

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

**LAWONDA SHEPHERD**

**APPELLANT**

**v.**

**No. 2009-KA-00112-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF APPELLANT  
LAWONDA SHEPHERD**

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On Appeal from the  
Circuit Court of Bolivar County  
No. 2008-022-CR2

***ORAL ARGUMENT REQUESTED***

Andrew B. "Drew" Schimmel  
3000 Old Canton Road, Suite 465  
Jackson, Miss. 39206  
T: 601.852.3764  
F: 601.519.0009  
E: drew@schimmel-law.com

David Neil McCarty  
Miss. Bar No. [REDACTED]  
*David Neil McCarty Law Firm, PLLC*  
416 East Amite Street  
Jackson, Miss. 39201  
T: 601.874.0721  
F: 866.236.7731  
E: dnmlaw@gmail.com

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Miss. R. App. P. 28(a)(1), 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:

1. Lawonda Shepherd, *Appellant*
2. Alfred Kirkham, *Appellant*
3. The Honorable Albert B. Smith, III, *Bolivar County Circuit Judge*
4. Ms. Leslie Flint, *Assistant District Attorney, Eleventh Judicial District*
5. Ms. Brenda F. Mitchell, *Assistant District Attorney, Eleventh Judicial District*
6. Mr. Wilbert L. Johnson, *Trial Counsel for Appellant Shepherd*
7. Mr. Stan S. Perkins, *Trial Counsel for Appellant Kirkham*
8. Fabian Curry, *Victim*
9. Andrew B. "Drew" Schimmel, *Lead Appellate Counsel for Appellant Shepherd*
10. David Neil McCarty, *Appellate Counsel for Appellant Shepherd*
11. Mississippi Office of Indigent Appeals

So CERTIFIED, this the 8th day of February, 2010.

Respectfully submitted,



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David Neil McCarty  
Miss. Bar No. [REDACTED]  
*Attorney for Appellant*

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## **Statement of the Issues**

This appeal presents four main questions:

1. Should a trial be severed when a confession given by a co-defendant implicates the accused?
2. Was the jury properly instructed on the law of self-defense in light of the changes in the law wrought by the Castle Doctrine?
3. Does the Castle Doctrine also provide a defense for an accessory before the fact?
4. Is it ineffective assistance of counsel for a defense lawyer to fail to impeach a defendant, when the co-defendant has committed perjury and now implicates the accused in a crime? Is it further ineffective assistance to fail to raise a change in the law of self defense, and to request a continuance?

## **Statement of the Case**

This case involves a young woman whose boyfriend shot a man with a small pistol. Because the injured victim indicated to police that she handed her boyfriend the pistol, she was charged alongside her paramour with aggravated assault. The boyfriend had provided a sworn statement prior to trial that he had produced the gun himself, but on the stand at trial changed his testimony to say that she had given him the gun.

As a result of this perjurious testimony, which her attorney did not protest, she was convicted. Further, the jury was not properly instructed regarding the law of self defense in Mississippi, another point which her attorney did not raise.

## **Statement Regarding Oral Argument**

This case presents a question of first impression in Mississippi concerning the application of the recent change in self defense law pursuant to the Castle Doctrine. Oral argument would aid the Court in addressing the issues raised by the application of this new law.

### **Procedural History and Relevant Facts**

There is one core undisputed fact in this case: Alfred Kirkham shot Fabian Curry in the chest with a small pistol, causing him injury. There are only two substantive issues that are disputed. First, whether under the circumstances Kirkham was justified in shooting Curry. Second, whether Kirkham's girlfriend at the time of the shooting, Lawonda Shepherd, aided and abetted him in shooting Curry.

The events take place in Shaw, Mississippi, a small Delta town close to Greenville and Leland. In the Spring of 2007, the brother of Alfred Kirkham was driving Fabian Curry's car, and he wrecked it. Tr. at 184. Curry demanded that Kirkham pay him for the damage his brother caused to the car. Tr. at 184-86. Kirkham disputed that he should be required to pay for the damage, but tried to arrange for his father to pay Curry. Tr. at 186.

Curry believed the damage to the car would take around \$3,500 to fix, and when he had not received any money from Kirkham's father, began calling and demanding again that Kirkham pay for the damage. Tr. at 187. Kirkham continued to refuse. Tr. at 187.

On Sunday, June 24, 2007, while waiting at her family's house for his girlfriend Lawonda Shepherd to return from church, Kirkham was confronted by Curry. Tr. at 187-88. Kirkham testified that Curry came up to him and shoved him against a wall, demanding the money for the damage to the car. Tr. at 188. After Kirkham left on his motorcycle, Kirkham ran him off the road with his car. Tr. at 188. While Kirkham's mother advised him to contact the police and press charges, he demurred. Tr. at 189.

What happened the next day, June 25, 2007—the day that Kirkham shot Curry—is less clear, although neither prosecution nor defendant disputes that ultimately Curry would be in the hospital with a gunshot wound inflicted by Kirkham.

In Curry's sequence of events, it is the early evening, and he is at a friend's apartment at the Promise Land Apartments at a house party, having party wings and Rotel. Tr. at 63. He left the apartment to head to the store for more beer. Tr. at 64. He spots Kirkham's girlfriend, Ms. Shepherd, outside the apartment, and hears the approach of Kirkham's motorcycle. Tr. at 64-65. According to Curry, Kirkham confronts him about the "altercation" the day before. Tr. at 66-67. Kirkham is on his motorcycle, wearing a helmet, next to a Cadillac which he also owns. Tr. at 66-67.

In Curry's version, he sees Ms. Shepherd hand Kirkham a small pistol, which she retrieved from the Cadillac. Tr. at 67-68. The men curse each other for about three minutes. Tr. at 101. Kirkham then shoots Curry in the chest, and then hovers over him, taunting, and tries to pull the trigger again—but the gun jams. Tr. at 69. At that point Curry's friends arrive, who take him to the hospital. Tr. at 69. Curry ultimately admitted that he "couldn't say" whether he or Kirkham started the argument. Tr. at 103.

Ms. Shepherd's recitation of what happened is markedly different. Instead of a lone Curry ambushed by a raving Kirkham, she testified that Curry surrounded her boyfriend that day with three other men, while he was still sitting on his motorcycle. Tr. at 222. Curry then punches Kirkham in the face—a fact disputed by Curry, although there are contemporaneous photographs to support the story, as well as other testifying witnesses. Tr. at 103, Exhibit D-3. Ms. Shepherd intervened, telling Curry that her boyfriend didn't want to fight, which resulted in Curry threatening her with physical harm and cursing her. Tr. at 222. Curry threatened that he and his crew would go get their "thumpers," which she understood to mean their guns. Tr. at 225. She felt like she was in serious danger. Tr. at 227. Indeed, she feared for her life and that of her boyfriend, and considered the four men to be dangerous people. Tr. at 227.

Then Ms. Shepherd's aunt intervenes, trying to remove her young niece from what is already a bad situation. Tr. at 222. During the commotion, Ms. Shepherd simply hears a shot, and turns to see Curry on the ground. Tr. at 222. She never saw the gun, and testified that she didn't hand a gun to Kirkham. Tr. at 222-23.<sup>1</sup> Ms. Shepherd also disputed that there was a gun in the Cadillac, which she had been driving. Tr. at 223.

Kirkham's story was markedly the same. He recalled being punched in the face by Curry while he was sitting on his motorcycle, and was "nervous and anxious." Tr. at 194. He also testified he was "trying to avoid a confrontation." Tr. at 194. Kirkham said that Curry stuck his hand in his pants, as if to withdraw a gun. Tr. at 209. He was also worried that after Ms. Shepherd protested to the four men about his treatment, they were going to attack her as well. Tr. at 209-10. He admitted he was scared of serious bodily injury from Curry and his associates. Tr. at 199.

Before trial, Kirkham admitted in a signed statement that he "came up with the gun" before shooting at Mr. Curry. Exhibit D-2. Indeed, in his sworn statement to the Shaw Police Department produced prior to trial, Kirkham does not even use Ms. Shepherd's name, just calling her his girlfriend, and nowhere in the statement is the concept that she handed him the gun. D-2.

Yet at trial his position changed dramatically: he testified that he asked Ms. Shepherd to hand him a gun, and that she did. Tr. at 196. He also testified that the gun was not his and that it belonged to Ms. Shepherd. Tr. at 206.

No other witness saw Ms. Shepherd hand a gun to Kirkham. Ms. Shepherd's grandmother corroborated the testimony that the day before the shooting she saw Curry push Kirkham up against a wall. Tr. at 147. Ms. Shepherd's aunt also corroborated that Curry wasn't

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<sup>1</sup> Nor did the prosecution see the gun; it was never recovered, and not introduced into evidence at the trial.



alone the day of the shooting, but accompanied by three other men. Tr. at 151. She also testified that he hit Kirkham with his fist. Tr. at 152, 153.

After the shooting, both Kirkham and Ms. Shepherd were indicted for aggravated assault, or aiding and abetting in aggravated assault. R. at 58. Following the testimony at trial, the jury deliberated for roughly two hours before delivering a verdict of guilty for both Kirkham and Ms. Shepherd. Tr. at 260-61. At Ms. Shepherd's sentencing hearing, Curry's mother asked the Court to "[b]e lenient." Tr. at 268. She received a sentence of fifteen years, with five suspended. Tr. at 268-69.

Before his sentencing for the shooting, Kirkham had also been convicted of a felony for possession of cocaine with the intent to sell. Tr. at 271. He received a twenty year sentence. Tr. at 272.

### **Summary of the Argument**

Ms. Shepherd's conviction must be reversed and this matter remanded for a new trial for four primary reasons. First, it was an abuse of discretion to try both her and Kirkham together, and the trial court should have severed the defendants for separate trials. Second, the jury was not properly instructed regarding the change in self defense law after the Legislature's adoption of the Castle Doctrine. Third, the Castle Doctrine provides complete immunity for Ms. Shepherd's actions. Last, she was denied the effective assistance of counsel when her lawyer failed to cross-examine Kirkham's perjurious statements that she was a part of the crime, and failed to introduce the Castle Doctrine in her defense.

### **Argument**

#### **I. The Trial Should Have Been Severed.**

It was an abuse of discretion for the trial court to refuse to sever Ms. Shepherd's trial from her co-defendant, and as a result she was irrevocably prejudiced.

A trial court's denial of a motion to sever a trial will not be overturned absent abuse of discretion. *King v. State*, 857 So.2d 702, 716 (Miss. 2003). Rule 9.03 of the Uniform Circuit and County Court Rules states, "[t]he granting or refusing of severance of defendants in cases not involving the death penalty shall be in the discretion of the trial judge." In a joint trial where the accused moves for severance because the prosecution intends to introduce a confession given by a co-defendant that implicates the accused, the trial judge should require the State to elect among three options: a joint trial in which the statement is *excluded*; a joint trial in which the statement is *admitted*, but the portion implicating the accused is *deleted* or *redacted*; or to agree to a *severance*. *Walker v. State*, 430 So.2d 418, 421 (Miss. 1983); *see also Anderson v. State*, 5 So.3d 1088, 1093 (Miss. Ct. App. 2007).

In the case at hand, both Kirkham and Ms. Shepherd were indicted for aggravated assault. Her position remained steadfast that she had no role in the shooting, and the undisputed shooter, Kirkham, admitted in a signed statement that *he* "came up with the gun" before shooting at Mr. Curry. Nowhere in the sworn statement to the Shaw Police Department is the concept that Ms. Shepherd handed him the gun. Yet at his testimony abruptly shifted to indicate that she had passed him the pistol, a full reversal from his earlier sworn statement.<sup>2</sup> His statements garnered no objection from Ms. Shepherd's counsel.

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<sup>2</sup> Because Kirkham's earlier signed and sworn statement was to the Shaw Police Department during its investigation of the shooting of Curry, his change in testimony at trial was perjury. The pertinent statute reads:

Every person who shall wilfully and corruptly swear, testify, or affirm falsely to any material matter under any oath, affirmation, or declaration legally administered in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof, or in any case where an oath or affirmation is required by law or is necessary for the prosecution or defense of any private right or for the ends of public justice, or in any matter or proceeding before any tribunal or officer created by the Constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer, shall be guilty of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed.

After this testimony, counsel for Ms. Shepherd requested a severance of the trial, stating that Kirkham's position had changed, as he now has:

... her passing him the gun. That's not in his [prior] statement. My client has always maintained that she did not [pass the gun]. Therefore, that's where we are getting into a---

THE COURT: Yeah.

Tr. at 201. The prosecutor interjects to assert that she "do[es]n't believe their defenses are opposed to one another," then immediately retracts this statement, admitting that counsel for Ms. Shepherd did not make an opening statement, and so Ms. Shepherd has not yet presented her theory of the case. Tr. at 201-02.

After reviewing the prior sworn statement of Kirkham, the Court rules that his testimony that Ms. Shepherd passed him the gun is "consistent with the statement of the victim," Fabian Curry, and "[s]o we would otherwise have it in." Tr. at 202. The trial court then denies the motion for severance. Tr. at 202.

This is not the standard outlined in *Walker* and *Anderson*. Regardless of whether the victim and one of the defendants agreed—which they did—the State must at this point elect one of the three paths described in precedent. First, to proceed with a joint trial, but to *exclude* the statement. Second, to proceed with a joint trial and admit Mr. Kirkham's statements, but *redact* or *delete* his references to Ms. Shepherd. Last, the State could have agreed to a *severance*.

In this case, none of the three paths were chosen. The State instead proceeded to try both defendants with the statement fully included in the trial and unredacted. The only permissible way to proceed would be to exclude the reference to Ms. Shepherd handing Mr. Kirkham the gun. However, at that point the cat was already out of the bag. The only possible cure at that point was to sever the trial.

The trial court abused its discretion by not focusing on the prejudice to Ms. Shepherd, which is the standard embraced by *Walker* and *Anderson*, but instead relying on the idea that the testimony of Kirkham was corroborated by Curry. Regardless of Curry's testimony, it is exactly the corroboration by Kirkham that harms Ms. Shepherd, and this is the exact reason why the law forbids such a route: there is an incentive for a co-defendant to "gang up on" a co-defendant that prejudices the accused.

Further, at the moment the perjurious testimony was introduced, a continuance would have been warranted so that defense counsel could prepare for Kirkham's change in testimony. In that fashion, this case is analogous to *Fulks v. State*, 18 So.3d 803, 805 (Miss. 2009). There, an "eleventh-hour disclosure of the unexpected content of this witness's testimony produced . . . a trial by ambush in which critically important evidence was sprung on a defendant with such abruptness that defense counsel had time neither to investigate its veracity nor to make meaningful preparation to meet it." *Id.* at 805. In reversing the conviction in that case, the Court held that:

When a [party] reveals evidence on the eve of trial that should have been disclosed earlier, and when that evidence completely undercuts the defense's theory of the case and renders most of its trial preparations worthless, then the only effective remedy is a continuance. Otherwise, the defense attorney is left with inadequate time and opportunity to investigate the newly arisen evidence, evaluate its trustworthiness, discuss its implications with his client, allow time for due consideration thereof, and, if necessary, to develop a new trial strategy.

*Id.* at 805. While the offending party in *Fulks* was the prosecutor, the same reasoning applies here: a defendant should be protected from trial by ambush, whether effected by the prosecutor or a co-defendant. It is not "merely . . . an impeachment opportunity for the defense," but prejudicial to the administration of justice, and undercut Ms. Shepherd's position. *Id.*

The trial court's refusal to sever the trial, and refusal to follow one of the three paths as outlined in *Walker* and *Anderson*, constitutes an abuse of discretion. A limiting instruction could

have perhaps been given to the jury, but even this tepid remedy was not in place. As a result, Ms. Shepherd's conviction must be reversed, and this case remanded so that she might receive a separate trial from Kirkham with the opportunity to fully defend herself against his perjurious change in position.

## **II. The Jury Was Improperly Instructed on Self-Defense Law in Mississippi.**

Because the jury was not properly instructed on the law of self defense in Mississippi, the conviction of Ms. Shepherd must be reversed.

"In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole," and "if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Johnson v. State*, 823 So.2d 582, 584 (Miss. Ct. App.2002) (quoting *Collins v. State*, 691 So.2d 918, 922 (Miss.1997)).

In the case at hand, three instructions were given regarding self-defense (the first two instructions are not numbered). "Self Defense 1" read:

The Court instructs the jury that to make an assault justifiable on the grounds of self-defense, the danger to Alfred Kirkham and/or Lawonda Shepherd must either be actual, present and urgent, or he or she must have reasonable grounds to believe that Fabian Curry intended to do him some great bodily harm, and in addition to this, Alfred Kirkham and/or Lawonda Shepherd must have reasonable grounds to believe that there is imminent danger of such act being accomplished. It is for the jury to determine the reasonableness of the grounds on which the defendant(s) act(s).

R. at 108. "Self Defense 2" reads: "The Court instructs the jury that one who claims self-defense as defense to his actions may not use excessive force to repel the attack, but may only use such force as is reasonable necessary under the circumstances." R. at 109.

Last, D-3 read: "The Court instructs the Jury that the State must prove beyond a reasonable doubt that the Defendant, Alfred Kirkham, did not act in lawful self-defense." R. at 110. There was no such corresponding instruction for Ms. Shepherd.

While at one point the instructions roughly reflected the state of the law, it is undisputed that the adoption of Miss. Code Ann. § 97-3-15 greatly changed the law of self-defense: the so-called “Castle Doctrine” adopted by the Legislature became effective on July 1, 2006, almost a year before the incident in question. As this Court has noted, “[t]he Castle doctrine made *substantive* changes to the law of self-defense . . . .” *Johnson v. State*, 997 So.2d 256, 260 n.2 (Miss. Ct. App. 2008) (emphasis added). Specifically, it “curtailed the duty to retreat and created a *presumption* that the defendant reasonably feared imminent death, great bodily harm, or the commission of a felony upon him . . . .” *Id.* (emphasis added).

The relevant portions of the law read:

A person who uses defensive force *shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him* or another or upon his dwelling, or against a vehicle which he was occupying, or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling, *occupied vehicle*, business, place of employment or the immediate premises thereof or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person’s will from that dwelling, occupied vehicle, business, place of employment or the immediate premises thereof and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred.

...

A person who is not the initial aggressor and is not engaged in unlawful activity *shall have no duty to retreat before using deadly force* under subsection (1)(e) or (f) of this section *if the person is in a place where the person has a right to be*, and no finder of fact shall be permitted to consider the person’s failure to retreat as evidence that the person’s use of force was unnecessary, excessive or unreasonable.

Miss. Code Ann. § 97-3-15 (3), (4). Therefore the law creates two new standards applicable to this case. First, that when a person is in an occupied vehicle, he or she may use defensive force of any kind, as there is a *presumption* that there was a fear of imminent death, great bodily harm,

or the commission of a felony. Secondly, that a person who is attacked in a neutral place may use deadly force to protect themselves.

In the case at hand, the undisputed testimony showed that Kirkham was on his motorcycle, an “occupied vehicle” under the meaning of subsection 3 of the Castle Doctrine, when Curry approached and threatened him. Not only did both he and Ms. Shepherd testify that he was *actually* afraid of bodily injury, four persons testified that Curry punched him in the face—a felony. Under subsection 3, any defensive action he committed must be *presumed* to be reasonable in light of the circumstances.

However, jury was instructed by Self Defense 1 that reasonableness must be *proved*—the standard *before* the “substantive” change in self defense law announced by the Castle Doctrine. This does not accurately reflect the law, and even when read in concert with the other instructions does not adequately instruct the jury.

Secondly, subsection 4 of the Castle Doctrine states that if a person is where they are allowed to be, and they are not the initial aggressor, and not engaged in breaking the law, they have no duty to retreat before using deadly force. Yet the Self Defense 2 instruction heard by the jury bound them to the concept “that one who claims self-defense as defense to his actions may not use excessive force to repel the attack, but may only use such force as is reasonable necessary under the circumstances.” This is in direct contradiction to the Castle Doctrine. In the case at hand, Kirkham was in a parking lot in a public housing area where his girlfriend’s relatives lived. He was not breaking the law. Four witnesses testified that he was attacked by Curry; indeed, even Curry admitted that he did not know who started the argument. The jury should have been instructed that he was allowed to use deadly force, which he did.

There were no instructions given to the jury which adequately reflected the Castle Doctrine, and even read as a whole there is no way to cure what occurred: the jury was simply instructed on law that had been superseded by statute.

Unfortunately, there are no cases interpreting the Castle Doctrine under the facts of this case. *Johnson, supra*, only acknowledged the substantive change in self-defense law. A more recent case held that it did not apply when “there was no evidence that [the victim] was going commit an assault, offer violence to an occupant of [the building], or commit some other crime on the premises,” facts dissimilar to the case at hand. *See Westbrook v. State*, 2009 WL 3086430, \*3 (Miss. Ct. App. Sept. 29, 2009).

Last, and just as important, while Kirkham received an instruction that the State had the responsibility of disproving his theory of self defense, Ms. Shepherd did not. The exact same crime was imputed to her through the indictment, and she should have had the benefit of the same defenses. The other instructions all include her name alongside Kirkham’s, save D-3. Read in concert with the other misleading instructions, the jury could have inferred that even if Ms. Shepherd had acted reasonably, it did not provide a viable defense if Kirkham had not. This confusion prejudices Ms. Shepherd.

Because the jury was not properly instructed regarding the law of self-defense, Ms. Shepherd’s conviction must be reversed, and this matter remanded so that she might received a new trial with proper instructions.

### **III. The Castle Doctrine Provides Complete Immunity for Ms. Shepherd.**

In the alternative, and while Ms. Shepherd maintains that she did not provide Kirkham with the pistol, the Castle Doctrine would immunize her even if she had. As set out above, the Castle Doctrine allows deadly force when one is in an occupied vehicle and attacked, as Kirkham was. It further curtails the duty to retreat.



Ms. Shepherd was convicted as aiding and abetting Kirkham in his aggravated assault on Curry. Under the testimony of Curry and Kirkham, she is an accessory before the fact; this does not shield her from criminal conviction. See Bennett, Miller, and Campbell, *Accessory to a Crime*, 3 Ency. of Miss. Law § 23:11 (Jackson and Miller, Eds.) (“A person who is an accessory to any felony before the fact is deemed to be and is considered a principal and shall be indicted without regard to whether the principal perpetrator has been convicted,” as the “role is the same as the principal whether or not he or she was an accessory before the fact or an accomplice”).

Just as the acts of a principal are imputed to Ms. Shepherd, all applicable defenses are as well. Ample and corroborated testimony at trial demonstrated that she was scared for both her life and that of her boyfriend, who had already been attacked twice in two days by Curry. Under these circumstances, if she did take any actions in providing Kirkham with a pistol, they were allowed and completely immunized under the Castle Doctrine. As set out above, the law allows persons in the situation Ms. Shepherd was in to use deadly force to repel an intrusion into an occupied vehicle and fight off aggressors.

For this reason Ms. Shepherd cannot be convicted of aggravated assault, because under state law her actions have a presumption of reasonableness, and deadly force was authorized. Her conviction must be reversed.

#### **IV. Ms. Shepherd Was Denied the Effective Assistance of Counsel.**

But for the omissions of her trial counsel, Ms. Shepherd would not have suffered the prejudice of a joint trial or the damning statements of her co-defendant, would have gained the immunity of the Castle Doctrine, and would have achieved a different result at trial.

A defendant may be allowed a new trial if the actions or omissions of their previous counsel damaged their defense. See *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail with a Strickland claim, a defendant must show two things: first, that her counsel’s performance

was deficient, and (2) this deficiency prejudiced her. See *Leatherwood v. State*, 473 So.2d 964, 968 (Miss.1985). There is a strong but rebuttable presumption that his counsel's decisions were sound trial strategy. *Id.* at 968-69. To overcome that presumption, a defendant must show that a different result in trial would have occurred "but for" her counsel's deficiency. *Id.* Mississippi Rule of Appellate Procedure 22(b) provides in relevant part that "[i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record."

The instances of ineffective assistance are apparent from the record. In the case at hand, the victim, Curry, testified that he saw Ms. Shepherd hand Kirkham the gun. As hostile testimony to Ms. Shepherd, such a statement is to be expected.

However, shortly after her co-defendant Kirkham took the stand, a red flag was raised: he testified that the victim's narrative was accurate, in that "basically, he told the truth about the story." Tr. at 193. At this moment, in full contradiction to his earlier sworn statement, Kirkham becomes adverse to Ms. Shepherd, although it would not become full apparent until a few minutes later.

The hostility of the co-defendant comes to a head when he begins to testify that she handed him the .38 pistol. Tr. at 196. Counsel for Ms. Shepherd offers no objection; does not ask for a limiting instruction; does not request an immediate severance pursuant to *Walker*; does not ask for a continuance pursuant to *Fulks*; indeed, does nothing, as Kirkham continues to damn his co-defendant before the jury through his corroboration of Curry's story.

Only after Kirkham's lengthy monologue on the guilt of Ms. Shepherd, defense counsel does request a severance, which the trial court denies. Counsel for Ms. Shepherd then begins a gentle examination of Kirkham, which—despite being labeled as "cross examination" by the court reporter—is simply leading questions about "what happened next?" See, for example, Tr. at

204. Indeed, he re-elicits the *same* damning and perjurious statements from Kirkham that Ms. Shepherd handed him the gun, even allowing Kirkham to bolster and strengthen his earlier narrative. Tr. at 205-07.

At no point does counsel for Ms. Shepherd introduce Kirkham's prior sworn statement that directly contradicts his new testimony. Indeed, although he had shortly before offered meekly to the trial court that the statements were contradictory, at no point does he demand to know from Kirkham "which is true," the prior sworn statement or the new testimony. Counsel simply allows the co-defendant to meander on and on, underscoring his already damning statement that she handed him the gun, and irrevocably prejudicing Ms. Shepherd.

Further, her counsel did not object to the misleading and outdated jury instructions regarding the law of self defense, nor invoke the complete immunization of the Castle Doctrine. Nor did trial counsel request a continuance pursuant to *Fulks* in light of the late-breaking change in testimony by Kirkham, which completely devastated Ms. Shepherd's defense. If the Court deems that these issues were waived because they were not objected to at trial, or not raised, the ineffectiveness of counsel at trial is only heightened.

These failures were deficient, and these deficiencies prejudiced Ms. Shepherd's defense and resulted in her conviction for aggravated assault. Accordingly, her conviction must be reversed, and this matter remanded for a new trial.

### **Conclusion**

Mississippi precedent requires that when a co-defendant testifies against the accused, as in this case, that the trial be severed, or the information redacted in some fashion. Because this did not occur, Ms. Shepherd suffered from the apparent corroboration of testimony by a co-defendant and the victim, a trial by ambush in classic prohibited fashion. The jury was not

properly instructed regarding the law of self defense, and when read as a whole the instructions were improper. This error caused harm to Ms. Shepherd.

The substantive changes in self defense law wrought by the Castle Doctrine completely immunize Ms. Shepherd, and she cannot be held criminally accountable for actions the Legislature has approved. Last, the actions of Ms. Shepherd's trial counsel were so deficient that it resulted in prejudice, namely her conviction for aggravated assault.

These errors mandate a reversal of Ms. Shepherd's conviction, and a new trial in the Circuit Court of Bolivar County.

Filed this the 8th day of February, 2010.

Respectfully Submitted,

*Attorney for Appellant*

A handwritten signature in black ink, appearing to read 'D. McCarty', is written over a horizontal line.

David Neil McCarty, MSB No. [REDACTED]

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery, a true and correct copy of the above and foregoing *Appellant's Brief*, including the *Record Excerpts of the Appellant*, to the following persons at these addresses:

Office of the Attorney General  
Criminal Division  
P.O. Box 220  
Jackson, Miss. 39205

Honorable Albert B. Smith, III  
Bolivar County Circuit Judge  
P.O. Drawer 478  
Cleveland, Miss. 38732

Mississippi Office of Indigent Appeals  
301 North Lamar, Suite 210  
Jackson, Miss. 39201

THIS, the 8th day of February, 2010.

  
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DAVID NEIL McCARTY, ESQ.