

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-KA-01539-SCT

T

JOHN WILLIS GILBERT, JR.

APPELLANT

vs.

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 disqualification or recusal:

John Willis Gilbert, Jr., Appellant;

Allan D. Shackelford, Esq., trial attorney;

Jessica Ayers, Russell Barksdale, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

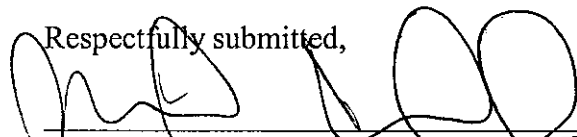
Charles William "Chet" Kirkham, Esq., Assistant District Attorney, and **Walter E. Bleck**, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Charles E. Webster, presiding Circuit Court Judge; and

Clarksdale Police/Sheriff's Department, investigating/arresting agency.

Respectfully submitted,



PHILLIP W. BROADHEAD, MSB
Clinical Professor, Criminal Appeals Clinic

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**MEANINGS OF ABBREVIATIONS AND THE INDICTMENT FAILED TO LIST THE
CORRECT CONVICTION OF A PREVIOUS CHARGE.**

STATEMENT OF INCARCERATION

The Appellant, John Willis Gilbert, Jr., is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to *Article 6, Section 146 of the Mississippi Constitution* and *Miss. Code Ann. 99-35-101 (Supp. 2008)*.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

STATEMENT OF THE CASE

This is a case of jealousy, anger, and revenge. John Gilbert, the Appellant herein, claimed Alice Stapelton attacked and injured him with a knife, and she in turn accused him of being the assailant. Three people testified that they witnessed the altercation, John Gilbert, Jr. (hereinafter, "John"), Alice Stapelton (hereinafter, "Alice"), and Alice's daughter, Jamie Stapelton (hereinafter, "Alice's daughter").

John and Alice began a romantic relationship in May or June of 2008. (T. II. 152) John was married at the time. (T. I. 73) After they began dating, Alice moved into John's apartment,

Apartment 5, 1103 Riverside, Clarksdale, MS. (T. II. 152) Alice's daughter lived with her aunt. (T. I. 72) Alice continued to live with John until October or November. (T. I. 72, T. II. 152) Alice then moved about 50 feet away to Apartment 7 in the same complex. (T. I. 72, 152-153) Alice's daughter then moved in with Alice. (T. I. 72) Alice's mother lived directly across the hall from her. (T. I. 56)

At some point during the fall of 2008, John told Alice that his wife wanted him back. (T. I. 142) John believed that Alice became angry about him renewing his relationship with his wife while Alice was still living with him. (T. II. 154) Alice's daughter was not sure if John and Alice started "fussing" after she and Alice moved in together. (T. I. 72) Alice said that, in November, she broke up with John in November because he was "lying and stealing." (T. I. 127) She also testified that she never met John's wife. (T. I. 146) Alice allegedly felt that as far as she was concerned, after she broke up with John, he could go back to his wife. *Id.*

It is undisputed that after Alice moved out, John frequently came to her apartment to visit or eat meals. Alice's daughter stated that the visits were not uncommon. (T. I. 72) During the visits, they would watch television, play cards, and cook. (T. I. 128) John explained that they also drank beer and socialized with friends. (T. II. 155) Alice testified that when he visited, John brought a knife for cooking. (T. I. 128, 131) She later claimed that John used the same knife to attack her. *Id.*

John unwaveringly maintained that he and Alice continued seeing each other every day after Alice moved out. (T. II. 153) He recounted that sometimes Alice would come over to his place and sometimes he would go over to her place. *Id.* John said he would go over to Alice's apartment and visit before she went to and after she got off work. (T. II. 155) Since John was a smoker and Alice and her daughter were not, he would walk outside of Alice's apartment to smoke. (T. I. 73-74)

The violence that led to John's conviction and life sentence occurred on December 18, 2008. (T. I. 53) At that time, Alice's daughter was pregnant. (T. I. 55) Alice recalled that the last time they

argued was a week and a half before. (T. I. 144-45) Alice also described John as acting normal that night. (T. I. 137) John got to Alice's apartment around 6:00 or 6:30 in the evening. (T. II. 156) He and Alice's daughter played a card game while Alice cooked spaghetti. *Id.* Later, all three watched a movie in the living room. *Id.* Alice laid on the same loveseat where John was sitting. (T. II. 73) Alice's daughter laid down on a sofa. (T. I. 53) Alice was underneath some sheets. (T. I. 63) Accounts of what happened after they began watching the movie are in direct conflict and hopelessly irreconcilable.

John's account was that Alice, "as was her habit" fell asleep early while John and Alice's daughter remained awake. (T. II. 156) After Alice fell asleep, John thought he "stepped out maybe twice to smoke." *Id.* When he came back from smoking, Alice was still asleep on the loveseat. *Id.* Later, Alice's daughter also fell asleep. (T. II. 157)

After the movie ended, John got ready to leave and made a bowl of spaghetti to take home with him. *Id.* Alice was lying on her stomach, and her head was facing her Christmas tree. (T. II. 161) (See Exh. S-8, RE. 37) Surprisingly, when he went back to the loveseat to kiss Alice goodbye, she suddenly pulled out a heavy butcher knife with a triangular blade and attacked him. (T. II. 157) It was not his cooking knife. *Id.* John did not know where Alice got the knife, but he thought that she had it under a cushion below her head. (T. II. 162) She swung at him with the knife while she was still lying down and then got up off the loveseat. (T. II. 158) Neither was cut while Alice was still on the loveseat, as it is without dispute that no blood was found on the loveseat. (T. II. 159)

When Alice got up, John stepped back before stepping forward to grab her arm to protect himself. *Id.* They then struggled. *Id.* Alice held the knife in her right hand. (T. II. 161) John is right-handed and six feet tall, weighing 180 pounds. (T. II. 161 & 163) During the struggle, both John and Alice were cut with the butcher knife. (T. II. 159) However, John unequivocally contended

that he neither stabbed nor caused intentional injury to Alice. (T. II. 160) John eventually got the knife from her, immediately dropped it, and ran out of the backdoor. (T. II. 160 & 164) At some point in time after Alice's attack, John dropped the bowl of spaghetti in the living room. (T. II. 165)

Alice's version of what happened differs dramatically. Alice claims she did not have a knife in her possession while on the loveseat and was still awake when her daughter fell asleep. (T. I. 129, 132, 134) She testified that John got off the loveseat around 1:10 a.m. and went into the kitchen and got his knife. (T. I. 140, 129) Alice was laying on her side and facing the television but was not sure if it was her left or right side. (T. I. 133) She thought John had left. (T. I. 129) She closed her eyes, and claimed that when she opened them, John was stabbing her with a big kitchen knife. (T. I. 130)

Alice claimed that the first place John "stabbed" her was the top part of her ear, which caused it to bleed. (T. I. 133, 141) (*See* Exh. S-5, RE. 34) According to her account, after he stabbed her once, she started getting off of the loveseat while John continued to stab her, and once she was up, John stabbed her in the chest. (T. I. 141, 134-35) Alice then tried to take the knife from John. (T. I. 135-36) Alice does not recall if she said anything or not. (T. I. 135) She also testified that at some point, John stabbed her twice in her left arm. *Id.* (*See* Exh. S-3, RE. 33) Her daughter woke up after Alice got off the loveseat and told John to "leave my mom alone." (T. I. 134) Alice was unable to get the knife from John and could not explain why he stopped stabbing her. (T. I. 136) John then supposedly "ran out" of the apartment's back door while Alice was still inside. (T. I. 136, 138)

Alice's daughter's version of events also differs from both Alice's and John's. She states that she and her mother fell asleep while watching television (T. I. 53) When she fell asleep, her mother was lying down on the loveseat where John was sitting. (T. I. 74) When she awoke, she claimed she saw John on top of her mother who was still on the loveseat and that her mother was screaming and trying to fight off John. (T. I. 54-55, 66) Alice's daughter explained she could not see very well

after she awoke. (T. I. 74) She attested that she did not notice any blood on her mother during the struggle. (T. I. 66)

Alice's daughter testified that she initially thought John was only hitting her mother and realized he had a knife only after seeing light from the television reflect off the blade. (T. I. 54, 67) Alice's daughter saw John moving the knife in a "kind of fast" stabbing motion. *Id.* She testified that during the struggle, Alice manage to get off the couch and was "slight bent over" trying to fight John off when stabbed in the neck. (T. I. 55, 66)

Alice's daughter testified that she rose from the sofa and told John to stop, and that because of her pregnancy, she was scared of getting involved in the fight. (T. I. 55) She claimed that she began hitting John, but did not remember how much longer the struggle lasted. (T. I. 75-76) After Alice's daughter told John to stop, supposedly, his hand was cut, and he stopped attacking her mother. (T. I. 55) Alice's daughter did not claim to see John cut his hand or know how or who cut it. (T. I. 56, 78) She estimated that the fight ended three to four minutes after she awoke. (T. I. 80)

Some of the statement Alice's daughter gave to police differs from her final version of the events. She told police that she "was hitting John in the back and telling him to stop, and then [John] ran out of the back door of the apartment." (T. I. 75) She also told the police that John left the apartment before Alice and her, but at trial, she said that John was the first to leave. (T. I. 77)

Alice and her daughter claimed that after the struggle, they went across the hall to Alice's mother's apartment. (T. I. 55) Alice stated that her niece let them in. (T. I. 137) Neither Alice's mother nor niece testified at trial.

Alice's daughter said that she returned to their apartment to get a jacket after an ambulance arrived. (T. I. 57) She said a police officer accompanied her. *Id.* Alice's daughter said that after the paramedics put her mother in an ambulance, her mother told her to return to the apartment to get a

jacket for her. *Id.* When she went back to the apartment for a second time, without an officer, she noticed the back door, which led to an outside area behind the apartment complex, was open. *Id.* Neither Alice's daughter nor any police officer claimed to see any signs of John returning to the apartment either of the times Alice's daughter retrieved jackets.

Alice's daughter stated that the ambulance took her mother to the hospital, and she went as well. (T. I. 58) Once there, Alice's daughter spoke with Sergeant Sims (hereinafter, "Sims"). *Id.*

Before going to the hospital, Sims was contacted by the dispatch and arrived at Alice and John's apartment complex around 2:00 a.m. and took photographs while remaining there for ten or fifteen minutes. (T. I. 83, 102, 103) Sims described how, in a photograph of the loveseat where the attack on Alice allegedly began, the throw pillows were not out of place. (T. I. 102) (*See* Exh. S-8, RE. 37) He later testified that while the two cushions on the end of the loveseat were in place, the one in the middle was merely "out of line." (T. I. 107) The photograph taken by Sims depicts two large pillows still in place in a vertical position on both sides of the loveseat. (*See* Exh. S-8, RE. 37)

Sims did not report any sign of blood on the loveseat, and the it was never tested by police for the presence of blood. Sims testified that he observed a lot of blood-soaked gauze bandages on the floor of Apartment 7, which is Alice's apartment. (T. I. 83) (*See* Exh. S-11, RE. 39) He also testified that there was a lot of blood on the floor of her mother's apartment. *Id.* Alice's daughter testified that the picture Sims took of her mother's apartment depicted sheets with bloodstains. (T. I. 63) (*See* Exh. S-9, RE. 38) She also stated that these were the same sheets her mother was lying under earlier in the night. *Id.* The sheets were never tested by police for the presence of blood.

Sims testified that he did not search for a knife because other officers on the scene told him that Alice said the attacker left the scene with it. (T. I. 104) Sims has been employed with the Clarksdale Police Department for four years and has been in law enforcement for about fourteen. (T.

I. 82, 102) After he photographed the scene, Sims went to the emergency room where he spoke with Alice and her daughter. (T. I. 83)

Alice was at the hospital emergency room for approximately six or seven hours. (T. I. 58) Sims took a picture of Alice in a neck brace at the hospital. (T. I. 64) No witness for the state offered testimony about why Alice was in a neck brace. After Alice was released from the hospital, she and her daughter returned to the their apartment; Sims was waiting outside. (T. I. 58)

Alice's daughter stated that she took Sims to a house where John was found. (T. I. 65) Sims found John at 8:00 a.m. at a house where a friend of John's lived. (T. I. 84) When Sims knocked on the door, a man opened it. *Id.* When Sims asked him if John was there, the man went further into the residence, and John came to the door. *Id.* Sims then placed John under arrest. *Id.*

Sims also testified that John's clothes were blood-stained and that John had a large cut on his hand. (T. I. 84). (See Exh. S-15, RE. 40) Sims arrested John and took him to the Clarksdale Police Department where he read John his *Miranda* Rights. *Id.* Sims took pictures of John at the department. (T. I. 86) The photographs depicted John's pants leg, which Sims described as showing spots of blood, and John's right hand where there is a large cut on his right pinky. (T. I. 87) Sims stated that the wound on John's hand was about half an inch long and ran down from the middle joint of the finger up to the top joint. (T. I. 105) Sims took John's belt, shirt, and pants to the Mississippi Crime Laboratory (hereinafter, "MCL") along with blood samples from Alice and John. (T. I. 90, 93) Sims, however, neither sent any of Alice's clothes to the MCL nor checked her shirt for any holes that might corroborate her claim of being stabbed in the chest.

Sims also took pictures of Alice's individual cuts at the police department after Alice was released from the hospital emergency room. (T. I. 106) (See Exh. S-3, S-5, S-6, S-7, RE. 33-36) The wounds in the photographs are not lumped together in the same general area of her body. There are

one or two wounds on her upper left arm, one on her ear, one on the back of her neck, and one on her chest. (See Exh. S-3, S-5, S-6, S-7, RE. 33-36) Unlike the photograph of John, these photographs do not depict any defensive injuries to Alice's hands.

The MCL found stains consistent with blood on the clothes Sims delivered, and it sent samples to Jackson for DNA analysis. (T. I. 113, 118) The analysis identified seven blood stains as matching John's reference sample and only one stain matching Alice's. (T. I. 123)

Alice and her daughter continued to live at Apartment 7 after the incident. (T. I. 52) Alice's daughter testified that she did not see the knife allegedly used by John again until it was found under the kitchen sink about three months later. (T. I. 68) She stated that Alice told Sims about the knife, and he came to get it. (T. I. 69) Alice's daughter also stated that she gave it to Sims, but she later testified that she was not sure if it was the knife used in the alleged attack. (T. I. 70) Sims testified that after being notified of the knife, he retrieved it from Alice's cabinet on May 27, 2009. (T. I. 96)

Alice conveyed that she found the knife in April under her kitchen sink. (T. I. 131, 144) She also testified that John never came back to the apartment after December 18, 2008. (T. I. 143)

The knife that Alice found and claimed John attacked her with was never tested for the presence of blood, fingerprints, or DNA. When shown to her at trial, Alice admitted that she could not see any blood on the knife. (T. I. 144) John identified the knife as his kitchen knife. (T. II. 155) However, he testified that Alice used a different knife when she attacked him and that there were other butcher knives in Alice's apartment. *Id.*

John was indicted for aggravated assault as a habitual offender on May 26, 2009, by a Grand Jury in Coahoma County, Mississippi. (CP. 2, RE. 10) The trial judge denied the Appellant's motion *in limine* to prevent the prosecutor and all witnesses from referring to Alice as a "victim." (T. I. 2-4, RE 21-23). The defense was granted a continuing objection to the use of the term throughout the

trial. (T. I. 4, RE 23) During trial, the State's case included the inconsistent testimonies from the accuser and her daughter. (T. I. 52-80, 126-45) (T. II. 146-47) During the State's presentation of its case, the defense moved twice for a mistrial due to Officer Sims bringing his weapon onto the stand and for the Sims' testimony that John "refused" to talk to the officer after his *Miranda* rights were read. (T. I. 82, 85, RE. 26) The trial judge denied both motions for mistrial. (T. I. 82, 85) Joseph Heflin, a forensic biologist who testified as an expert for the state, referred to Alice as "the victim." (T. I. 124)

After the presentation of the State's case, the defense moved for a directed verdict as to the charge of aggravated assault due to the State's failure to prove each and every element of the crime. (T. II. 148, RE. 20) The trial judge denied the defense's motion. (T. II. 148, RE. 20) The trial judge then asked if John would be testifying, and he answered affirmatively. (T. II. 148-49) The defense put on John as its only witness and rested its case. (T. II. 168) After the conclusion of its case, the defense again moved for a directed verdict of acquittal, arguing that there was insufficient evidence to sustain a verdict of guilty, but the motion was denied. (T. II. 169)

After a short discussion, the defense offered a peremptory instruction for a not guilty verdict to the jury which was denied. (T. II. 173) Then with the addition of a self-defense instruction, the jury instructions were given by the trial court. (T. II. 173-75). After less than a two hour deliberation, the jury returned a verdict of guilty to the indicted charge of aggravated assault. (T. II. 195) After the jury was dismissed, the trial court deferred sentencing because while John was tried as a habitual offender, the State lacked documentation with regard to the sentences that were imposed on previous convictions. (T. II. 199). At the sentencing hearing held in Clarksdale on September 17, 2009, the defense objected to the State's motion to amend its indictment post-verdict, but the amendment was allowed by the trial court. (T. II. 215, RE. 28) John was sentenced as a

habitual offender to life in prison without parole, probation, or any other form of early release. (T. II. 217) The defense filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (C.P. 15-16, R.E. 16-17) These motions were denied by the trial court. (CP. 17, R.E. 18) Feeling aggrieved by the verdict and sentence of the lower court, the Appellant herein perfected this appeal to the Mississippi Supreme Court on September 21, 2009. (C.P. 21, R.E. 19)

SUMMARY OF THE ARGUMENT

December 18, 2008, started like many other nights for John Gilbert, the Appellant herein. He visited with Alice Stapleton and her daughter Jamie at their apartment around the corner from where he lived. Alice cooked dinner while John and Jamie played cards and interacted like a family, except they were not a family. John was married to someone else. All night, Alice saw the family that she could not have, and her anger and jealousy intensified. By the time John was ready to return home, Alice had reached her boiling point. When he leaned down to kiss Alice goodbye, John was met with the blade of a butcher knife. A struggle ensued and a shocked John fled the apartment. Soon after, Alice contacted the authorities and accused him of attacking her with the knife. Against the great weight of the evidence, John was indicted for aggravated assault. At trial, based on nothing but incredulous witnesses, conflicting testimonies, and evidence that did not match the State's version of events, John suffered an unconscionable injustice when he was convicted and sentenced as a habitual offender to life in prison without the possibility of parole.

The trial court sanctioned an unconscionable injustice when it denied the Appellant's motion for judgment notwithstanding the verdict, and in the alternative, a new trial due to the overwhelming weight of the evidence favoring the Appellant (hereinafter, "John") and the legal insufficiency of the State's evidence. The overwhelming weight of the evidence that support John's version of events

includes, but is not limited to, John's defensive wound, the lack of defensive wounds found on Alice, the fact that all but one of Alice's injuries were cuts and not stabs wounds, the fact that all of her injuries could have easily been self-inflicted, the scattered placement of the wounds, and the fact that it was alleged that John, who was a 6-foot tall 180 pound man, only wounded Alice five times while repeatedly stabbing her in a fast motion. The overwhelming weight of the evidence also shows that although Alice claimed John attacked her while she was lying on the loveseat, no blood was ever found there and only one of its cushions was even slightly out of place. Also, the forensic evidence shows that of the eight blood samples found on John's clothing, all but one matched his own DNA.

The State's case is legally insufficient because it rests on the testimony of two unreliable witnesses and is stark opposition to the DNA evidence. During the trial, Alice Stapleton and her daughter's testimonies differed in material particulars from each other, were inconsistent with previous statements made to police officers, and did not correspond to the physical and forensic evidence found at the scene of the struggle. During the trial, both Alice and her daughter fabricated conflicting, inconsistent stories about the struggle. Accordingly, the jury's verdict was against the overwhelming weight of the evidence, and due to the State's key witnesses' lack of credibility, the case was legally insufficient and the trial court should have granted the Appellant's motion for judgment notwithstanding the verdict, and in the alternative, a new trial.

Furthermore, the trial court committed reversible error by denying John's motion for a mistrial after a police officer testified about John's post-*Miranda* silence. Considering the trial was basically a "swearing contest," pitting John's testimony against that of his accuser and her loyal, live-in daughter, the testimony referring to his post-*Miranda* silence was substantial, injurious, and caused a great prejudicial effect that could not be described as harmless beyond a reasonable doubt. Since the overwhelming weight of the physical evidence favored John's version of events, it is

apparent that the trial judge's attempt at a curative instruction was not adequate to protect John's due process rights. The prejudice to John was further compounded when one of the prosecution's witnesses prematurely referred to John's accuser as the "victim." The trial judge's refusal of John's pretrial motion to prevent his accuser from being referred to as the "victim" and his motion for a new trial were "but for" causes of the guilty verdict produced by prejudice, not proof.

Finally, John argues that the trial judge compounded previous errors when he ruled that the requirements of a habitual offender, under section 99-19-83 of the Mississippi Code, were met when the State failed to prove John's previous convictions beyond a reasonable doubt. The indictment in this case failed to allege with particularity the nature or description of the offenses constituting the previous convictions and the amount of time served for each. The trial judge and prosecution also, against the required burden, guessed the meanings of several abbreviations on the documents concerning previous convictions. Furthermore, the prosecution did not have the correct crime listed for a previous conviction. Accordingly, it was an abuse of discretion for the trial judge to allow the State to amend the indictment in this case. As a result, John was unjustly convicted as a habitual offender.

John was convicted without a legal sufficiency of proof and the jury's verdict was against the great weight of the evidence. In fact, the only plausible explanation for the jury's verdict was that the proof presented by the State of Mississippi was so highly inflammatory and prejudicial that none of the jurors selected in the case seriously considered John's testimony in light of the forensic evidence. A woman bent on revenge for seemingly being used and discarded convinced the jury to rush to judgment and resulted in an unjust conviction and a life sentence without the possibility of parole. Therefore, for the above reasons, this honorable Court should reverse and render, thereby discharging the Appellant from custody, or, in the alternative, reverse and remand for a new trial on the merits, with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE APPELLANT'S MOTION TO SET ASIDE THE JURY'S VERDICT (J.N.O.V.) BECAUSE THE EVIDENCE PRESENTED AT TRIAL WAS LEGALLY INSUFFICIENT, OR, IN THE ALTERNATIVE, REFUSING TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL, AS THE VERDICT OF THE JURY WAS NOT SUPPORTED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The evidence against the Appellant in this case fails with respect to both the jury's verdict in light of the whole record and the State's burden under the requirement of legal sufficiency. The manifest errors that occurred at trial reflect a botched investigation, support the unsubstantiated tale of two conspiring eyewitnesses, ignore the forensic evidence that revealed the credibility of the Appellant's testimony, and, ultimately caused a grave injustice.

Although weight of the evidence and legal sufficiency are analytically distinct evaluations under the jurisprudence of this State, the two standards jointly reveal the aforementioned errors and, therefore, will be treated herein as a single issue argument.

A. Weight of the Evidence

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. *Dilworth v. State*, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. *Dilworth*, 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. *Id.* When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate courts will only disturb a jury's verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an "unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a "thirteenth juror," but the motion is addressed to the discretion of the court, which should

be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id.* The evidence should also be weighed in the light most favorable to the verdict. The *Bush* Court stated:

A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the “thirteenth juror,” the court simply disagrees with the jury’s resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant’s motion for a new trial, although the circumstances warranting disturbance of the jury’s verdict are “exceedingly rare,” such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. *Thomas v. State*, 92 So. 225, 226 (Miss. 1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury’s determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. *Dilworth*, 909 So.2d at 737.

The “tenuous” nature of the evidence presented by the State against the Appellant in the case at bar literally cries out for this honorable Court to invoke its status as the “thirteenth juror” and its power to reverse the verdict to allow a new jury to consider the prosecution’s case in a new trial. The State’s paltry evidence, when considered against the Appellant’s credible explanation of the struggle that occurred on the evening of December 18, 2008, weighs in favor of reversing the jury’s verdict.

The overwhelming weight of the physical evidence is diametrically opposed to and

contradicts in material particulars Alice and her daughter's story. During a knife fight, the victim will almost without exception show defensive wounds, while the assailant will not. John and Alice both claimed at trial that they attempted to take the knife away from the other, whom they described as their assailant. (T. I. 135-136, T. II. 164) John had a large cut on one of his fingers, running from the last joint to the middle of the finger, that could be described with any certainty as a defensive wound. (T. I. 105) (Exh. S-15, RE 40) Alice, on the other hand, did not have any cuts on her hands or lower arms. It is highly improbable that Alice could have tried to take the knife from a larger man while lying down and fighting in the dark without sustaining any defensive wounds. The presence of John's defensive wound and Alice's lack of any such wounds both weigh heavily in favor of Alice being the actual assailant and raises an inference that John did not attack her as she claimed.

The types of wounds that the photographs depict on Alice's body also weigh heavily against the credibility of her story. With one exception, the wounds are cuts, not stabs. (Exh. S-3, S-5, S-6, S-7, RE 33-36) The photographs of Alice's wounds depict all but one as long, narrow, and shallow. *Id.* If a six foot tall man repeatedly stabbed Alice as she was lying on the loveseat "half asleep," the wounds would be numerous, and deep. Therefore, her own wounds discredit her story and raise an actual inference that she was not the "victim" of any thing. The wounds are similar to those that would result from accidental self-infliction during a struggle or purposeful self-inflicted ones. The kind, character, and location of Alice's cuts weigh against the verdict.

The cut on Alice's ear further supports John's testimony. In Alice's version of events, she was laying on the loveseat with her eyes closed when John began "stabbing" her. (T. I. 130) Her daughter claimed at trial that while Alice was still on the loveseat, she saw John stabbing her mother in a vicious manner while he was on top of her and she was supposedly lying in a prone position. (T. I. 54) The only wound above Alice's neck is a cut on her ear. (Exh. S-5, RE 34) The cut is long and

shallow as opposed to short and deep. If John had began stabbing Alice while she was on the loveseat, she would have multiple stab wounds on her back, right side, head and face. If he had “stabbed” her while either standing above her or while on top of her, the knife would have gone through Alice’s ear and wounded her head and skull underneath it.

Alice only spent a total of six or seven hours at the hospital emergency room. (T. I. 58) A significant amount of that time would have been spent going through the laborious process of being admitted and waiting on a doctor. The most reasonable inference from her very short time in the hospital would be that her wounds were not severe at all and thus more likely self-inflicted during and after the struggle than the result of a “stabbing.” (T. I. 54-56, 132-135) Furthermore, based on the photograph and the short amount of time Alice spent in the hospital, the wound on her chest did not pierce the chest cavity or damage internal organs. The only reasonable inference that can be drawn from Alice and her daughter’s contradictory testimony, Alice’s short stay at the emergency room, the absence of any defensive wounds, and the shallow chest wound is that Alice purposefully inflicted her chest wound. Biased testimony examined on its own in isolation is never enough to overcome the requirements of the *Bush* standard. One characteristic of physical evidence, however, is that it has no motive, no bias, no stake in the outcome of any case. So, while any witness can alter testimony to conform to the result they wish to achieve, the actual physical evidence found at the scene of a crime cannot be manipulated. The physical evidence makes up facts beyond change and cannot make implausible testimony credible, but more importantly, the physical evidence exposes Alice’s fraudulent, deceptive, and misleading testimony which she conveniently made up to have the case seem to conclusively point to the guilt of the accused and away from her.

The placement of Alice’s individual wounds also greatly weighs in favor of John’s innocence. Alice’s daughter claimed that John was moving his hand “kind of fast” while he was supposedly stabbing Alice. (T. I. 67) However, Alice’s cuts are random, sporadic and spread out

around her body in such a way that they could not have been inflicted as described by Alice and her daughter. (Exh. S-3, S-5, S-6, S-7, RE 33-36) The photographs show one cut on her ear, one on the back of her neck, the one slight puncture wound on her chest, and one or two cuts near her left shoulder. ***Id.*** If John was quickly stabbing Alice and she was lying on the loveseat as her daughter said, the wounds would be close together. Alice's daughter also testified that the struggle lasted three or four minutes. (T. I. 80) If John was quickly stabbing Alice for three or four minutes, the logical assumption is that she would have more than four or five minor cuts.

John could not have cut Alice's right ear while she was lying on the couch. Alice testified that she was lying on her side facing the television when John stabbed her in the ear. (T. I. 133). She also testified that the television was to the left of her sofa. (T. I. 134). Based on the photograph Officer Sims took of Alice's apartment, that would place the television somewhere in front and to the right of the loveseat. (Exh. S-8, RE 37) In order for Alice to have been able to watch the television while lying down, her head would have to have been near the loveseat's right armrest. Therefore, she would have been lying on her right ear. However, that's the same ear Alice testified John "stabbed" her on while she was lying down. (T. I. 132-133) (Exh. S-5, RE 34)

Furthermore, Sims's photograph clearly depicts the loveseat and reveals no blood on it. (Exh. S-8, RE 37) Sims never testified to having seen any blood on the loveseat or even finding it necessary to test the loveseat for the presence of blood. This seriously discredits Alice's testimony that John stabbed her while she was lying on it. Alice's daughter testified that John was on top of her mother on the loveseat while stabbing her. For her version of events to be true, there would have had to have been blood on the loveseat. It is simply not possible that after being "stabbed" in the ear, Alice could wrestle with a 180 pound man on her loveseat without getting any blood on it.

The placement of the pillows on Alice's loveseat also weigh in favor of John's version of events. John testified that no one was cut until after Alice was off the loveseat. (T. II. 159) If either

Alice or her daughter's testimony was true, the pillows and cushions on the loveseat would have been disheveled. However, Sims testified that the pillows on the loveseat were in their proper place, and his photograph shows the pillows and cushions in their normal position. (T. I. 103) (Exh. S-8, RE 37) On redirect, Sims testified that the middle cushion was simply "out of line" and that one of the three pillows was out of place. (T. I. 107-108) If Alice was on the loveseat fighting for her life, the loveseat would have reflected the disarray of the struggle. It is inexplicable how John could have stabbed Alice and she have gotten off the loveseat in time not to get fatally stabbed, as she testified, without even moving or disturbing the pillows and cushions. It is totally impossible for John to have been on top of Alice while stabbing her and then for Alice to manage to get out from under him, as her daughter testified, without tousling the pillows and cushions and getting blood all over the loveseat. The pillows and cushions' positioning support John's version of events: Alice took a swing at him with the knife from the loveseat and then got up, and began stabbing at him. (T. II. 157-160)

The sudden appearance of the knife allegedly used in the attack more than four months after the night of the struggle also weighs against John being the assailant. (T. I. 68-69, 96, 131) Alice claimed she found the knife under her kitchen sink in April. (T. I. 131) Sims testified that he did not retrieve the knife until May 27th, more than five months after the struggle. (T. I. 96) Alice's daughter testified that the knife was found three months after the struggle and that she handed the knife to Sims, but Sims testified that he retrieved the knife from the cabinet. (T. I. 68-69, 96) Sims also testified that officers at the complex after the struggle told him that the assailant left the apartment with the knife. (T. I. 104) The general inconsistencies and implausibility of these testimonies further discredit Alice and her daughter. Surely Alice would not have waited a month or more to notify the police that she found the weapon with which she was attacked, so there are only two explanations from which to draw reasonable inferences for this discrepancy in time. Alice either

flat-out lied about looking under the kitchen sink and finding the knife in April, or when Sims was notified about the presence of a critical piece of evidence, he did not think enough about it to respond within one month's time. The former completely discredits and substantially impeaches Alice's sworn testimony. The latter possibility is illustrative of the unlikely sequence of events in this case, which led to an innocent man being sentenced to life in prison. Either scenario greatly weighs against the jury's verdict and in favor of John's innocence.

Alice and her daughter lived in the apartment where they claimed to have found the knife for the entire time between the night in question and the day when the knife was found. (T. I. 52) It is highly improbable that they could have lived in the apartment that long without ever having looked under the sink, the area where cleaning supplies and other modern necessities are normally stowed. Even more telling is the lack of blood on the knife. Sims neither testified to field testing the knife for the mere presence of blood nor did he testify to testing the knife for fingerprints. Furthermore, Alice testified at trial that she could not see any blood on the knife. (T. I. 144) If John had attacked Alice with that knife, he would have had to either (1) washed and hid the knife immediately after attacking Alice or (2) taken the knife somewhere else to clean it before returning to Alice's apartment and hiding it. Both theories are ridiculous.

According to Alice, after the struggle, John "ran" out of the apartment through the back door. (T. I. 138) In a statement given to police shortly after the struggle, Alice's daughter gave a similar response and said that John ran out of the back of the apartment before her and her mother left. (T. I. 75) At trial, Alice's daughter changed her story and testified that John ran out of the door after they left the apartment. (T. I. 76-77) Regardless if John "ran" from the apartment before or after Alice left, he would not have been able to clean all the blood of a knife and stow it under the kitchen sink.

The credibility of John's accusers is further damaged because they testified to conflicting

accounts of what happened during the night in question. During direct examination, Alice's daughter twice stated that she saw John stabbing her mother while he was on top of her mother who was on the loveseat. (T. I. 54, 55) Alice testified that she awoke to see John about to stab her and that he only stabbed her once before she got off of the loveseat. (T. I. 130, 141) In another blatant and direct contradiction, Alice testified that John left the apartment before her while her daughter testified that John left after them. (T. I. 77, 138) It is not every night that a paramour attacks his lover with a knife in plain sight of her daughter. If John had actually attacked Alice, her and her daughter's recollection of events would not have been so drastically different.

The daughter's testimony at trial contradicted what she said to the officer after the struggle. She told police that she repeatedly hit John in the back during the supposed attack. (T. I. 75) At trial, she testified that due to her pregnancy, she was scared of getting involved in the fight. (T. I. 55) She also told the police that John left the apartment before Alice and her, but during her testimony, Alice's daughter said that John did not leave the apartment until after they fled. (T. I. 77) The daughter's credibility before the jury should have been destroyed by these and other contradictions in important, material facts. Whether or not someone jumps into a fight with a knife wielding assailant would stick with a witness and her report to police the night of this incident surely would have been consistent if she was telling what she actually saw.

Furthermore, Alice's daughter testified that she woke up to her mother's screaming. (T. I. 66) No evidence was presented that anyone else in the apartment complex heard Alice's screams. However, Alice's mother and niece were in the apartment right across the hall. (T. I. 136-137) Neither Alice's mother nor niece, who were both witnesses to Alice's condition and state of mind immediately after the struggle, testified at trial.

Alice's daughter also had a difficult time remembering several material facts during cross-

examination. She could not remember how long the struggle for the knife continued after she intervened or when it supposedly stopped. (T. I. 75) While testifying, she stated that John ran out of the apartment, but since she also testified that she left the apartment before John, she could not say how she knew John was running. (T. I. 77) She could not remember facts at least four other times during cross. (T. I. 71, 72, 78). In a vacuum, none of these statements totally discredits the daughter's testimony. However taken into consideration with all of the other inconsistencies, the daughter's difficulties in recalling important details is further illustrative of why her testimony was unreliable and mendacious.

Alice and her daughter had ample reason to lie about John attacking Alice. Alice was jealous of John and his stated intention to return to his wife, and it can be easily inferred that Alice decided that "if she could not have John, no one could." Alice could not testify to the contrary. On both cross and redirect, when asked if she was jealous of John's wife, instead of answering the question, all Alice said was, "I never met his wife." (T. I. 142, T. II. 146) Alice's daughter was pregnant and had no place to go, so what choice did she have but to back her mother's absurd story? Their testimony is self-contradictory, self-serving and totally inconsistent with the physical evidence found by police. In contrast, John's testimony is credible because the very same physical evidence and a complete lack of a motive to commit this crime supports his claim of actual innocence.

John was married while he was seeing Alice on the side. (T. I. 73) At some point during the fall, John told Alice that his wife wanted him back. (T. I. 142) Alice was upset that at that he was even considering reconciling with his wife. (T. II. 154) From John's testimony at trial, it makes sense why there was no blood found on the loveseat. According to John, Alice attacked him with the knife while she was still lying down on the loveseat and he was standing up. (T. II. 158) She got off of the loveseat after her first swing with the knife missed. *Id.* He would have suffered a wound

on his hand that would have bled everywhere if his testimony is correct, and that is exactly what the physical evidence proved. The physical evidence greatly weighs in favor of John's innocence.

The defensive wound on John's right hand pinky finger supports his testimony the he tried to take a knife away from Alice during a struggle. (T. II. 164) (Exh. S-15, RE. 40) John's cut was on his right hand and he is right handed. (T. II. 159) His wound is consistent with someone trying to take a knife from an assailant. Alice's cuts are also much more consistent with two people struggling over a knife than those of a "stabbing" victim.

The forensic examination of the physical evidence gathered by police also greatly weighs in favor of John's testimony. Eight blood stains found on John's clothes were tested. Of the eight, seven matched John's DNA sample and only one matched up with Alice's DNA. (T. I. 123) If John had been in a prolonged struggle with Alice where he stabbed her several times, surely he would have more of her blood on his clothes. If John had, as the daughter claimed, gotten on top of Alice and began stabbing her, he would have been covered in Alice's blood. The ratio of John's blood to Alice's corroborates his claim that he struggled with her over the knife, disarmed her, and left her apartment as quickly as possible.

The lack of other evidence supports an inference of a sloppy police investigation that was too quick to come to the hasty conclusion that John was the assailant based solely on Alice and her daughter's say-so. The blood on the blanket Alice was laying under and the blood on the floor were never tested, so the jury was left unguided by direct evidence, but comparing the cut on John's right hand with the relatively minor cuts found on Alice, it could easily be inferred that the finger bled profusely and the untested blood was John's. Neither the loveseat nor the knife allegedly used were ever tested for the presence of blood, ostensibly because no blood was observed on either. Alice's clothes were never inspected to see if they showed signs of struggle or revealed a tear in her shirt that

would correspond to the wound on her chest. Officer Sims only investigated the apartment complex for ten or fifteen minutes and did not look for a knife. (T. I. 102, 104) Sims' photographs of the apartment complex appear to have been taken in the dark. (Exh. S-8, S-9, S-11, RE 37-39) The existing physical evidence supports John, but there was other important evidence that could and should have been collected. The unprofessional manner in which this case was investigated supports the conclusion that Sims haphazardly came to the premature conclusion that John was the assailant. This led to him to fail in sufficiently investigating Alice and her daughter and going so far as violating John's constitutional rights by purposefully committing a *Miranda* violation at trial. *See generally, supra*, in Issue Two. The fact that the existing physical evidence supports John's version of events greatly weighs in favor of his innocence and against the jury's decision to find him guilty despite an abundance of evidence that clearly showed the State, at the very least, failed to establish each and every element of the crime of aggravated assault by credible evidence beyond a reasonable doubt. The more likely explanation of the erroneous and unsupported verdict of the jury was prejudice created by Alice and her daughter's story and the police siding almost immediately with the two women.

In light of the balance of the evidence that was before the jury in this case, the verdict reached in this matter is plainly repulsive to reason, inference, and conclusion. How the jury arrived at a verdict of guilty of aggravated assault from the totally contradictory evidence can only be described as an "irrational verdict." The State's case was clearly not strong enough to cause the jury to vote guilty on the indicted charge of aggravated assault, but instead the jury was manipulated by the false accusations of a woman who had every motive to want John either dead or in prison. This incomprehensible action of the part of the jury has created the "exceedingly rare" situation described in the *Bush* standard of review of the very set of circumstances that constitute an "unconscionable

injustice.” Although the lower court allowed the verdict to stand in face of defense counsel’s motion for a new trial, it was clearly an abuse of discretion for the trial judge to refrain from exercising its prerogative as the “thirteenth juror” on the trial level and grant a new trial. The verdict is so contrary to the overwhelming weight of the evidence that this honorable Court can alleviate the unconscionable injustice which has occurred, and the Appellant respectfully urges the Court to reverse the jury’s verdict, thereby remanding this case with proper instructions to the lower court for a new trial.

B. Legal Sufficiency

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in *Bush v. State*, 895 So. 2d 836 (¶ 17) (Miss. 2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). In *Bush*, the Court restated the legal principle that “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (emphasis added) The Court also emphasized that “[s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence ‘point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,’ the proper remedy is for the appellate court to reverse and render.” *Id.* (emphasis added) (citing *May v. State*, 460 So. 2d 778, 781 (Miss. 1984)). In order for a defendant to be convicted of aggravated assault, the evidence must prove that (1) an attempt has been made to cause, or (2) purposely or knowingly actually causes bodily injury, by the defendant to another, (3) with a deadly weapon or other means likely to produce death or serious bodily harm. *Miss. Code Ann. § 97-3-7(2)(b) (Supp. 2008)*. (emphasis added).

The evidence presented against John by the State was insufficient to support the trial judge’s decision to allow this case to go forward after the prosecution rested and to allow the verdict to stand

in the face of a JNOV motion filed post-trial. (T. II. 147-148, CP. 15-17, RE. 20, 16-18) Even taking the State's case in the light most favorable to the prosecution's case-in-chief, no rational trier of fact could have believed the direct testimony of John's accusers or the inferences that could be drawn from their stories they told at trial because their testimony was conflicting, inconsistent, and adverse to the physical evidence. The "facts and inferences" that could be drawn from the proof simply did not establish each and every element of the offense by credible evidence beyond a reasonable doubt. Alice had a clear motive for attacking John, she was jealous of his relationship with his wife and decided that if she could not have him, no one could. After she had attacked John, she lied not only to keep herself out of prison, but to make sure John was locked up for good. Her daughter also had an obvious motive for backing her mother's story to the jury, as she was pregnant and needed a place to live.

Nonetheless, biased testimony examined on its own in isolation is again never enough to overcome the requirements of the **Bush** standard. But when the "facts and inferences" are viewed in the light most favorable to the prosecution's case-in-chief, Alice and her daughter's credibility was destroyed because their testimony was directly contradicted by the physical evidence and because Alice's daughter's testimony contradicts in material particulars her earlier statement to the police made the very night of the incident. *See* Part A., *ante*. Because their testimony is the only evidence that supports the prosecution's theory that John was the assailant, no reasonable juror could have found John guilty. Taking all of the facts and the reasonable inferences that can be drawn from the live testimony, the physical evidence taken from the scene, and looking at the motives of these two individuals to attempt to stab one another, a reasonable, fair-minded person could only come to the conclusion that Alice was the guilty party to this affair, not John. The proof presented by the State did not establish that John even attempted to cause harm to Alice, which is an essential element of the offense that must be proven by more than just these incredibly unbelievable and patently

offensive stories told at trial by Alice and her daughter that were proven to be false by the forensic and physical evidence.

The State relied fully on the testimonies of Alice and her daughter and , unfortunately for them, neither could keep their stories straight during the trial because these events did not occur as they said in their sworn testimony. Their incredible stories were used to prove the State's case, but there were critically essential facts left missing, untested, or unexplained. Alice's daughter suffered from amnesia when asked uncomplicated questions by defense counsel during cross-examination. *See Part A., ante.* Several reasonable questions arise: Why would a witness who was so confident and set in her story during direct examination suddenly clam up when asked specific, related questions? Just looking at her testimony provide the answers to these questions: she testified in a very general way in telling her story, then when pressed for details, she could not provide any because the physical evidence proved that the events of that night did not unfold as she said.

Without re-stating the factual predicate for every one of the contradictions in the State's case set out above, Alice's daughter testified that she woke up to her mother screaming and saw that Alice was lying down with John on top of her stabbing her. (T. I. 54) Alice could not recall if she had even said anything when the struggle occurred. (T. I. 135) However, Alice testified that she was stabbed only one time in her ear while she was on the loveseat and she got up from the loveseat when she was struck. (T. I. 141) This inconsistency alone should and would have engendered reasonable doubts in the mind of any rational, fairminded juror, which deprives the prosecution's case of the "favorable inference" in this testimony that was crucial to the proof in the obligation to make out a *prima facie* case in the State's case-in-chief. *See Bush, supra*, at ¶17. If Alice was struck only once while lying on the loveseat and she quickly got up, how could her daughter's claim to have seen her being stabbed on the loveseat be the truth? If Alice woke up screaming as her daughter testified, why is it that no neighbors were brought to testify?

Thirdly, the testimony of Alice's daughter at trial differed from her statement to the police on a crucial fact. She could not get her story straight as to whether John had ran out after she hit him on the back, or if he had exited after she and her mother had left the apartment. *See Part A., ante.* Alice, despite admitting that she did not see it, claimed that John ran out the back door. *See Part A., ante.* The first question a reasonable juror would have asked in this situation is if John was so set on harming Alice, why would he stop when attacked by a pregnant, weaponless girl. A reasonable juror would then ask if neither Alice or her daughter could admit to seeing John running out of the apartment, did he really run? If Alice and her daughter had left the apartment, would it be reasonable for John to stay, especially if he was attacked?

Finally, the suspicions of any reasonable juror would have been aroused by the uncontroverted physical evidence presented in this case. Alice's daughter testified that while they were struggling, John's arm moved up and down quickly while he stabbed Alice as she was slightly bent over, trying to fight him off. (T. I. 66) Alice testified that she might have tried to take the knife from John. *See Part A., ante.* However, the photographs of Alice show wounds spread out, with all but one being light cut marks, and no defensive wounds on either of her hands. *See Part A., ante.* Yet John, who is right-handed, had a defensive wound to his right hand. *See Part A., ante.* Any reasonable juror would want to know if John attacked Alice, and he was stabbing her in a constant, first motion, why would she have so few wounds? If John was the attacker, why was he the only one to suffer a defensive wound? If Alice was "bent over" defending herself as her daughter testified, how could she have gotten the wound on her chest?

The physical evidence, outside of wounds of both parties involved in the struggle, were crucial to this case, yet left critical questions unanswered by the State. Alice claimed that John first stabbed her on the loveseat. *See Part A., ante.* However, no blood was recovered from the loveseat. The State introduced photographs of a significant amount of blood seen on the floor of the apartment

as well as a sheet that Alice was said to have been lying under. (T. I. 60, 63) But neither the floor nor the sheet were tested to see from whom the blood was from. Of the blood found on John's clothing, seven of eight samples belonged to John. *See* Part A., *ante*. If John was the attacker and had stabbed Alice in the fast up-and-down motion as her daughter had testified, why was there only one drop of Alice's blood on him? Considering that the only evidenced tested for blood showed that the majority of the blood was John's and most of Alice's wounds were only cuts, where did all the blood on the floor and on the sheet come from?

The "facts and inferences" in the State's case are shot full of blatant inconsistencies, logical fallacies, and impossibilities of events and only serve to conclusively establish that no "rational" juror could have believed the State's key witnesses gave credible evidence that the Appellant intentionally assaulted the accuser. The lack of "reasonable inferences" that plague the State's case are such that the prosecution's witnesses raise more questions than they answer, rendering its eyewitnesses' testimonies utterly incredible, inconsistent to the point of total invalidity, and completely uncorroborated by the direct physical evidence in the case. Because the State did not meet its burden of proof in their case-in-chief in presenting credible evidence to the jury that would allowed them to "infer" the guilt of John Gilbert "beyond a reasonable doubt" on an essential element of the crime of aggravated assault, namely that the Appellant was the person who actually was the assailant in this case, the Appellant asks this honorable Court to reverse and render the judgment of the lower court denying counsel's motion for a directed verdict, peremptory instruction, and J.N.O.V., and order the Appellant be immediately discharged from the custody of the Mississippi Department of Corrections.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR A MISTRIAL AFTER A STATE'S WITNESS TESTIFIED, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS, THAT

THE APPELLANT DID NOT WANT TO GIVE A FORMAL STATEMENT OR SPEAK WITH POLICE AFTER BEING ARRESTED, THEN *MIRANDIZED*, WHICH ONLY COMPOUNDED THE ERROR ALREADY COMMITTED BY THE COURT WHEN IT ALLOWED THE STATE TO PREMATURELY REFER TO THE ACCUSER AS THE “VICTIM” AFTER THE APPELLANT FILED FOR A MOTION *IN LIMINE* TO PROHIBIT THE STATE FROM USING SUCH HIGHLY PREJUDICIAL REFERENCES PRIOR TO PROVING A CRIME EVEN OCCURRED.

Jealousy and anger caused Alice Stapleton to attack John Gilbert with a butcher knife. She was furious that John was married to someone else and was going to return to his wife, and she decided that if she could not have John, no one could. The great weight of the physical evidence as set out in Issue One supports the conclusion that Alice actually attacked John and then accused him of attacking her, while enlisting her daughter's assistance in telling this factually unsupported and ridiculously concocted yarn. In the face of this evidence of mendacity, the jury unreasonably convicted John of aggravated assault, obviously because of inflammatory and prejudicial language used by the prosecution's witnesses. John's constitutional right to a fundamentally fair trial before an impartial jury was first violated when a police officer who knew better testified to John's post-*Miranda* silence and the trial judge refused to grant the defense a motion for a mistrial. (T. I. 85)

The prejudice caused by the police officer's testimony was further compounded when a forensic pathologist testifying for the prosecution conclusatorily and prejudicially referred to Alice by the semantically-loaded word, “victim.” (T. I. 124) In any circumstance, the prosecution should never allow its witnesses to comment on the post-*Miranda* silence of an accused, nor refer to a complainant in a criminal case as a “victim” because of the inherent prejudice created in the minds of the individual jurors. Such error is even more prejudicial in the case at hand, which was basically a “swearing contest” where John and Alice each accused the other of being the assailant. The comment on John's post-*Miranda* silence, combined with the reference to Alice as “the victim” resulted in the jury rushing to judgment during the State's case-in-chief and convicting John on irreconcilably contradictory, incredibly improbable, and inflammatorily prejudicial evidence.

Officer Sims' illegal, improper, and highly prejudicial sworn testimony before the jury on John's choice, post-*Miranda*, to not make a formal statement violated his constitutional rights, painted him as a villain to the jury, and, therefore, constitutes reversible error. The Mississippi Supreme Court has held that it is "improper and ordinarily, reversible error to comment on the accused's post-*Miranda* silence." *Emery v. State*, 869 So. 2d 405, 408 (Miss. 2004). The Supreme Court has gone so far as to say that "the Miranda Warning has probably become more familiar to the general public than any other concept in our criminal law" and that "[i]t would be difficult to find anyone who is not aware that, when you are arrested, 'you have the right to remain silent.'" *Id.*

Although not all comments on post-*Miranda* silence create reversible error, Sim's intentional remark that John invoked his constitutional right of silence amounted to prejudicial error. In testifying about the events of that night, Sims stated that he noticed a "large cut" on John's hand, bloodstains on his clothes, arrested him, then purposefully said before the jury:

... At that time I placed him under arrest, took him to the Clarksdale Police Department and read him his Miranda Rights and attempted to interview him, and he refused to speak with me about the incident.

(T. I. 84) (emphasis added)

This testimony clearly did not constitute an innocuous observation in passing about the events following John's arrest, but rather seemed to be a calculated tactic on the part of the investigating officer to call into question in front of the jury a twisted motive for John's choice to remain silent.

Officer Sims was well aware that his *Miranda* violation would preemptively impeach John's character for truthfulness before the defense's case could even begin. *See generally, Mississippi Rule of Evidence 404(a)*. To paraphrase the Mississippi Supreme Court, even laymen are aware of an accused's right to silence under *Miranda*. *Emery*, 869 So. 2d at 408. Sims, who had been in law enforcement for 14 years and had surely testified numerous times, was indisputably aware of the

consequences of comments on an accused's *Miranda* rights. However, Sims was also aware of the sloppy job he had done during the investigation and the weak, factually unsupported case against John. *See* Issue 1 Part A., *ante*. Sims' years of service, his inadequate investigation, and the weak case all create a very strong inference that the *Miranda* violation was purposeful. Therefore, the violation's insult to due process is louder, resulted in injury that could not be described as "accidental," and created a clear fundamental intrusion on an accused's basic rights.

After Sims' statement, the defense counsel moved for a mistrial, but the trial court refused to grant it, instead opting for a limiting instruction to the jury. (T. I. 84-85, RE 25-26). The judge's decision to allow the prosecution's witness to testify in this manner and to only instruct the jury to disregard the violation must be reviewed by this Court under the abuse of discretion standard, which can be difficult to meet. *Dora v. State*, 986 So. 2d 917, 921 (Miss. 2008). However, due to the incurable prejudice created by the police officer's character-assassinating "refused to speak" commentary in this particular "swearing contest," coupled with the conflicts between the testimony and physical evidence presented by the prosecution, the trial judge acted outside the bounds of reasonableness by refusing to immediately halt these proceedings, reprimand the police officer, and immediately grant a mistrial. Therefore, this failure on the part of the trial judge to decisively act clearly abused his discretion in the heat of trial and the ruling should be reversed.

In the recent Mississippi Supreme Court case *Birkhead v. State*, dissenting in reference to a post-*Miranda* silence issue, Justice Dickinson warned, "So long as the Courts overlook such blatant violations of constitutional rights, prosecutors and investigators will have little incentive to refrain from committing those violations." 2009 Miss. LEXIS 73, 34 (Miss. 2009) [Dickinson, J. dissenting]. Justice Dickinson also declared that refusing to reverse for *Miranda* violations increased the chance that the real criminals will go free while innocents are imprisoned. *Id.* at 35. In *Birkhead*, there was nothing in the opinion to suggest that the prosecutor and testifying

investigator were intentionally trying to violate the defendant's constitutional rights in order to impeach his character for truthfulness. According to the explanation given by the prosecutor in *Birkhead*, he was simply trying to lay the proper foundation for the introduction of evidence. *Id.* at 23-24. He asked a question to the officer and the investigator simply replied, "He was advised of his Miranda rights, and he refused to give a statement or say anything . . ." *Id.* at 23. In light of the evidence available at trial, the violation in *Birkhead* seemed unintentional and harmless. The same cannot be said in John's case. When Sims was asked what he did after finding John, he gave a half-page, rambling answer that ended with "and he refused to speak with me about the incident." (T. I. 84). While Justice Dickinson's concern might not have been strong enough in *Birkhead* to warrant reversal by the Supreme Court, the effect of Sims' violation was so damaging to John's credibility that it seriously calls into question the fairness of the proceedings and the validity of the verdict. If the Court allows it to stand, it will embolden law enforcement to violate future defendants' constitutional rights with similar illegal testimony when the evidence does not support the state's theory of prosecution. There is no better proof of that hypothesis than John's case.

In a case more similar to this inherently prejudicial effect, the Mississippi Supreme Court ordered a new trial in *Emery v. State*, *supra*. In *Emery*, during the cross-examination of the defendant, the prosecutor attempted to impeach the accused by questioning him about his post-*Miranda* silence. 869 So. 2d at 407. The Mississippi Supreme Court found this to be reversible error *per se*, reversing and remanding it for a new trial. *Id.* at 410. John's case differs because the improper impeaching testimony was admitted into evidence by a police officer instead of being entered through a question asked of the defendant. It still created a similar result, casting suspicion in the jury's mind as to the veracity of John's testimony. However, because police officers are generally believed and even revered by juries, the foul play in John's case was more egregious.

The evidence against John was much weaker than the evidence in *Emery*, where, while

finding that the weight of the evidence was not overwhelming, the Court stated that there was neither fingerprints nor a confession. *Id.* 409. In John's case, the accuser, four or five months after the struggle, notified police that she had found the knife she claimed John used to attack her. *See* Issue 1 Part A., *ante*. However, since the knife was never tested for finger prints, blood, or DNA, it had much less relevant probative value than the evidence in *Emery*. When coupled with the fact that John accused Alice of being the actual assailant, credibility became central in the minds of the jury.

In *Emery*, the Supreme Court also stated that there was no DNA or other physical evidence. *Id.* In John's case, the forensic evidence actually supported his testimony. *See* Issue 1 Part A., *ante*. The opinion in *Emery* also noted that no photographs were taken of the crime scene. *Id.* A series of photographs of the apartment complex in John's case actually impeach the testimony of the prosecution's witnesses. *See* Issue 1 Part A., *ante*. In both cases, the bulk of the prosecution's evidence consisted of suspect testimony by individuals who were involved in an altercation with the accused. However, the testimony in *Emery* was much more reliable than the story concocted by Alice and her daughter. In *Emery*, police officers testified that the defendant was the same man with which they had an altercation. *Id.* at 410. The Court noted that their ability to actually identify the defendant was not completely reliable. *Id.* While the identification might have been unreliable, there was no evidence of an apparent bias that would have caused the police officers to openly lie. Alice and her daughter, the only witnesses of the alleged assault, had obvious reasons to lie (to escape prosecution and to help her mother) and a bias toward John. *See* Issue 1 Part A., *ante*. Because the evidence against John is much weaker than the evidence in *Emery*, the Appellant contends that this Court should follow the legal principles laid down in *Emery* and reverse the trial judge's decision not to immediately declare a mistrial due to this blatant *Miranda* violation.

Emery also contains a ruling by the trial judge that somewhat distinguishes it from John's case, but in light of the totality of the circumstances, the importance of that distinguishment is greatly

diminished. In *Emery*, the trial judge failed to sustain an objection to the *Miranda* violation and issue a curative warning. In John's case, the objection was sustained and the jury was admonished by the trial judge to disregard Sims' declaration to the jury that John "refused" to speak with him. However, considering the highly prejudicial nature of Sims' seemingly intentional intrusion into an area of the law that he should know by heart, the trial judge's instruction to the jury could not have possibly cured the effective impeachment of John's truthfulness.

In John's case, the trial judge's instructions to the jury utterly failed to cure the *Miranda* violation. The trial judge did sustain defense counsel's objection to Sims's statement that John "refused to speak with [him]." Then the trial judge followed the sidebar with the parties with this straying, weak, totally ineffectual "cautionary" instruction to the jury:

The jury will disregard the last comment with regard to the defendant's statement. *The defendant can – actually they have* a constitutional right to speak or not to speak, and if a defendant exercises his constitutional right not to speak, that is his right.

(¶. I. 85) (emphasis added)

Ordinarily, instructing the jury to disregard a statement may be enough to cure error in an innocent mis-statement by a witness. *Baldwin v. State*, 784 So. 2d 148, 157 (Miss. 2001). However, when serious and irreparable damage such as this comment by a police officer on such a fundamental violation of constitutional right has occurred, admonishing a jury in this way to "disregard" an improper comment without any meaningful instruction or follow-up questioning does not begin to cure the prejudice created in the jury's mind. *Id.* At 164. In *Baldwin*, the Supreme Court found that the prosecutor never commented directly or indirectly on the defendant's failure to testify. *Id.* Here, a police officer clearly declared that John exercised his right to post-*Miranda* silence and from the use of the word, "refused," insinuated that John probably had something to hide. In a "he said, she said swearing contest," where the evidence actually supports the defense theory of the case, the

accusers' testimonies are contradictory and totally implausible, the police perform an inadequate investigation, and the jury still finds the defendant guilty, a ***Miranda*** violation of this type coupled with an expert witness describing the accuser as "the victim" diminishes the reliability of the proceedings and raises an inference of uncertainty whether an accurate verdict was rendered.

John's case differs greatly from the facts in the United States Supreme Court's opinion in ***Greer v. Miller***, 483 U.S. 756 (1987). In ***Greer***, the United States Supreme Court (hereinafter, "USSC") found no reversible error sprang from the following chain of events: a prosecutor questioned a defendant about his post-arrest silence, defense counsel objected before the defendant could answer, and the trial judge sustained the objection and issued a curative instruction. ***Id.*** at 759. The foremost reason John's case is distinguishable is because Sims, a police officer, actually emphasized to the jury John's post-arrest silence. In ***Greer***, the USSC stated that because the prosecutor was not allowed to bring out the defense's post-***Miranda*** silence, no violation occurred. ***Id.*** at 764-65. An additional distinguishing characteristic from the case before this Court is that in a lower court opinion in ***Greer***, the Illinois Supreme Court found that there was sufficient "properly admitted evidence" to find the defendant guilty beyond a reasonable doubt. ***Id.*** at 766-67. Considering the nature of the weak, conflicting, and hotly disputed evidence presented by both sides in John's trial, once Sims improperly committed on John's constitutionally protected post-***Miranda*** silence, a bell was rung in the jury box that the trial judge's superficial curative instruction was incapable of making unring.

The prejudice created by commenting on John's post-***Miranda*** silence was intensified by improper statements made by a witness for the prosecution. John filed a motion *in limine* to prevent the prosecution and its witnesses from using such highly prejudicial language, but the motion was refused. (T. I. 4, RE. 23) During the prosecution's case-in-chief, Joseph Heflin (hereinafter, "Heflin"), a forensic pathologist at the Mississippi Crime Laboratory, referred to Alice during his

testimony as “the victim.” (T. I. 124). It would be highly prejudicial for any state employee to refer to a complainant as “the victim,” but the statement was even more prejudicial in the testimony of Heflin. Before Heflin’s description of Alice as a “victim,” the prosecution presented him to the jury as an expert witness. (T. I. 124). While on the stand, Heflin testified to his education, training, experience, and expertise. *Id.* The jury was already suspicious of John after wrongfully hearing of his post-*Miranda* silence when it heard an expert refer to Alice as the victim. The prejudice already ingrained in the jury was intensified when Heflin improperly commented on the weight of the evidence. The trial judge’s prior instruction to the to the jury to disregard the police officer’s “comment” not only substantially failed to cure the constitutional violation, but rather served to heighten the jury’s predisposition to believe Alice was telling the truth and John was lying. After hearing insinuations of guilt against John for remaining silent and the unfair characterization of Alice as a “victim,” no jury could fairly and impartially weigh all of the evidence presented in John and Alice’s “swearing contest.”

Persuasive authority supports that it was error for the trial court to refer to Alice as the “victim.” Black’s law defines victim as a “person harmed by a crime, tort, or other wrong” **Black’s Law Dictionary** 1598 (8th ed. 2004). Opinions by other state courts also support that it was error. See *Ohio v. Wright*, 2003 Ohio 3511, (¶6) (Ohio Ct. App. 2003) (stating “the trial court should refrain from using the term ‘victim,’ as it suggests a bias against the defendant), *Connecticut v. Molnar*, 829 A.2d 439, 452 (Conn. App. Ct. 2003) (writing that it did not condone a lower “court’s use of the word ‘victim’ to refer to the accuser”), *Jackson v. Delaware*, 600 A.2d 21, 24 (Del. 1991), (writing that “the word ‘victim’ should not be used in a case where the commission of a crime is in dispute”), *Barger v. Maryland*, 202 A.2d 344, 348 (Md. 1964) (stating that the term “victim” in reference to the deceased “may not have been the most desirable word” to be used by the trial court in a self-defense case). Any of Alice’s cuts that may have been caused by John were caused by

accident while he was trying to pry a knife away from her while she attacked him. Therefore, she was not a “person harmed by a crime” and cannot be said to be a “victim.”

Johns’ case is distinguishable from *Taconi v. State* where the Mississippi Court of Appeals found an issue on using the term “victim” to be without merit. 912 So. 2d 154 (Miss. Ct. App. 2005). In *Taconi*, the trial judge granted a pretrial motion to prevent the prosecution from referring to the complaining witness as the “victim.” *Id.* at 156. However, during closing arguments, the prosecution used the term “victim” several times. *Id.* There are many reasons why referring to Alice as a “victim” is more egregious than the statements by the prosecutor in *Taconi*. Nothing in the *Taconi* opinion supports that the accuser and her boyfriend, who also testified against the defendant, had conflicting stories. In John’s case, there were gaping inconsistencies in Alice and her daughter’s version of events. *See* Issue 1 Part A., *ante*. In addition, the prosecutor used the term “victim” during closing argument in *Taconi*, but an expert witness for the prosecution used the term in John’s case. A jury is less likely to be biased by a prosecutor’s use during closing because it would understand that the prosecutor was arguing over evidence. The expert’s reference caused more prejudice because it was offered during the prosecution’s case-in-chief as actual evidence. Furthermore, the finding of no merit in the *Taconi* opinion was partly based on the defense not making a timely objection. *Id.* at 157. In John’s case, pretrial, the trial judge, granted the defense a continuing objection to references to Alice as a “victim.” (T. I. 4, RE 23)

The combined prejudice in John’s case was serious and irreparable. Whether a *Miranda* violation results in reversible error must be judged on a “case-by-case” basis examining the totality of the circumstances. *Riddley v. State*, 777 So. 2d 31, 35 (Miss. 2000). In some more conclusive and clear-cut factual scenarios, the language used by Sims’ testimony might not be strong enough to warrant reversible error on its own. John’s case, however, was a “swearing contest” where each party accused the other of being a knife-wielding assailant. None of the physical evidence

contradicted John's testimony, but seriously called into doubt the veracity of both of Alice and her daughter's testimony. In this case, where the jury's verdict ultimately came down to whose version of the events of that night it believed more, the statement by Sims, a sworn officer of the law, in violation of John's constitutional protections, was so highly prejudicial that "serious and irreparable" error occurred. A "skunk" of prejudice was thrown into the jury box long before John had an opportunity to present his version of events, and the jury made up its mind about the incident even before the defense could present a single witness. Combining this with another highly-regarded expert witness employed for the purpose of examining forensic evidence in criminal cases characterizing Alice as "the victim" brought this case to a premature close.

Returning to the facts and circumstances of *Birkhead*, *supra*, the *Birkhead* trial was not a "swearing contest" involving two people who each accused the other of being the knife-wielding assailant. Therefore, the prejudice was not as great in that case. In this case, the ultimate issue for the jury's determination was whether John or Alice was lying. Once the jury decided who was telling the truth, and thus who was the victim, considering John's guilt or innocence was a forgone conclusion.

The two cases are further distinguished because Heflin was allowed to testify that Alice was "the victim." Heflin was presented as an expert in DNA analysis and forensic pathology, the same expertise shared by the protagonists of the line of *CSI* television series, a franchise that, at the beginning of the 2009-2010 television season, boasted three of the top fifteen rated shows in the United States. Tim Jicha, *NCIS, Spinoff Are Nos. 1, 2 TV's Opening Week*, Fort Lauderdale Sun-Sentinel: Online Edition, 9/29/2009. In the current atmosphere, DNA experts are highly regarded, and juries likely hold their testimony in the highest esteem. If Alice was in fact, as Heflin stated, "the victim" in this case and not the assailant, then considering the totality of the testimony given at trial, the jury had no option but to find John guilty. Heflin's improper comment on the evidence

blinded the jury from the most relevant part of his expert testimony: seven of the eight bloodstains on John's clothing matched his own DNA. Heflin's improper comment intensified the *Miranda* violation and further distinguishes John's case from *Birkhead*.

Finally, the curative instruction to the jury in *Birkhead* was much clearer and much more forceful. In *Birkhead*, the trial judge in the curative instruction admonished the jury:

This witness has just testified about the defendant's exercise of his constitutional right to remain silent. It's a right that all of us would have if we were criminal defendants in a case, and that is not to be considered against the defendant in any way. It's a right that he has that he can exercise. So I want you to disregard that statement entirely and certainly not give it any consideration or weight in this case.

Id. at 24.

In contrast, the trial judge in John's case only made the sterile statement that "the defendant can – actually they have a constitutional right to speak or not to speak, and if a defendant exercises his constitutional right not to speak, that is his right." (T. I. 85-86) In *Birkhead*, the instruction was much stronger and related the right in a "do unto others" example that was easier for the jury to hear and to follow. Thus, the trial judge personalized *Miranda* rights for the jury, gave a more pronounced admonishment, and was unequivocal in the terms employed.

Reversing the trial court in John's case in no way endangers the majority's decision in *Birkhead*. Issues concerning a defendant's failure to give up their rights and speak to the police are always determined on an individual basis after viewing the totality of the circumstances and the effect the alleged error had on the jury's verdict. *Id.* at 25 (citing *Weeks v. State*, 804 So. 2d 980, 993 (Miss. 2001)). The Appellant's argument for reversal is much stronger in this case because the trial was a "swearing contest," the evidence in John's case favored the defense, the *Miranda* violation was escalated by a DNA expert improperly testifying as to the ultimate issue of who was the assailant, and the curative instruction given to the jury was weak and muddled. Therefore, the Court should give the proper weight to the legal principles laid down in *Birkhead* and should reverse the

trial court's decision on the *Miranda* violation ruling.

When prejudice is substantial and injurious, it cannot be considered harmless beyond a reasonable doubt, especially in a close case such as this, where the physical evidence actually corroborated John's testimony and the accusers could not keep their stories straight, making their sworn testimony implausible. Therefore, the Appellant contends that Sims and Heflin's improper comments, especially when viewed in combination, cannot be said to be harmless error. *See Haynes v. State*, 934 So. 2d 983, 991 (Miss. 2006) (stating that harmless error exists when the other evident against the defendant is overwhelming) The Appellant respectfully requests this honorable Court to reverse and set aside the verdict of the jury and the sentence of the trial judge, thereby remanding this case to the lower court with proper instructions for a new trial.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED IN RULING THAT THE FACTS IN THE CASE MET THE CRITERIA FOR SENTENCING THE APPELLANT AS A HABITUAL OFFENDER UNDER SECTION 99-19-83 OF THE MISSISSIPPI CODE ANNOTATED WHEN THE STATE FAILED TO PROVE THE APPELLANT'S PREVIOUS CONVICTIONS BEYOND A REASONABLE DOUBT WHEN IT "GUESSED" AT THE MEANINGS OF ABBREVIATIONS AND THE INDICTMENT FAILED TO LIST THE CORRECT CONVICTION OF A PREVIOUS CHARGE.

John was dealt an unconscionable injustice when he was sentenced to life in prison without the possibility of parole. Alice, a vindictive former paramour attacked John because of her anger and her jealousy over his planned reconciliation with his wife. The time lapse on December 18, 2008, between the violent struggle between the two in her apartment and when the police arrived allowed Alice and her daughter Jamie to conspire to prevaricate to the police. Alice and her daughter then manipulated the prosecution, the trial court, and the jury into believing their unlikely story. Against the great weight of evidence including, but not limited to, the inconsistencies between statements to police and the court, the conflicting stories between Alice and daughter, and the forensic evidence that illustrated the fact that only John's testimony was plausible, the Appellant was unjustly

convicted by the jury of aggravated assault. To further exacerbate the unsupported and unjust conviction, the Appellant also respectfully contends that the trial court erred when (1) it allowed the State to improperly amend the indictment in this case and (2) it sentenced John as a habitual offender during the sentencing hearing without proof beyond a reasonable doubt that John's previous convictions met the criteria for an enhanced sentence under Mississippi's habitual offender statute.

As provided in *Rule 11.03 of the Uniform Rules of Circuit and County Court Practice (URCCC)*, in cases that involve enhanced punishment for subsequent offenses under state statutes, an indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment. At the second phase hearing of a bifurcated trial, the burden rests upon the State to prove the defendant's previous convictions and to also prove them beyond a reasonable doubt. *Dalgo v. State*, 435 So. 2d 628, 630 (Miss. 1983) (citing *Wilson v. State*, 395 So. 2d 957, 960 (Miss. 1981)). Also, as provided in *URCCC Rule 7.09*, an amendment to any indictment may be amended as to form, but not as to the substance of the offense charged. The trial court abused its discretion when it sentenced John Gilbert to life in prison without parole as an habitual offender, pursuant to *Miss. Code Ann. § 99-19-83 (Supp. 2008)*.

A. Whether the State's amendment to the indictment in this case was of substance rather than form.

It is well-settled in Mississippi jurisprudence that an amendment to any indictment may only be as to form, but never as to the substance of the offense, but in this case, the trial court allowed the State to amend a substantive portion of the indictment. *URCCC Rule 7.09*, *Evans v. State*, 813 So. 2d 724, 728 (¶21) (Miss. 2002). According to the original indictment, John Gilbert was charged with four offenses, with one of them being a conviction for intimidating a witness and another being attempted homicide. (CP. 3, RE. 11) The original indictment alleged that for the offense of

intimidating a witness John was sentenced to three years in prison and was sentenced to fifteen years for the offense of attempted homicide. *Id.*

At the sentencing hearing, the trial court, while speaking to the prosecution, questioned whether it made “any difference the fact that the indictment in this case reflects the original charge as opposed to what he was actually convicted of?” (T. II. 214) In response, the State decided it was necessary to amend the indictment handed down by the Coahoma County Grand Jury in this case. *Id.* The prosecution moved that “the continuation of the amendment to the indictment or the continuation of the indictment be amended to reflect the proper charge under ‘offense’ as being ‘first degree reckless endangerment’.” (T. II. 214-15, RE 27-28)

The amending of the original indictment at the sentencing hearing was obviously a substantive change, rather than one of form. Prior to the sentencing hearing and before the trial court addressed it, the State was aware of the deficiency in their indictment. The prosecution knew that they did not have the necessary information to meet criteria for enhanced sentencing under *Miss. Code Ann. § 99-19-83 (Supp. 2008)*. At the end of the trial where the jury made its verdict, the trial court said, “. . .the State informs the Court that while they do have the necessary documentation as regards [to] the convictions themselves, they are lacking in some documentation with regard to the sentences that were imposed, . . . that is a necessary element for the imposition of sentencing under 99-19-83.” (T. II. 199) (emphasis added) The State only asked for a continuation to retrieve information about the sentences imposed for prior convictions. When it later moved to amend the indictment to alter a prior conviction, the State affected the basis for sentencing under 99-19-83.

In cases where the Court has allowed the State to amend indictments with regards to habitual offenders, the amendment is almost always made to add the habitual offender charge to the indictment. In *Commodore v. State*, the State made an oral motion on the morning of the trial to amend the indictment to charge Commodore as a habitual offender. 994 So. 2d 864, 875 (¶30)

(Miss.Ct.App. 2008). At the hearing on the State's oral motion, it was shown that Commodore had rejected a plea offer that would not include sentencing as a habitual offender. *Id.* The Court ruled that Commodore was not unfairly surprised by the State's intention to add the habitual offender status and that a motion to amend the indictment to include habitual offender language is one of form and not substance. *Id.* at 876 (¶31). In *Shumaker v. State*, the trial court granted the State's motion to change Shumaker's status to a habitual offender. 956 So. 2d 1078, 1087 (¶24) (Miss.Ct.App. 2007). Shumaker asserted that the trial court did not have authority to amend the indictment against him during the sentencing stage of the trial without the authority of the grand jury. *Id.* The trial court, using the fact that Shumaker was given more than three months notice before trial that the State sought to change his status to a habitual offender, found that Shumaker was not unfairly surprised or prejudiced in his defense by the motion to amend the indictment and rejected his argument. *Id.* at (¶25).

Contrary to the facts in both *Commodore* and *Shumaker*, when the indictment in this case was first brought by the grand jury, it included the habitual offender language in the original document served on John Gilbert. Not only did the indictment allege the habitual offender status, but in its attachment it listed the specific cause number, the court of the convictions, the dates of the incidents, the offenses, the dates of convictions, and each of the sentences alleged in years. (CP. 3, RE. 11) In this case, the trial court approved the State's amendment to the already included habitual offender charge. (T. II. 214-15, RE 27-28) The State had plenty of opportunities prior to both stages of the bifurcated trial to amend the indictment in the case but failed to do so until it was prompted by the trial court. (CP. 2, 5-6; T. II. 199; RE. 10, 31-32) The grand jury brought the indictment on May 26, 2009, three months prior to beginning of the trial on August 13, 2009. (CP. 2, RE 10) On July 14, 2009, one month before the trial, the prosecution submitted a motion to the court to amend the indictment to add additional prior convictions to the habitual offender continuation of indictment,

yet that amendment did not include a correction to the previous incorrectly listed conviction. (CP. 5-6, RE 31-32) The Court also deferred sentencing due to the State's inability to meet the necessary elements for the habitual offender status for one month prior to the sentencing hearing after the jury reached its verdict. (T. II. 199)

The trial court prompted the prosecution's decision to amend the indictment at two different times during the sentencing hearing. (T. II. 213, 214) The trial court's first attempt to alert the prosecution to the inherently fatal problem with the indictment was when it asked,

Do you think it makes any, does it have any effect, the fact that the ultimate conviction appears to have been, I would call it reckless endangerment, but it has "first reckless" - - I would guess "first degree reckless" something "with injury" when in fact the indictment charges attempted murder or attempted homicide?

(T. II. 213) (emphasis added)

When the prosecution failed to respond to the question, the trial court later asked, "My only difficulty would be do you think it makes any difference the fact that the indictment in this case reflects the original charge as opposed to what he was actually convicted of?" (T. II. 214) It was only then that the prosecution moved to amend the fatally defective indictment. (T. II. 214-15)

The State's failure to properly list the conviction it desired to use to meet the criteria for a habitual offender sentence went beyond mere form and even the trial judge recognized that in its original language, it would be legally insufficient to establish even mere eligibility for a life without the possibility of parole sentence. In order for the State's amendment to be proper under the *URCCC*, they would have had to re-present the case to a grand jury in order to cure this fatal deficiency. Because the State neglected to present the substantive alteration of the indictment to the grand jury, the trial court erred when it allowed the amendment to the indictment in this case.

B. Whether the State and trial court's speculation and conjecture about the meanings of

abbreviations satisfied its burden of proof beyond a reasonable doubt at the sentencing hearing.

Parallel to the trial court's error in allowing the prosecution to improperly amend the indictment in this case was the further error it committed during the sentence enhancement hearing when the trial court and the prosecution speculated on the record as to the meanings of abbreviations contained in the documentation the State employed to attempt to establish habitual offender enhancement status as alleged in the amended indictment. (T. II. 213, 215) The State has the same burden of proof as to the habitual offender portion of the indictment as it has on the principal charge. *Young v. State*, 507 So. 2d 48, 50 (Miss. 1987). The State must prove a defendant's previous convictions beyond a reasonable doubt. *Dalgo, supra*, at p. 630.

During the sentencing hearing, the trial court, which had to bring the information to the attention of the prosecution, along with the prosecution, made assumptions as to what abbreviations from the "pen pack" meant. While reading a Judgment of Conviction, the trial judge said, ". . . coming down on it has Count I: Att. which I assume will be 'attempt,' Attempted First, int." (T. II. 213) (emphasis added). When the trial court asked the prosecution if it had any idea to what "int." stood for, he responded, "I would say 'intentional.'" *Id.* (emphasis added). The trial court asked the State if "cond." was "condition" and the prosecution responded, "Could be condition." *Id.* (emphasis added). Further adding to the speculation by the prosecutor, the trial court then responded, "I thought it would have been 'endangerment,' to be honest with you, but—and then 'inj.' 'injury'." *Id.* (emphasis added). After this series of speculating and conjecturing colloquies between the prosecution and the trial court, the State moved to amend the indictment in this case. (T. II. 215) Before it ruled on the motion to amend or heard any arguments from the defense, the trial court responded to the prosecution's motion by saying, "I can't actually tell you exactly if that is what these abbreviations stand for. As far as endangerment is concerned." *Id.* (emphasis added).

A conviction under the Mississippi habitual offender statute has sentenced John Gilbert to life in prison without the possibility of parole. Because that conviction mandates a complete loss of liberty, it is imperative that all prior convictions be clearly proven beyond all reasonable doubt and it is undisputed that the State bears the burden to conclusively prove each element by credible evidence. The State utterly failed to meet this burden of proof in the sentencing hearing when it could not even accurately describe the contents of the “pen packs” with particularity without resorting to speculation, guesswork, and conjecture. To allow the State and the trial court to just guess at the meanings of abbreviations would be tantamount to allowing the State to convict a defendant without putting on evidence to back up its case and convince a jury beyond a reasonable doubt of the accused guilt.

After the State moved to amend the indictment, defense counsel objected to the motion. (T. II. 215, RE 28) Defense counsel objected to the prosecution’s amendment of the indictment on the ground that the State had already rested its case and argued that it was too late for the State to amend the indictment. *Id.* According to *Cox v. State*, a contemporaneous objection must be made at trial in order to preserve an issue for appeal. 793 So. 2d 591, 599 (¶ 33) (Miss. 2001) (citing *Smith v. State*, 530 So. 2d 155, 162 (Miss. 1988)). Defense counsel’s objection was contemporaneous to the State’s motion and should have been sustained because the documents placed into evidence, the “pen packs,” did not constitute proof beyond a reasonable doubt due to the State’s failure to provide concrete answers to what the abbreviations meant in order to meet the habitual offender status criteria.

The trial court erred by allowing the amendment to the indictment in the first place only to reflect the speculated meanings of the abbreviations in the documents against its own doubts, as well as the doubts of the prosecution, as to what the abbreviations actually meant. The trial court’s allowance of the amendment to the indictment in this case to reflect the assumed, or conjectured

abbreviations, was clearly an abuse of discretion and therefore, this honorable Court should reverse the verdict of the jury and the sentence of the trial court, reversing this case and remanding it with proper instructions to the lower court for a new trial or in the alternative, a new sentencing hearing.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court with instructions to the lower court for a new trial. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claims of error in this case are brought by the Appellant under *Article 3, Sections 14, 23, and 26 of the Mississippi Constitution* and the *Fifth, Sixth, and Fourteenth Amendments to the United States Constitution*. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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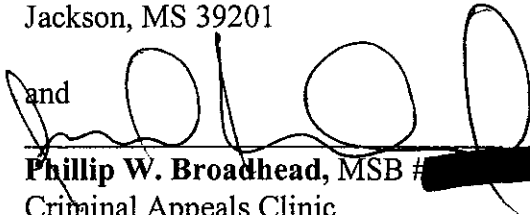



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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

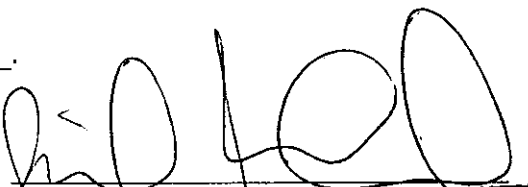
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This the 9th day of April, 2000.


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