IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALFRED KIRKHAM — APPELLANT

V. — NO. 2009-KA-0112-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
W. Daniel Hinchcliff, MS Bar No [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Alfred Kirkham

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STATE OF MISSISSIPPI **APPELLEE**

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. Alfred Kirkham, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Albert B. Smith, III, Circuit Court Judge

This the 4TH day of January, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE ISSUES

ISSUE NO. 1 : WHETHER COMMENTS MADE BY THE TRIAL COURT DURING VOIR DIRE AND THROUGHOUT THE TRIAL WERE INAPPROPRIATE AND DENIED APPELLANT A FAIR TRIAL.

ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENDANT TO PUT ON EVIDENCE OF THE WITNESS/VICTIM'S REPUTATION FOR VIOLENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Bolivar County, Second District, Mississippi, and a judgement of conviction against Alfred Kirkham for the crime of aggravated assault and a sentence of twenty years following a jury trial commence on December 1, 2008, Honorable Albert B. Smith, III, Circuit Judge, presiding. Alfred Kirkham is presently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Alfred Kirkham was indicted for the crime of aggravated assault along with co-defendant Lawonda Shepherd. Both Kirkham and Shepherd were tried together but were represented by

separate counsel.

Fabian Curry, ["Curry"], was shot outside of Promise Land Apartments, where he had been attending a small party with some friends. Curry left the gathering to go and buy additional chips and Rotel for the party (T. 62-64) As he came downstairs and around a corner, he heard a motorcycle and saw defendant on his motorcycle and co-defendant Lawonda Shepherd, ["Lawonda"]. She was on the phone with co-defendant Alfred Kirkham, ["Kirkham"]. Curry later explained that he was able to discern this "fact" by his observation that Lawonda hung up the phone at the same time Kirkham did. (T. 86) Kirkham, who apparently had been talking on his phone, according to Curry, as he was riding his motorcycle, pulled up, got off the bike and confronted Curry, saying "What's up now?". (T. 64-66)

Curry explained that the day before he had been in an "altercation" with Kirkham over Curry's car, which Kirkham's brother had wrecked. Apparently, Curry was pushing Kirkham to pay him the amount of the damages. (T. 67) The continuation of the altercation led to Kirkham shooting Curry with a .38 caliber handgun, which Curry said, Lawonda "passed to him on the side." According to Curry, Lawonda may have gotten the gun from Kirkham's car, a Cadillac parked next to his motorcycle. Curry first seemed to say she got the gun out of the car but then guessed that she already had it. (T. 68) As Curry saw the gun, he said "[w]hoa, whoa, whoa" to which Kirkham replied "[w]hat's up now." Curry then told him; "You got–you have to shoot me. You have to shoot me." (T. 68) Kirkham took him at his word and shot him once in the chest. Curry fell to the ground and Kirkham the stood over him, saying: "What's up now? What' up now? You ain't talking now. You ain't talking now." Kirkham attempted to shoot Curry again, but the gun "jammed", so instead, Kirkham kicked him in the head. (T. 69)

Kirkham left then on his motorcycle and a couple of guys put him in a car and took him to the hospital. (T. 69, 72) The bullet passed through him. He was in the hospital for a week.

Curry identified Kirkham as the shooter. The events occurred on June 25, 2007. Curry denied seeing any other persons out there besides Jackie Williams, Octavian Robinson and Freddie Stewart.

Curry was crossed examined by both defendant's attorneys, the attorney for Kirkham going first. He denied trying to run Kirkham over the day before, stating Kirkham had parked his cycle and they talked. He explained the dispute was over a car he owned, that Kirkham's brother had damaged and that Kikham had agreed to pay for. He denied that at the time of the shooting, he first hit Kirkham with a beer bottle. (T. 73-77) He knew it was a .38 caliber weapon pointed at him, and in denying striking Kirkham, argued that he would not strike someone holding a gun to his chest.(T . 79-83) Curry agreed that he had told Kirkham to fight him. Kirkham's attorney then received the Court's permission to put on demonstrative evidence of a size comparison between Curry and defendant Kirkham As they were compared, the trial judge quipped: "Don't get 'em to close together" evoking laughter in the courtroom. No reference is placed in the record as to the relative sizes of the men.

Upon further cross examination, Curry stated that even though Kirkham kept his helmet on, he had a clear view of his face and knew it was him. He also knew Marilyn Shepherd, ["Marilyn"], Lawonda's mother, but did not see her there. He denied Marilyn tried to pull Lawonda away, and denied throwing beer on her. (T. 87-88)

Lawonda's attorney the questioned Curry. Curry had no previous problems with Lawonda. Examination concerning the beer resolved that Curry had only had one, that he was almost finished with it and was on his way to buy more. (T. 90) Curry again claimed Lawonda had passed a gun to Kirkham. (T. 92-96) Curry conceded that it was he that had started the confrontation the day before.

(T.98) Counsel obtained Curry's agreement that he had twice told Kirkham to fight like a man. (T. 100)

Redirect placed Curry's friend Frederick Stewart as coming out of the apartment and around the corner at the time of the shooting. His friend Octavia Robinson had not yet come out. (T. 102)

Bolivar County deputy sheriff Jeff Joel became involved in the case on June 27, 2007. (T. 105) He interviewed witnesses Marian (sic) Shepherd, Octavia Robinson, Frederick Stewart, Fabian Curry, and Lawonda. He was not approached by any other persons who claimed to have been present. (T. 106) At an unspecified subsequent date, Joel was outside the sheriff's office conversing with Curry's mother when Kirkham approached, asking to speak to Mrs. Curry. According to Joel, "Kirkham apologized to her for shooting her son. He said that he hated that it happened, but it had to happen." (T. 107)

Kirkham's attorney used Joel's report to clarify Kirkham's "admission", showing that what Kirkham had said was that "he did what he had to do" not that it had to happen. (T. 109) The report was offered into evidence, and the trial defered ruling by instructing counsel to "[t]able the document..." (T. 110) Joel agreed that Kirkham had claimed to be acting in self defense. Out of the presence of the jury, the State objected to the report as hearsay prepared by a different officer, and the court sustained the objection. However, the State did not request , nor did the trial court instruct, that the previous testimony be disregarded. During this conference away from the jury, the trial judge ruled on the State's motion in limine to exclude reference to gangs. (T. 112-114) It should be noted here that the trial court had gratuitously interjected the topic of gangs to the jury during voir dire saying, apropos of nothing, "[i]n Clarksdale we've had more problems with gangs and stuff but we do this in every case." (T. 32) Joel acknowledged that he had not included a picture of Kirkham in his file, but did not agree a picture of the defendant would necessarily be part of a case file. (T

116-117)

The Attorney for Lawonda asked Joel if he observed any marks on Kirkham, any bruises or scratches. The answer was that Joel did not recall any marks on Kirkham's face. (T. 118) Joel had not heard that Lawonda had possessed or passed a pistol to Kirkham from any other witness. (T. 119)

Jaqueline Williams was next called by the State. She was friends with Curry's mother, and had been present at Promise Land Apartments on June 25, 2007. She saw a group of people coming around the building as she was unloading groceries. She recognized Curry because he was taller than the others. (T. 121) As Curry and Kirkham argued she heard Curry tell Kirkham to fight like a man. Curry was holding a beer bottle, but was not doing anything with it. She could not identify Kirkham, but only saw a man in a motorcycle helmet. (T. 122) She saw Kirkham shoot Curry and heard the shot. She also heard the beer bottle brake, but it was not clear from the testimony whether it was in relation to the shot or not..She saw the man in the motorcycle helmet try to shoot Curry again. She took Curry to the hospital in her car.

Cross examination by Kirkham's attorney added no new testimony, but Attorney for Lawonda saw Curry's "hands up" while Curry was demanding several times that Kirkham "fight ... like a man." (T. 129-130)

Octavian Robertson, ["Octavian"], first heard an argument, then heard a "pop" as he came around the corner. He could not say where Curry got the gun, which he thought to be a derringer. (T. 136-137) Octavian testified that Kirkham tried to shoot again but the gun jammed. (T. 138)

After a brief cross examination and redirect, the State rested. A motion for directed verdict from both counsel followed, which was denied.

Kirkham's defense began with witness Caldonia Robinson. (T. 146) She saw Curry push Kirkham the day before outside her church. (T. 147) Marilyn Shepherd, who lived at Promise Land

Apartments, saw Curry come around the building with three other males. Curry said "What's up now, now, bitch." She saw Curry approach Kirkham, saying something to him and then striking him in the head. (T. 152). When asked if her "daughter" was out there, she replied that Lawonda was her niece. The trial judge then interjected "Don't confuse things , lawyer." drawing laughter from those present. As she went outside to bring Lawonda in, she saw curry "dash"beer on Kirkham. She was afraid for her niece and afraid for Kirkham. (T. 155) Curry had been "talking crazy."

> Well, he –they–well, basically he was just calling him all out of his name, calling him a bitch ass n***** and saying he needed his woman to fight his battle. (T. 154)

The attorney for Lawonda elicited that Curry and his friends had been calling Lawonda a "bitch" also. Lawonda was at her aunt's side at the time of the shot.

Ths State the examined Marilyn Shepherd and she testified that her niece dated Kirkham and that her niece had exchanged words with Curry. (T. 157-159)

Keveon Shepherd was with Marilyn that day. He was thirteen years old and stated that to tell the truth was to not tell stories. He saw Curry and Kirkham outside the apartments, and saw Curry hit Kirkham in the face, causing his motorcycle to come out from under him. (T. 162-163) Curry was accompanied by several friends. He also saw Curry "dash" beer on Kirkham, just before he shot. (T. 165) He was afraid because he had never seen someone get "jumped" like that, in "front of other people."

Joyce Clayton knew Kirkham. While not present at the shooting, she saw him later that day. Kirkham had a swollen left eye, blood around his right eye and was limping. She took pictures which were introduce into evidence. (T. 175-178) The State objected to a question on when the pictures were taken as leading. The trial court made the following response:

> Oh, let's move it along. That's far right. (sic) That's what he's got to

ask him. I– let's get–something–we are being held up. Let's move on. We have we got?

The State then began a cross examination of Clayton and asked her if kicking a person on the ground could make a foot swell. The trial judge, sua sponte, made the following comment in the presence of the jury, after first instructing the State to "move on."

THE COURT: **You got enough evidence to**– there's no need asking her about that . (T. 181)

There was no objection by the defense as to this comment on the weight and sufficiency of the evidence.

The final witness was Alfred Kirkham. He averred that he had several run ins with Curry over the preceding 3-4 months. (T. 184) The issue was premised on Kirkham's brother wrecking Curry's car and Curry expecting him to pay for it. On the Sunday before the incident, Curry had shoved against a wall, saying "ain't nobody paid me." (T. 188) As he left that occurrence on his motorcycle, Curry ran him off the road. (T. 188) When asked about his knowledge of Curry reputation for violence (peacefulness) the State objected and the Court ruled for the State. (T. 189-190)

Kirkham said he was outside the Apartments, after visiting family, and was asking Lawonda to follow him home on his bike, when Curry and three others came around the corner. He was confronted by Curry, who hit him knocking him off his motorcycle and into a car. (T. 194) Curry "dash[ed] beer on all of us", then told his "home boys" to "get the pistols, we fixin to kill this n*****." In Kirkham's mind, his life was in peril, he believed they were going to kill him. His apprehension increased as Curry reached into his crotch, making Kirkham believe he was reaching for his weapon. Curry came towards him, hollering. Kirkham told Lawonda to pass him the derringer. He told Curry to stop and Curry responded " No, you got your gun. I got mine." (T. 196) Curry also advised Kirkham that Kirkham would have to kill him. As he said this he moved as if to

pull his pistol, and Kirkham shot him. (T. 197) Then he left.

Twice as his counsel sought to further develop Kirkham's defense, the trial judge laughed at the questions and answers. (T. 199) It was significant enough for the court reporter to note it in the record.

As the attorney for Kirkham concluded, Counsel for the co-defendant moved for a severance, premised on opposing defenses. It was not granted.

The attorney for the co-defendant then cross examined Kirkham. The facts were reviewed, concluding with Kirkham saying that he could not say who owned the derringer, but that he had assumed she had a pistol. (T. 203-206) In response to the State's questions, Kirkham again avowed that he had been visiting his mother. That as the events transpired he had been encircled by a group of males. He specifically denied attempting a second shot. He agreed that he was bigger than Curry. (T. 210-218)

Lawonda Shepherd took the stand. She denied handing the pistol to Kirkham. (No motion for severance was made by Kirkham at this time.) She affirmed that Curry struck Kirkham twice in the face during the altercation. (T. 221-222) She heard Curry tell his comrades to get their "thumpers" because they were "going to have to kill them."(T. 225) She explained that "thumpers" was "slang for gun." Lawonda felt both she and Kirkham were in danger for their lives, and she considered Curry and his confederates to be "dangerous people." (T. 227)

Thereupon all side rested, and after the jury had retired and deliberated, a verdict of guilty was returned.

SUMMARY OF THE ARGUMENT

The trial court made quips and comments during the proceedings which commented on the weight of the evidence and which interfered with the decorum necessary to insure Appellant a fair

trial.

When the Appellant attempted to introduce evidence on the complaining witnesses reputation for violence in a charge of aggravated assault, the trial court sustained the State's objection. This ruling Appellant from developing his defense and therefore denied him a fair trial

ARGUMENT

ISSUE NO. 1 : WHETHER COMMENTS MADE BY THE TRIAL COURT DURING VOIR DIRE AND THROUGHOUT THE TRIAL WERE INAPPROPRIATE AND DENIED APPELLANT A FAIR TRIAL.

In his motion for a new trial, Appellant, through his counsel specifically complained that:

> 4. The Court's comments during voir dire and cross examination were inappropriate. (C.P. 121, R.E.11)

It is a fundamental principle in our criminal justice system, that to insure each defendant a fair trial, the proceedings must be conducted with dignity and circumspection, the trying judge neither making light of a solemn occasion, nor indicating a preference for the case of either side.

> 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...

Thompson v. State, 468 So.2d 852, 854 (Miss. 1985) It is not a question of the intent, or state of mind, of the trial judge, but instead, the possibility that extraneous, or un-circumspect comments could have swayed the jury in it's considerations. Beginning in the Court's voir dire and continuing throughout the proceedings, the trial court induced laughter from the courtroom. During the court's voir dire, there was laughter reported in the record in ten instances. Although a cold record does not explain the basis for the jocularity, some instances were clearly a response to the Court's comments. For instance, when a juror answers "sometimes" to the Court's inquiry of whether they were friends with one of the lawyers, or went to the lawyer's home, the court jested:

> THE COURT : Are you sometimes personal friends or sometimes go to the home? I'm not sure.
>
> (Laughter) (T. 13)

Another extraneous comment drew laughter when the court remarked, apparently to his clerk, that vernacular terminology had changed since his youth. (T. 21) Another quip from the court "You are not friends with anybody?" was interjected when the juror had difficulty expressing whether his knowledge of the witnesses would affect him. (T. 24) The State's voir dire inquired of the jury whether they had previous criminal trial experience. As the juror is answering, the court contributes that "Bill went to high school with us, too. Didn't he Tresa [sic]?" (Laughter) (T. 39) Voir Dire from defense counsel also evoked humorous comments. When counsel asked if any prospective jurors owned a weapon for personal protection the court mused that they might need to know if they had such a weapon on them at the present time. (T. 42) The attorney was discomforted, and an element of the defense was made light of. The court also referred to the attorney's by their first names. Certainly, such informality contributed to a less than August proceeding. (T. 17, 33, 340) The court seemed to understand that use of first names for the attorneys during the trial might detract from the serious nature of a felony trial when it explained to the jury panel:

> We–we have a circuit. You know in the old days, there was some people that had to be– courthouse had to be a horse ride from the other court house.
>
> Dan Bell.
>
> Dan is a big horse man. Got his own business. Appreciate him being there.
>
> But in our circuit, we have five court houses, we see the same folks. If I call one of them by their first name, I'm not trying to show lack of respect. They are friends. We work together. And so we know each other in this arena. And these are good attorneys and very respectful. (T17-18)

Importantly, there was one attorney present who was not from that circuit, the attorney for appellant Alfred Kirkham. Thus, the court singled out the prosecutor and the other defense counsel and named them as friends and good attorneys.

Due to the aforementioned actions, the trial is in it's infancy and the proceeding has been reduced in solemnity and the prosecutor has been endorsed and vouched for.

> Jocularity and humor, by a court, should not be indulged in when a man's liberty is at stake. The officers of a court, and especially the judge, district attorney and sheriff, because of the attributes of the offices they hold, unconsciously exert tremendous influence in the trial of a case, and they should be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions. *Rogers v. State,* 243 Miss. 219, 136 So.2d 331 (1962). We cannot say with assurance that the jury was not influenced by the incompetent testimony of the sheriff and inadvertent statements of the court.

Roberson v. State, 185 So.2d 667, 670 (Miss. 1966) as the Mississippi Supreme Court pronounced, a trial judge hold a position of very strong prestige, and they therefore can inadvertently exert "tremendous influence" over the jurors. Accordingly, the trial judge should not ad lib, but be "astutely careful" in it's comments to the jury. One additional comment during voir dire suggested some gang issue in the trial, when the trial court told the jury that in another city in the circuit they had "had **more** problems with gangs and stuff." A nexus of this case and gang issues was clearly inferrable by the jury.

As the trial began, the alleged victim was called to the stand by the State. During cross examination, by Kirkham's attorney, said attorney sought to put on demonstrative evidence of the comparative sizes of the defendant and the purported victim. While counsel obviously intended this as a critical juncture in portraying his client as not guilty by virtue of his acting in self defense, the court found it necessary to insert a humorous comment. As the witness and defendant stood to allow

the jury to view their builds and size, the trial court joked: "don't get 'em to close together." The laughter that resulted and the erosion of the seriousness of the case were critical; but, were not the worst part of this unnecessary remark. From the point of a person charged with the violent crime of aggravated assault, potential violence from the defendant has now been insinuated to the jury. This comment could easily be seized upon by the jury as an indicator of his opinion, and hence a judge "cannot be too careful and guarded in his language and conduct in the presence of the jury." *Beyersdoffer v. State*, 520 So. 2d 1364, 1366 (Miss. 1988) Another extraneous comment implied the defense was trying to confuse the jury. The trial court criticized the defense attorney's questioning of a witness saying: "Don't confuse things , Lawyer." (T. 152) The jury was receiving a direct comment that the defense sought to confuse them.

As all the proceeding cited cases make clear, the reviewing courts do not condone a trial judge's asides or less than circumspect comments, and will not tolerate them if it affects the fairness of the proceeding. "While we do not condone the apparent informality of some of the trial judge's comments, we can find no instance where the trial court made light of the proceedings or joked at the defendant's expense." *McKinney v. State*, ___So. 3d ___,2009 WL 1588831, 6(Miss.App. June 6, 2009) Thus ,if it were arguable that up to this point, the outcome of the trail was not affected, it is urged that when the trial court made a comment that could readily be understood to comment that the State had achieved a sufficient weight of evidence to overcome reasonable doubt, then this cause must be reversed. The State was cross examining defense witness who had testified to bruises and injuries on the Appellant. As the State asked if such injuries, a sprained ankle, could be associated with kicking someone on the ground, the court told the prosecutor to move on, that she had already presented "enough evidence." Such a pronouncement by the trial court, that the State "got enough evidence to - - there's no need in asking her about that" could only be construed by the jury as the

court's judgement that the State had proved it's case, that no more evidence was required to convict the defendant. The very position of a judge during trial makes each comment unusually susceptible of influencing a juror or the jury." *Davis v. State*, 811 So. 2d 346, 353 (Miss App. 2001), quoting *Hannah v. State*, 336 So. 2d 1317, 1321 (Miss. 1976)

This case is one where the defendant did not deny shooting the purported victim, but instead raised the defense of self defense. It is a difficult question for the jury to resolve where there is conflicting evidence. In such a case, a criminal defendant is entitled to a fair trial conducted with proper dignity, and without a whisper of taint that the trial court favored one side or the other. It is respectfully urged that in this cause, the trial court's informality and jocularity, when amplified by two inadvertent comments, affected the outcome by influencing the jury. This is error of constitutional proportion, fundamental in scope, and it undermines the public's faith in the judicial system. As such, it is plain error requiring reversal. *Fulgham v. State*, 386 So. 2d 1099, 1101 (Miss. 1980), *United States v. Olano*, 507 U. S. 725, 113 S.Ct. 1770 (1993)

ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENDANT TO PUT ON EVIDENCE OF THE WITNESS/VICTIM'S REPUTATION FOR VIOLENCE.

As appellant Kirkham testified, his attorney sought to explain his state of mind to the jury, why did he believe that he was in mortal danger from the man he shot. Critical to a jury evaluation of a self defense claim is the state of mind of the defendant. "When self-defense is raised, it is the jury's role to pass upon the reasonableness of the defendant's actions and, therefore, the jury is 'entitled to be made fully aware of all relevant facts which reflect apprehension, fear or anxiety in his state of mind.'" *Raiford v. State*, 907 So.2d 998, 1003 (Miss.App. 2005) In this case, the defense attempted to introduce evidence of whether Kirkham knew Curry to be a peaceful person. The court refused to admit such evidence. But such evidence would clearly be relevant to impeach

Curry's portrayal of himself as the passive person, purely a victim, and to support Kirkham's state of mind, that he reasonably feared Curry.

Kirkham had been explaining the events leading up to the shooting and a preceding incident where the purported victim had confronted him. Kirkham's counsel then asked about Curry's reputation for "peacefulness" in the community. The State objected, complaining that the defendant was not a character witness. The defense countered that it should be able to explain Kirkham's state of mind as it pertained to Curry. At a bench conference the defense offered that Curry did have a reputation for violence. The Court opined that such evidence had a Miss. Rules Evi. "403 problem", and ruled such evidence was "stretching it at this point." (T. 189-190) The exact nature of the court's refusal is not entirely clear, but in any event, Kirkham's defense was partially eviscerated. Curry was allowed to portray himself as the passive party. Kirkham's fear of Curry was left dangling.

This ruling prevented Kirkham from receiving a fair trial. He was prevented from putting on evidence of his state of mind. "[T]his Court held when an accused is being tried for a serious offense, the jury is entitled to hear any testimony that the appellant might have in the way of an alibi or defense." *Terry v. State*, 718 So.2d 1115, 1121 (Miss. 1998) In fact "[i]t is a basic tenet of our criminal justice system that a defendant is entitled to fully develop his theory of the case..." *Miller v. State*, 846 So. 2d 846, 848 (Miss. App. 1998)

As noted above the exact portion of Rule 403 that was used by the court was not explained, but no part of the rule would support such a refusal of evidence. The State had argued bolstering, but no evidence of Curry's reputation for violence was in the record , beyond the immediate events. It was not cumulative. It could not be prejudicial, as Curry was not a party. [1]

---

[1]See *Young v. State*, 731 So. 2d 1145 (Miss 1999)

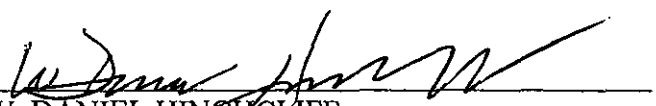
Thus, the trial court abused it's discretion by denying Kirkham the right to fully develop his theory of the case. This is especially true where the theory is self-defense. Accordingly, Kirkham is entitled to have this cause reversed and remanded for a new trial.

CONCLUSION

It is respectfully submitted that premised upon the foregoing argument, Appellant urges this Honorable Court reverse the judgement of the lower court and remand this case for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. [redacted]

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Alfred Kirkham, 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:

Honorable Albert B. Smith, III
Circuit Court Judge
Post Office Box 291
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney, District 11
Post Office Box 848
Cleveland, MS 38732

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 4th day of January, 2010.

W. DANIEL HINCHCLIFF
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200