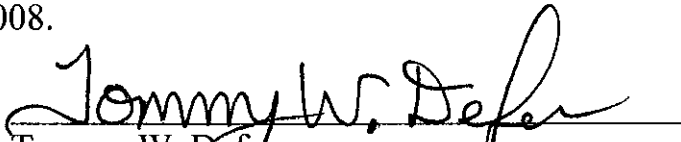
This the 24th day of October 2008.

  
Tommy W. Defer, Miss. Bar No. [REDACTED]  
LAW OFFICE OF TOMMY W. DEFER,  
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### CERTIFICATE OF SERVICE

I, Tommy W. Defer, Counsel for the Appellant, do hereby certify that I have this day mailed postage prepaid a true and correct copy of the foregoing *Appellant's Brief* to Hon. Jim Hood, Attorney General of Mississippi, Hon. Andrew C. Baker, Circuit Court Judge, and Hon. Rhonda Amis, Assistant District Attorney, at their usual business mailing addresses.

This the 24th day of October 2008.

  
Tommy W. Defer