

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DAVID JOHNSON**

**APPELLANT**

**V.**

**NO. 2008-KA-1010-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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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. David Johnson, Appellant
3. Honorable John W. Champion, District Attorney
4. Honorable Robert P. Chamberlin, Jr., Circuit Court Judge

This the 17<sup>th</sup> day of February, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

  
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**STATEMENT OF THE ISSUES**

**ISSUE NO 1: WHETHER CONFLICTING INSTRUCTIONS, ARGUABLY SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT TO PROVE HIS INNOCENCE, DENIED APPELLANT A FAIR TRIAL.**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Desoto County, Mississippi, and a judgement of conviction for the crime of fondling and a resultant sentence ten (10) years followed by five (5) years of post release supervision following a jury trial commenced on October 3, 2008, honorable Robert P. Chamberlin, Circuit Judge, presiding. David Johnson is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

**FACTS**

The purported victim in the case, referred to herein as "L.J." to protect her identity, was the State's first witness. She told the jury that she was twelve years of age, being born on January 9, 1996. (T. 65-66) The defendant, David Johnson {"Johnson"}, is her uncle. On October 3, 2007 she came home from school to her home, an upstairs apartment over a store located in Olive Branch,

Mississippi. (T. 67-69)

L.J. came up the stairs. Her uncle was on the porch and handed her \$6.00. L.J.'s mother told her to bring a chair in and as she did, she testified that Johnson grabbed her between the legs (T. 71-72) She went into the house, to her mother's room, and began to cry. Her mother, at some point, began to put "perm" in her hair. While her mother worked on L.J.'s hair, Johnson came in and "started messing with [her]" ( T. 74), and also apparently gave her \$20.00 at that time (T. 76) According to her testimony, Johnson grabbed at the upper portion of her body, even as her mother put perm in her hair. L.J. told Johnson to leave her alone and stabbed him in the hand with a comb. At that point her mother went outside and told her older brother. At some point during these events, she told her mother about what happened on the porch. (T. 74-75) Over objection, raised originally in an objection to the State's opening statement <sup>1</sup>(T. 61-64), the prosecutor asked L.J. if Johnson had ever talked to her about sex, and based upon the courts prior ruling, she was allowed to testify that Johnson kept asking her for her "cat" meaning he wanted sex. (T. 76-77)

Upon cross examination, L.J. explained that she lived with her mother, another uncle, her grandfather and two brothers. She claimed that Johnson had asked for sex sometime that month (T. 78-84)

L.J.'s mother, Margaret Ann Johnson ["Margaret"], informed the jury that Johnson was her half brother and had come to the house to visit his father, L.J.'s grandfather. (T. 86) Johnson had been drinking beer that day. (T. 86-87) She recalled that L.J. came in upset, telling her that Johnson had given her some money. She sent L.J. to get a chair and when she came back she had tears in her

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<sup>1</sup>During the State's opening statement, a reference was made to Johnson having previously talked to L.J. about sex. The bench conference was not reported, but, there was not an on the record balancing conducted by the trial court. Instead the court merely instructed the jury that there had been an objection to prior bad acts, which would only be admitted to show Johnson had a "lustful and lascivious disposition towards the victim."

eyes. (T. 88)

Margaret was doing L.J.'s hair when Johnson came in. According to Margaret, Johnson tied to grab L.J.'s "titties", then gave her \$20.00. (T. 89) L.J. started cussing, grabbed the pick comb and stuck it in Johnson's arm saying, "I don't play that shit." (T. 89) Margaret got up and went and told her son. (T. 92) That son, Bernard, confronted Johns, asking him: "Why did you touch my sister?" Johnson responded; "I didn't mean to touch your sister." Bernard then pummeled Johnson. (T. 92)

Johnson went to the store downstairs seeking beer; but was refused because he was drunk. Margaret called her cousin to come get her brother. The store owner called the police. (T. 94)

In response to cross examination Margaret told the jury that Johnson had been staying there for one to two days. He slept on the couch with Bernard. L.J.'s father was out of town at the time in Jackson working. (T. 95-99) Margaret again professed to seeing Johnson give L.J. \$20.00

Mitchell Bernard Johnson ["Bernard"] testified that he did not see the touching. Johnson told him he didn't mean to touch L.J. He did not remember Johnson ever visiting his home before. At the time of the incident, neither Johnson's brother nor father were present. He was outside fixing a bicycle when his mother came to him and told him what happened. He confronted his uncle and hit him once and then seven or eight more times. (T.102-108)

Harry Schreffler ["Schreffler"] was the responding officer. When he arrived he saw the mother, Margaret with her two boys and L.J.. L.J. was crying. Schreffler approached Johnson and observed that he appeared drunk. He arrested him for public intoxication. (T. 110-111)

The dates of birth of Johnson was obtained by Schreffler and admitted into evidence; April 14, 1976.

The State made multiple attempts to get Officer Scheffler to define "cat" as used by L.J..

Though the original objection did not specify that the question was without proper foundation, the trial court sustained the original and subsequent objections on that basis. Ultimately Scheffler sated the obvious, that “cat” had a sexual connotation. (T. 115)

During Schreffler’s cross examination, the trial court advised Johnson to not get up in front of the jury, apparently due to his movements being shadowed by a deputy. (T. 119) Johnson then was given a restroom break during which the court revisited the issue an issue raised earlier by the defense, the States use of evidence of other bad sexual acts by the defendant towards L.J.. The trial court found that the evidence admissible as evidence of Johnsons “lustful and lascivious disposition towards the victim” and found that the probative value outweighed its prejudicial value. (T. 121-122). The trial court also noted that while no question had been raised as to L.J.’s competency as a witness, the court, sua sponte, found her competent. At this point the State rested, followed by the defendant’s motion for a directed verdict. The argument was that touching (grabbing) the clothes did not constitute fondling. The motion was denied and the trial judge advised Johnson pursuant to *Culverson*.

The defense in this case stood upon the testimony of Johnson himself. His defense was summed up in his statement:

...I ain’t never had no sexual relation or touching or none of that, because I know—I got more respect than that not to do nothing like that. I’m 32 years old, and I know better than that. You know, I know right from wrong. (T. 131)

Johnson denied seeing L.J. getting off the bus, denied grabbing at her, denied touching her at all and claimed he had not been stabbed with the comb. Johnson also denied giving L.J. any money and refuted the fight with her brother.

When questioned by the State, Johnson also denied drinking, which he adjusted to not having more than one or two beers.(T. 138-139) He contradicted the reported time of the event and did not



see L.J. getting her hair permed.

To explain the evidence against him, Johnson testified that his sister was out to get him (T. 143) He explained his unsteady gait, testified to by the arresting officer, as resulting from pins and screws in his leg. On redirect, his attorney elicited that he had been in a car accident.

### **SUMMARY OF THE ARGUMENT**

The jury was given conflicting instructions, on the one hand requiring that Johnson be found guilty beyond a reasonable doubt and conversely, given an instruction which clearly implied to the jury that the jury, in fact, had to find the defendant innocent to set Johnson free. Although no objection was made to this instruction, it is urged that the jury's verdict cannot be deemed reliable.

### **ARGUMENT**

**ISSUE NO 1: WHETHER CONFLICTING INSTRUCTIONS, ARGUABLY SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT TO PROVE HIS INNOCENCE, DENIED APPELLANT A FAIR TRIAL.**

There can be no certainty in a jury's verdict when the jury has been given conflicting instructions, and even more so when the instruction shifts the burden of proof to the defendant to prove his innocence. The burden of proof, that guilt must be proven beyond a reasonable doubt, is axiomatic to our system of jurisprudence. "The burden of proof the State must meet to convict a defendant never shifts to the defendant..." *Simon v. State*, 857 So.2d 668, 696 (Miss.2003). In the instant case, a jury instruction given by the trial court can be said to have done exactly that, to have given the jury an instruction requiring the jury to find David Johnson innocent. The instruction was tendered by the court and included, without objection, to the instructions given the jury. The instruction, as shown below, virtually defined "not guilty" as "innocent."

### **JURY INSTRUCTION # 5**

The Court instruct you that it is just as **much your duty under the law and upon your oaths as jurors to free an innocent person** by

**your verdict of not guilty** as it is for you to convict a guilty person.

CR-5 (C.P. 64, R.E. 4)

This instruction, no matter how well intended, undermines the concept of a fair trial guaranteed under the Sixth and Fourteenth Amendments. It tells the jury that a verdict of not guilty is a finding of innocence. As such, it directly contradicts the long accepted standard, that of beyond a reasonable doubt.

Thus, in this case, the query is unavoidable, did the jury apply the appropriate standard of beyond a reasonable doubt, or did they become confused and resolve to convict David Johnson because they were not fully assured of actual innocence. “When a jury is given instructions which are in hopeless conflict this Court is compelled to reverse because it cannot be said that the jury verdict is founded on correct principles of law.” *Scott v. State*, 446 So.2d 580, 583 (Miss.1984) The concept of innocence clearly requires a finding of complete and absolute absence of guilt, a standard of Biblical proportion. The standard of guilty beyond a reasonable doubt obviously allows for some possibility of innocence, but one that is less than sensible or reasonable. The gap between actual innocence and guilty beyond a reasonable doubt is a yawning chasm. Yet the complained of instruction obviates the distinction.

As has been conceded, no objection was entered to this instruction. Often, this absence of objection has been treated as a waiver, a procedural bar. But, should this bar operate to deprive someone of their liberty, when there exists no assurance that the jury applied the appropriate legal and constitutional standard. If the jury utilizes an erroneous standard in deciding the question of guilt, the accused has not been afforded a fair trial. It is therefore urged, as articulated in the then Justice Waller’s dissent in *Fears v. State*, 779 So. 2d 1125, 1132 (Miss. 2000) that when a jury receives conflicting instructions, “[t]he fact that the defense did not object to the instruction is not

determinative.” And it should not be, as our Constitution is established upon the principle that every citizen is afforded the right to a fair trial. A misguided jury cannot be fair.

Accordingly, the verdict of guilty against David Johnson should be reversed. As the Mississippi Supreme Court stated in *Brazile v. State*, 514 So.2d 325, 326 (Miss. 1987) “Because of the inaccurate and confusing nature of this instruction, we conclude that the verdict of the jury must be reversed and the case remanded ...”

### CONCLUSION

With the jury being given contradictory and confusing instructions, potentially causing the jury to believe that if David Johnson is not shown to be wholly innocent, then the alternative is that the jury must find him guilty under their oath, it is respectfully submitted, requires that this cause be reversed and remanded for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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**CERTIFICATE OF SERVICE**

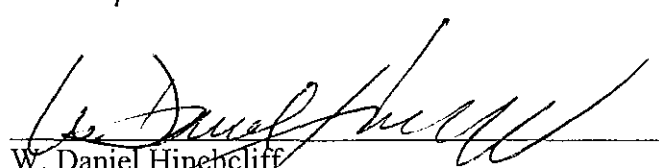
I, W. Daniel Hinchcliff, Counsel for David Johnson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge  
Post Office Box 523  
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Honorable John W. Champion  
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This the 17<sup>th</sup> day of February, 2009.

  
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