

TELLING YOUR STORY THROUGH JURY INSTRUCTIONS



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Jury instructions may be the most frequently overlooked and under-prepared aspect of a criminal trial. Usually criminal defense lawyers are busy interviewing witnesses located in discovery documents, looking for exculpatory witnesses, and examining physical evidence or just looking in the mirror hoping the person looking back will have some good defense for the case set for trial that day! When was the last time you spent 2 hours preparing jury instructions? What about 5 hours researching and preparing jury instructions? Have you gone to a major library and poured through various digests (I know that is “Old School”) or gotten on the internet searching for jury instructions to support a theory of defense? More likely than not you asked your secretary to print out the last set of instructions you used and change the heading.

Ignoring your jury instructions is ignoring your theory of the case. Successful civil attorneys, you know those who get multi-million dollar verdicts, prepare jury instructions shortly after they accept a case and they use the instructions to help guide them through the case. We all learn through repetition. You tell the jury your theory in *voir dire*, opening, during your cross-examination of the State’s witnesses (maybe with defense witnesses), and finally with the power of the court, speaking through jury instructions.

If you adequately research your theory of the case and develop jury instructions to conform to your theory, then you have another powerful weapon in your arsenal of persuasion. And, possibly even an instrument for reversal if your client is convicted.

I am providing you an outline and sample instructions. Neither the outline nor the instructions should be absolutely relied upon. If you just grab the instructions from this book without thinking about how they fit your case, and how you can integrate the facts into the instructions, then again you have done a *half-ass* job. This outline and these jury instructions are products of years of research and study. Even so, I recommend you use the outline and these instructions as a beginning point and as a tool, but not the only tool. Add to the notebook and make improvements. Check the instructions for updates before you offer them. Instructions are fertile sources of reversal. Each time a new case is reported that affects one of these jury instructions, make a notation and add the instruction to your notebook. Your notebook will eventually save you considerable time and be a powerful tool supporting the theory of your case.

Mérrida “Buddy” Coxwell

Abandonment

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2

Accessory Before The Fact

- Defendant's Instruction No. 1
- State's No. 2 - condemned
- Defendant's Instruction No. 3
- Defendant's Instruction No. 4

Accomplice Testimonies

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2
- Defendant's Instruction No. 3
- Defendant's Instruction No. 4

Aggravated Assault

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2

Assault - Simple

- Defendant's Instruction No. 3
- Defendant's Instruction No. 4
- Defendant's Instruction No. 5

Aides & Abetting

- No Sample Instructions

Alibi

- Defendant's Instruction No. 1

Character Evidence

- Defendant's Instruction No. 1

Children's Testimony

- Defendant's Instruction No. 1

Circumstantial Evidence

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2
- Defendant's Instruction No. 3
- State's Instruction No. 4

Confessions

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2
- Defendant's Instruction No. 3

Confession - Unrecorded

Conspiracy

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2
- Defendant's Instruction No. 3

Credibility of Witness: Defendant's Testimonies

- Defendant's Instruction No. 1 (improper)
- Defendant's Instruction No. 2 (improper)
- Defendant's Instruction No. 3 (improper)
- State's Instruction – Competent witness No. 4 (improper)
- Person on Trial / Competent witness No. 5 (improper)
- Person on Trial / Credibility No. 6 (improper)
- Quantity of witness vs. quality No. 7 (improper)
- Defendant's Competent No. 8 (improper)
- Defendant's Competent Witness No. 9 (improper)
- Interests of witnesses No. 10 (improper)

[See also, witness herein]

Defenses, Generally

- Defendant's Instruction No. – Necessity
- Defendant's Instruction No. 2 – Duress
- Defendant's Instruction No. 3 – Spoliation
- Defendant's Instruction No. 4 – Resisting Unlawful Arrest

Eye witness Identification

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2

[Other Jurisdictions]

Flight Instructions

- State's Instruction No. 1
- State Instruction No. 2

Flight - Absence Of

- Defendant's Instruction No. 1

[Other Jurisdictions]

Flight, consciousness of Innocence, Absence of Flight, Voluntary Surrender

Grand Larceny

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2
- Defendant's Instruction No. 3
- Defendant's Instruction No. 4

Impeachment

- Defendant's Instruction No. 1
- Defendant's Instruction No. 2
- Defendant's Instruction No. 3

Lesser Offense Instructions

- Defendant's Instruction No. 1 - Law, generally - pg. 1-5
- Defendant's Instruction No. 2 – Assisted Suicide

No specific examples

Lawyer's Duty

- Defendant's Instruction No. 1 - Duty Interview witness

Malice

- State's Instruction No. 1
- Instruction No. 2
- Instruction No. 3

Murder/Manslaughter

- State or Defendant's Instruction No. 1 – Self Defense
- Defendant's Instruction No. 2 – No duty prove self-defense
- Defendant's Instruction No. 3 – No duty prove self-defense
- Defendant's Instruction No. 3A/3B "Resisting Force"
- Defendant's Instruction No. 4 - A armed at time of meeting deceased
- Defendant's Instruction No. 5
- Defendant's Instruction No. 6 – Original Malice
- Defendant's Instruction No. 7 – Self-defense, generally
- Defendant's Instruction No. 8 – Self-defense – After developed facts
- Defendant's Instruction No. 9 – After developed facts
- Defendant's Instruction No. 10 – After developed facts
- Defendant's Instruction No. 10A – After developed facts
- Defendant's Instruction No. 10B – After developed facts
- Defendant's Instruction No. 10C – Self Defense
- Defendant's Instruction No. 11 – No Duty to flee
- Defendant's Instruction No. 12 – No Duty to flee
- Defendant's Instruction No. 13 – Acting of deceased appearance
- Defendant's Instruction No. 14 – Acting of deceased appearance
- Defendant's Instruction No. 15 – Deceased's Actions
- Defendant's Instruction No. 16 – Right to carry gun if threatened
- Defendant's Instruction No. 17 – Right to carry gun if threatened
- Defendant's Instruction No. 18 – Self-defense of self or others
- Defendant's Instruction No. 19 – Defendant's right to anticipate deceased
- Defendant's Instruction No. 20 – Defense of Habitation

Other Crimes

- Separate Distinct (404B) -Defendant's Instruction No. 1
- Not guilty – effect of - Defendant's Instruction No. 2

Possession

- Defendant's Instruction No. 1 - Possession C/S
- Defendant's Instruction No. 2 - Lack Knowledge
- Defendant's Instruction No. 3 - Lesser Offense
- Defendant's Instruction No. 4 - Lack Knowledge and Intent
- Defendant's Instruction No. 5 – Sale False Substance, Lesser

Possession of Firearm

- Defendant's Instruction No. 1 – Self-Defense to Crime of Felon in Possession of Firearm

Possession, Recently Stolen Property

- State Instruction No. 1 – Possession Recently Stolen Property

Preemptory Instruction

- Defendant's Instruction No. 1

Presumption of Innocence & Reasonable Doubt

- Defendant's Instruction No. 1 – Need not know a Defendant's innocent
- Defendant's Instruction No. 2 – Another Version
- Defendant's Instruction No. 3 – Indictment not evidence

- Defendant's Instruction No. 4 – Presumption of innocence
- Defendant's Instruction No. 5 – Reasonable Doubt
- Defendant's Instruction No. 6 – Reasonable Doubt
- Defendant's Instruction No. 7 – Probability of guilt not sufficient
- Defendant's Instruction No. 8 – Burden Proof
- Defendant's Instruction No. 9 – Reasonable Doubt
- Defendant's Instruction No. 10 – Reasonable Doubt from Lack of Evidence, Conflicting Malice
- Defendant's Instruction No. 11 – Reasonable Doubt from Lack of Evidence, Conflicting Malice
- Defendant's Instruction No. 12 – Cannot Convict Suspicion Probabilities, Speculation
- Defendant's Instruction No. 13 – Cannot Convict Suspicion Probabilities, Speculation
- Defendant's Instruction No. 14 – Presumption
- State's Instruction No. 15 – “Don't Have to Know Defendant Guilty”
- State's Instruction No. 15(a) – (Object)
- Defendant's Instruction No. 16 – Reasonable Doubt
- Defendant's Instruction No. 17 – Reasonable Doubt
- Defendant's Instruction No. 18 – No Presumption from Indictment
- State's Instruction No. 19 – “Shield the Guilty” – Condemned
- State's Instruction No. 20 – “Don't Have to Know Defendant Guilty” – Condemned
- State's Instruction No. 21 – Burden Shifting – NEVER!

Witnesses

- State's Instruction No. 1 – Interest of Witness Testifying
[See also Credibility of Witnesses]

Robbery/Armed Robbery/Deadly Weapon

- Defendant's Instruction No. 1 – Armed Robbery / Lack of Intent to Steal
- Defendant's Instruction No. 2 – Armed Robbery
- Defendant's Instruction No. 3 – Robbery, Lesser Included
- Defendant's Instruction No. 4 – Weapon, Likely to Produce Death or Serious Bodily Harm
- State's Instruction No. 5 – Armed Robbery
- State's Instruction No. 6 – Armed Robbery

State's Instructions, Generally

- State's Instruction No. 1 – Element of Crime Cannot be Presumed
- State's Instruction No. 2 – Firearm Enhancement
- State's Instruction No. 3 – Presumption of Intent

Sexual Battery

- State's Instruction No. 1 – Sexual Battery

Sharplin

- Defendant's Instruction No. 1 – Sharplin / Allen / Dynamite Charge
 - Court's Instruction No. 2 – Objectionable – Only One Approved Charge

Right of Silence

- Defendant's Instruction No. 1 – Right Not to Testify
- Defendant's Instruction No. 2 – Right Not to Testify

Theory of Defense

- Defendant's Instruction No. 1 – Theory of Defense

Unlawful Arrest – Right to Resist

- Defendant's Instruction No. 1 – Right to Resist Unlawful Arrest

Venue

- Essential Instruction

Verdict of Jury

ABANDONMENT

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the abandonment of a criminal enterprise prior to the completion of the crime may, under certain circumstances, be a valid defense to a criminal charge. If a person becomes engaged in a criminal enterprise or conspiracy and before completion of that conspiracy or enterprise, that person completely renounces and abandons the criminal enterprise or conspiracy voluntarily and of his own free will without intervention from legal authorities or for any other reason, then that person shall not be held criminally liable for any actions committed thereafter by his co-conspirators.

If you believe that John Doe did, on January 1, 1993 unlawfully, wilfully, and feloniously embark upon a criminal enterprise or conspiracy with another person or persons, that enterprise being the commission of an armed robbery, and if you believe that John Doe renounced and abandoned that criminal enterprise voluntarily and of his own free will without the intervention of any legal authority or for any other reason, then you may not find John Doe guilty of capital murder.

Furthermore, if you believe after the abandonment of the criminal enterprise as described above, that John Doe by culpable negligence acted in such a way as to cause or procure the death of Bill Smith, then you may find John Doe guilty of manslaughter.

COMMENT:

Capital murder conviction reversed due to trial court's refusal to grant this abandonment instruction. Hester v. State, 602 So.2d 869 (Miss. 1992). To establish the common law defense of abandonment or withdrawal, a defendant must show that he abandoned and renounced his intention to commit a crime and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the crime. Miller v. State, 503 So.2d 929 (Fla. 1987). The bracketed material may be deleted in non- capital cases.

The Defendant must prove “he voluntarily abandoned his intent and did not have his intent frustrated by the resistance of the victim or the intervention of a third party. *Hawkins v. State*, 11 So.3d 123 (Miss. App. 2008). *Pruitt v. State*, 528 So.2d 828, 831 (Miss. 1988).

[DEFENDANT'S INSTRUCTION - ABANDONMENT- NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

It is not an attempt to commit a crime if the defendant abandoned his attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of his criminal purpose.

COMMENT:

Above instruction came from a case citing the general law on abandonment. It should be made fact specific. Giving an abandonment instruction in an attempt case raises interesting issues. If the attempt is complete upon the commission of the overt act, how do you abandon the attempt? Unfortunately the cite for othis instruction was misplaced, however abandonment should apply to attempts.

ANCILLARY NOTE:

A person cannot be convicted of an attempt if he actually completed the offense. This law applies no matter how "slight" the completion of the offense. Mason v. State, ____ So.2d ____ (Miss. ____). See Mississippi Code Annotated, § 97-1-9 (1972). However, some offenses such as armed robbery include attempts within the definition of the elements and the general attempt statute would not apply to those crimes. (Mississippi Code Annotated, § 97-3-79 (1972)).

[DEFENDANT'S INSTRUCTION - ABANDONMENT - NO. 2]

ACCESSORY BEFORE THE FACT

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that an accessory before-the-fact is one who arranges for or counsels or commands another to commit a felony, but is not himself present when the felony is committed.

Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal and shall be indicted and punished as such; and this is true whether the principal has been previously convicted or not.

Therefore, should you find from the evidence in this case, beyond a reasonable doubt, that the Defendant, John Doe, did willfully, unlawfully and feloniously and knowingly arrange for or counsel or command another to sell cocaine to Mr. Informer on January 1, 1993 in Jackson, Mississippi, in exchange for three hundred dollars (\$300.00) good and lawful currency of the United States, then it is your sworn duty to find the Defendant guilty of the sale of cocaine and find him guilty as charged under the indictment.

COMMENT:

The above instruction was held to be error in Wilson v. State, 592 So.2d 993, 997 (Miss. 1991) because it did not require the jury to first find the crime had in fact occurred.

Before the accused can be liable as a principle or accessory before the fact, the accused must possess the requisite mental state or community of intent. Welch v.

State, 566 So.2d 680 (Miss. 1990); Malone v. State, 486 So.2d 360 (Miss. 1986).

There is a legal distinction between an accessory before the fact and someone who is charged with aiding and abetting, though the distinction is insignificant for punishment purposes. An aider or abettor is one who is present at the commission of a criminal offense and aids, counsels or encourages another in the commission of the offense. Sayles v. State, 552 So.2d 1383 (Miss. 1989). An accessory before the fact is someone who procures, counsels or commands another to commit a felony but is not actually or constructively present when the felony is committed.

[DEFENDANT'S INSTRUCTION – ACCESSORY BEFORE THE FACT - NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that under the laws of the State of Mississippi, fear, coercion or duress is no defense to the charge of murder, and this is true regardless of who struck the fatal blow. Accordingly, if you find from the evidence in this case, beyond a reasonable doubt, that the Defendant was an accessory before the fact to the murder of the deceased, as defined by the Court's Instructions, then **even if the Defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case.** (Emphasis added).

COMMENT:

Improper instruction under Mississippi law. The italicized portion of the instruction is in error because the accused would not be guilty of accessory before the fact if he did not possess the requisite mental intent. Welch v. State, 566 So.2d 680, 684 (Miss. 1990).

NOTE: Coercion or duress can be a defense in Mississippi.

**[STATE'S INSTRUCTION CONDEMNED -
ACCESSORY BEFORE FACT - NO. 2]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

A person may commit a crime by his own personal act or through the act or acts of another person. Any person who knowingly aids, abets, counsels, hires or otherwise procures the commission of a crime is equally guilty with the one who actually performs the criminal act, whether he is or is not present at the commission of the offense. However, for one person to be guilty of a crime physically committed by another, it is necessary that he have a conscious intent that the criminal act shall be done and that, pursuant to that intent, he do some act or say some word which was intended to and which did incite, cause, encourage, assist or induce another person to actually commit the crime.

[DEFENDANT'S INSTRUCTION - ACCESSORY BEFORE THE FACT - NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that an accessory after the fact is one who conceals, receives, relieves, aids or assists any person, knowing that such person has committed a felony, with intent to enable such person to escape or avoid arrest, trial, conviction or punishment, after the commission of such felony.

The Court further instructs the jury that John Doe is not required to establish he was an accessory after the fact to your satisfaction, but if the evidence or lack of evidence in this case raises in the minds of the jury a reasonable doubt as to whether the Defendant was only an accessory after the fact, then, in that event, you must give him the benefit of the doubt and may not convict John Doe of the crime of armed robbery, and therefore, it would be your sworn duty to return a verdict of not guilty.

COMMENT:

An accessory after the fact is not a lesser included offense of other crimes. The Mississippi Supreme Court has sanctioned the granting of the following instruction as a lesser offense instruction as a lesser offense instruction if justified by the facts. Gangl v. State, 539 So.2d 132, 135 (Miss. 1989); Mississippi Code Annotated, § 97-1-5 (1972).

[DEFENDANT'S INSTRUCTION - ACCESSORY AFTER FACT – NO. 4]

ACCOMPLICE TESTIMONY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged accomplice, and requires the jury to weigh same with great care, caution and suspicion. You should weigh the testimony from alleged accomplices, and passing on what weight, if any, you should give the testimony, you should weigh it with great care and caution, and look upon it with distrust and suspicion.

COMMENT:

Authorized accomplice instruction from Wheeler v. State, 560 So.2d 171 (Miss. 1991). See the following instruction, labeled "2", for an explanation.

[DEFENDANT'S INSTRUCTION - ACCOMPLICE TESTIMONY - NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

Mr. Informer and Mr. Snitch are accomplices in this case, and the testimony of an accomplice is to be considered and weighed with great care and caution. **You may give it such weight and credit as you deem it to be entitled.** (Emphasis added).

COMMENT:

In Wheeler v. State, 560 So.2d 171 (Miss. 1990), the Mississippi Supreme Court reversed and remanded the appellant's armed robbery conviction after the trial Court refused the defendant's instruction (1), and granted the Court's instruction (2). The Mississippi Supreme Court held that the trial Court's Instruction "diluted" the effect of the accomplice instruction. (See darkened portion of instruction.) The granting of a cautionary instruction rests in the sound discretion of the trial judge. The Mississippi Supreme Court established a two-part test to determine whether the trial Court has abused its discretion. First, was the witness an accomplice; secondly, was the accomplice's testimony without corroboration? Holmes v. State, 481 So.2d 319, 322 (Miss. 1985); Derden v. State, 522 So.2d 752 (Miss. 1988).

In Edwards v. State, 630 So.2d 343 (Miss. 1994), (decided 1/15/94) the Mississippi Supreme Court held that a cautionary instruction must be given if the prosecution bases its case **solely** on the testimony of an accomplice, corroborated only by a confidential informant paid on contingency.

[COURT'S INSTRUCTION CONDEMNED - ACCOMPLICE TESTIMONY - NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you believe Mr. Smith and Mr. Informer, or both, were persuaded to testify by any promise, leniency or reward, or if you believe their testimony occurred as a result of an understanding between them and the State to the effect that they would be compensated in some way by the State for testifying, then you must take such beliefs into consideration in determining what weight you should give to their testimony and you may consider such promise or understanding to be, of itself, a strong motivating reason for them to fabricate their testimony and such testimony should be highly suspect and should not be accepted unless it carries with it the absolute conviction of truth.

COMMENT:

The trial Court's refusal to grant this accomplice instruction was not held to be error in Young v. State, 425 So.2d 1022 (Miss. 1983), since the Court had granted another accomplice instruction. (See form from Wheeler v. State, 560 So.2d 171 (Miss. 1990). The Mississippi Supreme Court did not hold this instruction was improper, and it could be offered as a substitute to the standard accomplice instruction which is an abstract form. See also: Informers.

[DEFENDANT'S INSTRUCTION - ACCOMPLICE TESTIMONY - NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that Jane Doe is an accomplice in this case. The Court has already instructed you that you, as jurors, are the sole judges of the weight and credit to be assigned the testimony and supporting evidence of each witness who has testified in this case. However, since Jane Doe is an accomplice in this case, any testimony of Jane Doe which you find to be uncorroborated by other evidence should be viewed with great caution and suspicion if you find such uncorroborated testimony to be unreasonable, self-contradictory, or substantially impeached.

COMMENT:

The Mississippi Supreme Court ruled that it was error for a trial judge to refuse a cautionary jury instruction regarding an accomplice's testimony against the Defendant. In a concurring opinion, Justice Carlson offered the above jury instruction, saying that the instruction ought to be given "if there is any doubt at all as to whether the testimony of the accomplice is uncorroborated." Williams v. State, 32 So.3d 486, 494 (Miss. 2010).

**[DEFENDANT'S INSTRUCTION- WITNESS TESTIMONY/ACCOMPLICE
TESTIMONY – NO. 4]**

AGGRAVATED ASSAULT

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

Mr. John Doe has been charged by way of indictment with purposely, knowingly, recklessly and feloniously causing serious bodily injury to Bill Smith, a human being, under circumstances manifesting extreme indifference to the value of human life by running over Bill Smith with an automobile. The indictment in this case is not evidence and you should give it no weight as evidence.

The charge against Mr. John Doe contains the phrase "manifesting extreme indifference to the value of human life." Under Mississippi law this language defines a degree of negligence that is of a higher degree than that which in civil cases is held to be gross negligence. It must be negligence so gross as to be tantamount to wanton disregard of or utter indifference to the safety of human life.

If you find from the evidence in this case that on January 1, 1993 John Doe recklessly or negligently caused serious bodily injury to Bill Smith by hitting him with an automobile, but the negligence of John Doe, if any, was not of such a degree as to be tantamount to a wanton disregard of an utter indifference to the safety of human life, then you should find John Doe not guilty of aggravated assault.

COMMENT:

Instruction used to define the term "manifesting extreme indifference to the value of human life" and to emphasize to the jury that the accused's actions must be more than just gross negligence as defined in civil law.

[DEFENDANT'S INSTRUCTION - AGGRAVATED ASSAULT - NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that if you find the prosecution has failed to prove any one of the essential elements of the crime of rape, you must find the Defendant not guilty and you may proceed with your deliberations to decide whether the state has proved beyond reasonable doubt all the elements of the lesser crime of aggravated assault.

* * * *

(B) The Court instructs the jury if you find from the evidence, if any, beyond a reasonable doubt that the Defendant purposely or knowingly under circumstances manifesting extreme indifference to the value of human life caused serious bodily injury to [the prosecutrix], then you shall[may] find the Defendant guilty of aggravated assault.

COMMENT:

It was error for the trial Court not to grant the above instructions in a rape case. Boyd v. State, 557 So.2d 1178 (Miss. 1989) Instruction (2) may be used in any case where an aggravated assault would be a lesser included offense. It would then be necessary to define the term "manifesting extreme indifference to the value of human life."

[DEFENDANT'S INSTRUCTIONS - AGGRAVATED ASSAULT - NO. 2]

SIMPLE ASSAULT

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find that the State has failed to prove any one of the essential elements of the crime of rape, you must find the Defendant not guilty and you will proceed with your deliberations to decide whether the state has proved beyond a reasonable doubt all the elements of the lesser crime of simple assault.

The Court instructs the jury that if you find from the evidence, if any, beyond a reasonable doubt that the Defendant knowingly or purposely injured or attempted to cause bodily injury to [the prosecutrix], then you shall find the Defendant guilty of simple assault.

COMMENT:

It was error for the trial Court not to grant the above simple assault instruction in a rape case. Boyd v. State, 557 So.2d 1178 (Miss. 1989)

[DEFENDANT'S INSTRUCTION - SIMPLE ASSAULT - NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently caused bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.

If you find from the evidence in this case that on January 1, 1993 John Doe either (a) recklessly caused injury to Bill Smith; or (b) negligently caused bodily injury to Bill Smith with a means likely to produce death or serious bodily harm, to-wit: an automobile, then in that event you may find John Doe guilty of the crime of simple assault.

COMMENT:

Drafted from M.C.A., 97-3-7 (1972), as amended. The Mississippi Supreme Court held in Hutchinson v. State, 594 So.2d 17 (Miss. 1992) and in Hunt v. State, 569 So.2d 1200 (Miss. 1990), that the defendants were not entitled to simple assault instructions _____ deadly weapons were _____ with the intent to injure the victim, even though the resulting injury was slight. Counsel should not be deterred from offering simple assault instructions based on the decisions in these cases.

[DEFENDANT'S INSTRUCTION - SIMPLE ASSAULT - NO. 4]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the jury may return a verdict of the lesser-included offense of simple assault if the jury finds that the defendant attempted to cause or purposely, knowingly, or recklessly caused bodily injury to another.

COMMENT:

Reversible error not to grant this simple assault instruction in a rape case. Griffin v. State, 533 So.2d 444 (Miss. 1988). Simple assault is a frequent lesser offense instruction offered in rape cases.

[DEFENDANT'S INSTRUCTION - SIMPLE ASSAULT - NO. 5]

AIDING AND ABETTING

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

"Any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an aider and abettor and is equally guilty with the principal offender." Sayles v. State, 552 So.2d 1383, 1389 (Miss. 1989); Bullock v. State, 391 SO.2d 601 (Miss. 1980), cert. Denied, 452 U.S. 931, 101 S.Ct. 3068, 69 L.Ed. 432 (1981).

**[DEFENDANT'S INSTRUCTIONS - NO AIDING AND ABETTING INSTRUCTION -
NO. 1]**

ALIBI

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you believe from the evidence there may be some other person who committed the crime of which the defendant is charged, and the name of that person has not been disclosed by the evidence, it is not required of the defendant to show the name of such person.

COMMENT:

The above instruction is an alibi instruction cited with approval in Harper v. State, 463 So.2d 1036 (Miss. 1985). The refusal to grant this instruction was not error because the trial Court granted another alibi instructions. This instruction can be very useful when counsel wants to argue, together with the reasonable doubt and presumption of innocence instructions, that some other person could have committed the crime and it is not the defendant's burden to prove who committed the crime. See also: Mississippi Model Jury Instructions for a standard alibi instruction.

**[DEFENDANT'S INSTRUCTION - UNKNOWN PERSONS
COMMITTING CRIME - NO. 1]**

CAPITAL MURDER

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Defendant, [**Name**], has been charged in the indictment with the offense of Capital Murder in Count One. The court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that:

1. The Defendant, [**Name**];
2. On or about April 6, 2008 in the First Judicial District of Hinds County, Mississippi
3. Did purposely, knowingly and feloniously did murder one the Deceased, a human being
4. with deliberate design or while in the commission of an act eminently dangerous evincing a depraved heart, without authority of law;
5. and not in necessary self defense
6. at a time when he the said Defendant was then and there engaged in the commission of the crime of robbery of the said Deceased

then you shall find the defendant, guilty of Capital Murder in Count One.

COMMENT:

The Supreme Court held it reversible error for the trial court to submit the above instruction without submitting a separate instruction providing the elements for the underlying felony—robbery. The Court overruled its decision in *Kolberg v. State* “to the

extent that it provides harmless error analysis when the trial court fails to instruct a jury as to elements of a charged crime.” 829 So.2d 29, 46 (Miss. 2002).

The Court analyzed its decision in *Kolberg*, ruling that “The result reached in *Kolberg* effectively does away with the prohibition against directed verdicts in favor of the prosecution. Engaging in harmless error analysis here would mean determining [the Defendant]'s guilt without a jury ever deciding whether he committed a single element of the crime of burglary. What would happen if the jury in a criminal trial had not been instructed as to any element of the crime and rendered a conviction? Would we then weigh the evidence in a harmless error analysis? How many, or what percentage, of the elements of a crime need to be omitted before we invoke the prohibition against directed verdicts for the prosecution? Allowing harmless error analysis as to uninstructed elements of the charged crime opens the door to harmless error analysis should a trial court one day err and grant a directed verdict for the prosecution.” *Harrel v. State*, 134 So.3d 266 (Miss. 2014).

**[STATE’S INSTRUCTION- REVERSIBLE ERROR FOR FAILURE TO PROVIDE
ELEMENTS OF UNDERLYING FELONY – NO. 1]**

CHARACTER EVIDENCE

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that good character may in itself create a reasonable doubt, when otherwise no such doubt would exist. If in the judgment of the jury, the evidence of good character raises a reasonable doubt against any evidence introduced by the prosecution, you have the right to entertain such doubt, and the Defendant should have the benefit of it.

COMMENT:

This instruction was held to be proper in cases where character evidence is presented. Lewis v. State, 47 So. 467 (Miss. 1908). CF: Harris v. State, 166 So. 392 (Miss. 1936).

[DEFENDANT'S INSTRUCTION - CHARACTER EVIDENCE – No. 1]

CHILDREN TESTIMONY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that _____ is a child and was _____ (____) years old at the time of the alleged offense. In examining the testimony of _____, you should take into consideration the following:

- A. The youthfulness of the witness;
- B. Her capacity and ability to observe events and to recollect and communicate those events;
and,
- C. Her capacity and ability to understand questions and to frame and make intelligent answers.

Robinson v. state, 662 So.2d 1100 (Miss. 1995); *Bandy v. State*, 495 So.2d 486, 493 (Miss. 1986); *Jones v. State*, 606 So.2d 1051, 1060 (Miss. 1992).

[DEFENDANT'S INSTRUCTION – CHILDREN TESTIMONY – NO. 1]

CIRCUMSTANTIAL EVIDENCE

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if there are two plausible theories arising out of the evidence in this case, and one tends to prove Mr. Victim was killed by some unknown person or persons, and the other tends to show that John Doe killed Mr. Victim, and if the jury is unable to determine from the evidence which of the two theories is true, the jury must accept that theory most favorable for John Doe and find him not guilty.

COMMENT:

This instruction was made fact specific by the defendant and approved in Windham v. State, 45 So.2d 861 (Miss. 1980). A circumstantial evidence instruction is proper when the prosecution can produce neither eyewitnesses nor a confession to the crime. The statement, "I can tell you who I got this [stolen goods] from" was not an admission of guilt warranting the denial of a circumstantial evidence instruction. Stringfellow v. State, 595 So.2d 1320 (Miss. 1992). See also: Wilcher v. State, 455 So.2d 727, 735 (Miss. 1984) for a similar instruction.

[DEFENDANT'S INSTRUCTION - CIRCUMSTANTIAL EVIDENCE - NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that if there is a fact or circumstance in this case susceptible to two interpretations, one favorable and the other unfavorable to the accused, and when the jury has considered said fact or circumstance with all other evidence, and there is a reasonable doubt as to the correct interpretation, then you, the jury, must resolve such doubt in favor of the accused, and place upon such fact or circumstance the interpretation most favorable to the accused.

(B) The Court instructs the jury that if you can reconcile the evidence upon any reasonable hypothesis consistent with the accused's innocence, you should do so and find him not guilty.

COMMENT:

These instructions were approved **together** in Henderson v. State, 453 So.2d 708 (Miss. 1984). See also, Parker v. State, 606 So.2d 1132 (Miss. 1992), where the Court reversed and remanded the defendant's capital murder conviction based on the trial Court's refusal to give a circumstantial evidence instruction. Also see, Hendrick v. State, 637 SO.2d 834 (Miss. 1994).

[DEFENDANT'S INSTRUCTION - CIRCUMSTANTIAL EVIDENCE - NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

Circumstantial evidence is legal evidence and a crime (any fact to be proved) may be proved by such evidence. A well-connected chain of circumstances is as conclusive, in proving a crime (fact, as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules:

1. The circumstances themselves must be proved beyond a reasonable doubt.
2. The circumstances must be consistent with guilt and inconsistent with innocence.
3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of defendant's guilt (the fact to be proved).

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

[DEFENDANT'S INSTRUCTION - CIRCUMSTANTIAL EVIDENCE - NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Defendant, has been charged in Count I with the offense of Burglary of a Dwelling House.

If you find from the evidence in this case beyond a reasonable doubt that:

1. The Defendant, on or about the 8 day of October, 2007, in the Second Judicial District of Jones County, Mississippi;
2. Did break and enter;
3. The dwelling house of the Victim located at 1438 32 Street, Laurel, Mississippi;
4. With the intent to commit the crime of larceny therein;
5. Once therein, the Defendant, did unlawfully take, steal and carry away the personal property of the Victim;

Then you shall find the defendant, [Insert D's Name], guilty in Count 1 of Burglary of a Dwelling House.

If the State has failed to prove any one or more of the above elements beyond a reasonable doubt, then you shall find the defendant, [Insert D's Name], not guilty in Count I of Burglary of a Dwelling House.

COMMENT:

When the State presents no direct evidence for the charged crime, the Defendant is entitled to either a “two-theory instruction” or a “circumstantial-evidence instruction,” and the lack of both instructions is reversible error when denied by the trial court and objected to by the defense. The only reason a trial court may properly refuse a circumstantial-evidence instruction is if “any evidence presented fits the direct-evidence definition from *Kirkwood*” (*Kirkwood v. State*, 52 So.3d 1184, 1187 (Miss.2011)). The definition from *Kirkwood* is the “gravamen” test, which means “substantial point or essence of a claim, grievance, or complaint”; therefore, if any evidence fits this definition, then, and only then, may a trial court properly refuse a circumstantial-evidence instruction. In the cited case below, the State presented no direct evidence against the defendant that fit the “gravamen” definition. And the Court held that the above instruction “contains no language that is traditionally included in any circumstantial-evidence instruction.” Therefore, the cited case was reversed. *McInnis v. State*, 61 So.3d 872,875 (Miss. 2011).

**[STATE’S INSTRUCTION- BURGLARY INSTRUCTION NEEDED
CIRCUMSTANTIAL-EVIDENCE LANGUAGE – NO. 4]**

CONFESSIONS

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you believe from the evidence that the alleged confession of the defendant was untrue you should disregard it, or if you believe from the evidence that it was made under the influence of hope or fear, you may take this into account in determining what weight or credit, if any, you may attach to it as evidence.

COMMENT:

Manslaughter conviction reversed due to trial Court's refusal to grant this instruction. Thomas v. State, 426 So.2d 795 (Miss. 1983) See also Mississippi Model Jury Instructions - Criminal 104.04, Mississippi Judicial College, 1992, or Fifth Circuit Pattern Jury Instructions.

[DEFENDANT'S INSTRUCTION - CONFESSION - NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the testimony and other evidence in this case concerning statements attributed to the defendant by law enforcement officers have been admitted in evidence by this Court for your sole consideration and judgment as to the weight and credibility thereof; all facts and circumstances in evidence which affect the weight and credibility of any such statement are for your sole consideration as jurors, and you are not bound to believe or to attach any weight or credit to any such statement on the ground alone that the Court has decided that it was admissible in evidence, and you as jurors in this case have the same freedom of action with reference to the acceptance or rejection of a confession as you have in regard to other testimony and evidence.

COMMENT:

The preceding confession instruction is considered a better instruction because it makes no reference to the trial Court having already ruled the confession admissible. If the jury is advised of this fact it seems unlikely they would then make a determination against the judge's finding.

[DEFENDANT'S INSTRUCTION - CONFESSION - NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

A statement (admission) (confession) made out of court by a person charged with crime should be received and acted upon with great caution. It cannot be considered as evidence against him unless it was freely and voluntarily made. Any statement (admission) (confession) made because of or induced by any threat, promise or other inducement held out to the defendant by anyone was not freely and voluntarily made and should be wholly disregarded.

A statement (admission) (confession) voluntarily made should be given fair and unprejudiced consideration with due regard to the time and circumstances under which it was made and its harmony or inconsistency with other evidence as well as the motives shown by the evidence to have influenced the making of the statement (admission) (confession) which you find to be true and reject those parts which you find to be untrue.¹

COMMENT:

Source unknown, however this might be a useful instruction if you can get it granted.

[DEFENDANT'S INSTRUCTION - CONFESSION - NO. 3]

¹ All "statements" which justify this charge are not "confessions." The word "confession" should be used with great care so as to avoid suggesting to the jury that a statement or admission is actually a confession of guilt.

CONSPIRACY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that mere presence of a defendant or the association of a defendant with other person[s] engaged in unlawful activities is not within itself sufficient to establish guilt on the part of a defendant.

The Court further instructs the jury that a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the jury may find a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that a conspiracy was knowingly formed and the defendants, or other person who is claimed to have been a member, did willfully, unlawfully and feloniously conspire, confederate and agree together and with each other to unlawfully distribute marijuana, and if the State has failed to so prove, it is your sworn duty to return a verdict of "Not Guilty".

COMMENT:

The first paragraph may be useful in any case where the accused was present when a crime occurred. This instruction should address the facts of your

case.

The preceding together with the one on the following page, were granted in Gray v. State, 487 So.2d 1304 (Miss. 1986), and held to have cured deficiencies in the State's instructions. Counsel should carefully review the prosecution's instructions to insure they require both elements of a conspiracy: (1) acts on the part of the defendant(s) in furtherance of the conspiracy, and (2) a separate finding that the defendant(s) knowingly became a part of the conspiracy to commit a crime.

[DEFENDANT'S INSTRUCTION - CONSPIRACY - NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

A conspiracy is a combination of two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. In this case, the State must prove beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that each defendant in some way or manner, or through contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan to distribute marijuana as alleged in the indictment.

Before the jury may find that a defendant has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that each defendant or other person claimed to have been a member, willfully, unlawfully and feloniously conspired, combined, confederated and agreed to participate in the unlawful plan, with intent to advance or further some object or purpose of the conspiracy to distribute marijuana, and if the state has failed to prove such to your satisfaction beyond a reasonable doubt, it is your sworn duty, as jurors, to return a verdict of "Not Guilty."

COMMENT:

This instruction was granted in Gray v. State, 487 So.2d 1304 (Miss. 1986) and was held by the Mississippi Supreme Court to have cured deficiencies in the State's instructions.

[DEFENDANT'S INSTRUCTION - CONSPIRACY DEFINITION - NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

As I have previously instructed you, the essential element of the offense of conspiracy to commit a crime is the express, or, implied agreement, voluntarily made, between two or more persons to commit that crime. One person acting alone without the actual agreement of another person, no matter how sincere he may be in his desire to commit a crime, cannot be guilty of a conspiracy to commit a crime.

In line with the law, you are advised that:

(1) if one person only feigns acquiescence in a proposal of another to commit a crime, there is no conspiracy between that person and the other since there is no union or concert of wills of two or more persons to commit a crime; or

(2) if one of two persons who conspire to commit a crime is acting as an informer and entered into the conspiracy for the purpose of informing on the other, then in either event, the other person cannot be guilty of the crime of conspiracy.

Applying these rules of law to this case, you are instructed that unless the State of Mississippi has proved beyond a reasonable doubt that John Doe at the time he entered into the alleged conspiracy intended to commit the crime and was not simply feigning acquiescence in a proposal

of Bill Smith, if any, to commit the crime, and that at the time any agreement was entered into between John Doe and Bill Smith, John Doe, acting as an informer, entered into the conspiracy for the purpose of informing on Bill Smith, then you cannot find Bill Smith guilty of having conspired with John Doe to commit a crime.

COMMENT:

In James v. State, 481 So.2d 805 (Miss. 1985), the Mississippi Supreme Court held the above instruction offered by the Defendant, if given, would have cured an error in the State's instruction. The State's instruction informed the jury it could find a conspiracy existed between the defendants or "any one of them." The trial court's refusal to grant this instruction was reversible error. Before a defendant can incur criminal liability, he must "knowingly" join the conspiracy.

Note: See the 2007 change to 97-1-1 where it now allows a conspiracy even if one of the two conspirators is a law enforcement official or person acting at the direction of a law enforcement officer.

[DEFENDANT'S INSTRUCTIONS - CONSPIRACY/INFORMER INVOLVEMENT - NO. 3]

**CREDIBILITY OF WITNESS:
DEFENDANT'S TESTIMONY**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is your duty not to consider the quantity of witnesses testifying in this case, but rather the quality of their testimony.

COMMENT:

The above instruction was held to be a comment upon the weight of the evidence. Bell v. State, 411 SO.2d 763 (Miss. 1982).

[DEFENDANT'S INSTRUCTION - QUALITY OF WITNESSES - NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that John Doe is a competent witness in his own behalf and it is the duty of the jury to consider his testimony just as it does the testimony of any other witness in this case; and if from his testimony in connection with the testimony of others, or his testimony alone, there arises a reasonable doubt of his guilt, then he is, in the eyes of the law, innocent of the crime charged and the jury shall find him not guilty.

COMMENT:

This instruction was approved for years but the Mississippi Supreme Court overruled prior case law and held it is an improper instruction. Baker v. State, 391 So.2d 1010 (Miss. 1980).

In Johnson v. State, 452 So.2d 850, 854 (Miss. 1984) the Mississippi Supreme Court again held the defendant was not entitled to an instruction that he had a right to testify in his own behalf and his testimony should be treated as all other witnesses.

[DEFENDANT'S INSTRUCTION - COMPETENT WITNESS - NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the law of this State gives a Defendant the right to testify in his own behalf, and the jury has no right to disbelieve him simply because he is the Defendant. His testimony is entitled to just as much faith and credit as the jury under all the circumstances think it should have. Furthermore, his testimony is just as entitled to consideration as that of any other witness who testified in this case.

COMMENT:

This instruction is similar to the one on the preceding page and was held to be an improper instruction. Wilcher v. State, 455 So.2d 727 (Miss. 1984).

[DEFENDANT'S INSTRUCTION - COMPETENT WITNESS - NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury for the State of Mississippi that in passing upon the testimony of the witnesses for the State and for the Defendant that you have the right **to take into consideration the interest which any witness may feel in the result of this case**, as shown by the facts and circumstances growing out of the testimony in the case and to give to the testimony of each and every witness only such weight as you think it entitled to under all the circumstances proven in the trial. (Emphasis added).

COMMENT:

This instruction was held to be error because it amounts to a comment by the Court on the weight of the evidence. Bryson v. State, 291 So.2d 693 (Miss. 1974); Boyd v. State, 204 So.2d 165 (Miss. 1967) (contra); Phillips v. State, 196 So.2d 365 (Miss. 1967). Language similar to this can be found in some of the Court's standard instructions and thought should be given deciding whether to object. The prosecutor often makes reference to the accused's interest in testimony. If the defendant does not testify and no defense is offered this language may provide good argument against the prosecution's witnesses.

[STATE'S INSTRUCTION - COPETENT WITNESS - NO. 4]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

A person on trial may become a witness and testify in his own behalf in, and considering his testimony and the weight and credibility which should be given to it, you should consider it just as you would the testimony of any other witness.

COMMENT:

This instruction is given frequently across Mississippi but seems subject to same objection as instructions 1 and 2.

[PERSON ON TRIAL / COMPETENT WITNESS – NO. 5]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that you are the sole judges of the credibility of the witnesses in this case. You should not disregard the testimony of John Doe solely because he is called the defendant, but you should give his testimony such weight, faith, and credit as you believe it merits.

COMMENT:

Subject to same objection as previous instructions.

Note: In Stewart v. State, 355 So.2d 94, 96 (Miss. 1978), a similar instruction advising the jury that they should not give the testimony of a police officer any greater weight merely because he was a police officer was refused under the authority of Mississippi Code Annotated, § 99-17-35 (1972).

[PERSON ON TRIAL / COMPETENT WITNESS – NO. 6]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is your duty not to consider the quantity of witnesses testifying in this case, but rather the quality of their testimony.

COMMENT:

The above instruction was held to be improper as a comment upon the weight of the evidence. Bell v. State, 411 So.2d 763 (Miss. 1982)

[DEFENDANT'S INSTRUCTION - COMPETENT WITNESS NO. 7]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that John Doe is a competent witness in his own behalf, and it is the duty of the jury to consider his testimony just as it does the testimony of any other witness in this case; and if from his testimony in connection with the testimony of others, or his testimony alone, there arises a reasonable doubt of his guilt, then he is, in the eyes of the law, innocent of the crime charged and the jury shall find him not guilty.

COMMENT:

This instruction was approved for years but the Mississippi Supreme Court overruled prior case law and held it is an improper instruction. Baker v. State, 391 So.2d 1010 (Miss. 1980) In Johnson v. State, 452 So.2d 850, 854 (Miss. 1984), the Mississippi Supreme Court again held the defendant was not entitled to an instruction that he had a right to testify in his own behalf and his testimony should be treated as all other witnesses. In McClain v. State, 625 So.2d 774 (Miss. 1993), the Mississippi Supreme Court again held that the defendant is not entitled to this instruction.

[DEFENDANT'S INSTRUCTION - COMPETENT WITNESS NO. 8]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the law of this State gives a Defendant the right to testify in his own behalf, and the jury has no right to disbelieve him simply because he is the Defendant. His testimony is entitled to just as much faith and credit as the jury under all the circumstances think it should have. Furthermore, his testimony is just as entitled to consideration as that of any other witness who testified in this case.

COMMENT:

This instruction is similar to the one on the preceding page and was held to be an improper instruction. Wilcher v. State, 455 So.2d 727 (Miss. 1984)

[DEFENDANT'S INSTRUCTION - COMPETENT WITNESS NO. 9]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury for the State of Mississippi that in passing upon the testimony of the witnesses for the State and for the Defendant that you have the right **to take into consideration the interest which any witness may feel in the result of this case**, as shown by the facts and circumstances growing out of the testimony in the case and to give to the testimony of each and every witness only such weight as you think it entitled to under all the circumstances proven in the trial. (Emphasis added).

COMMENT:

This instruction was held to be error because it amounts to a comment by the Court on the weight of the evidence. Bryson v. State, 291 So.2d 693 (Miss. 1974); Boyd v. State, 204 So.2d 165 (Miss. 1967) (contra); Phillips v. State, 196 So.2d 365 9miss. 1967) Language similar to this can be found in some of the Court's standard instructions and thought should be given to whether to object. The prosecutor invariably makes reference to the accused's interest when he testifies.

[STATE'S INSTRUCTION - INTEREST OF WITNESS NO. 10]

DEFENSES, GENERALLY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the defense of necessity allows conduct which is ordinarily criminal to be excused where a person reasonably believes that he is in danger of physical harm. The defense has three elements: (1) the act charged must have been done to prevent a significant evil; (2) there must have been no adequate alternative; and (3) the harm caused must not have been disproportionate to the harm avoided.

If you believe from the evidence in this case that:

(1) the Defendant entered the home of the Home-Owner in order to avoid physical harm to his person;

(2) the Defendant had no alternative than to enter the home; and

(3) Any harm caused by his entry into the home did not outweigh the physical harm he avoided to his person;

then you should find the Defendant not guilty.

COMMENT:

Without comment, the trial judge in the cited case refused to give the above instruction. The Court of Appeals affirmed, and the Supreme Court reversed, reaffirming the law by saying “a trial judge, when requested, must properly instruct the jury on the defendant's theory of the case—so long as that theory constitutes a legal defense to the charged

offense, is not repetitious, and is supported by evidence.” Flowers v. State, 51 So.3d 911 (Miss. 2010).

[DEFENDANT’S INSTRUCTION- DEFENSE OF NECESSITY – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that in order for duress to be a defense to a criminal charge, the impelling danger must be present, imminent, and impending, and such a nature as to induce in a person well-grounded apprehension of death or serious bodily harm if the act is not done and that the danger to the defendant must be continuous.

If you find from the evidence that the Defendant acted under coercion and duress and the coercion and duress was created by the Coercer and that the coercion and duress was present, imminent, and impending and induced the Defendant's apprehension of death or serious bodily injury if he did not comply with the Coercer's wishes and that such apprehension was continuous throughout the commission by him of the criminal act, then you should find the Defendant not guilty of capital murder.

If you find the Defendant not guilty of capital murder, then you may proceed with your deliberations to decide whether he is guilty of manslaughter.

If you find from the evidence that the Deceased was killed by the act, procurement, or culpable negligence of the Defendant and without authority of law, then you should find him guilty of manslaughter.

COMMENT:

The Supreme Court held that the Court of Appeals committed reversible error by not allowing this duress/ manslaughter instruction. The Court of Appeals reasoned that this instruction was an improper statement of law because it included a manslaughter instruction when the deceased was killed during a robbery (and Mississippi Code Section 97-3-2718 excepts the killing of an individual during a robbery from being manslaughter). However, duress is a valid defense for robbery. And if the jury found that the Defendant was acting under duress, he could not be guilty of the robbery of the Deceased, an essential element of the capital-murder charge. Upon that finding, the jury then could proceed to consider whether the Defendant was proven guilty of any lesser offenses which the trial court had determined were supported by the record, whether they be murder, manslaughter, or both. So the Court held that “the inclusion of a manslaughter instruction was not necessarily improper, as [the Defendant] would be entitled to instructions on lesser offenses should the jury find that he had committed the armed robbery under duress.”

Justice Chandler **dissented** from the majority in this case, saying that “The Court’s longstanding precedent has been that duress is not a defense to murder. . . . Application of this principle logically has been applied to capital murder cases.” Justice Chandler cited several cases, such as *Ruffin*, 992 So.2d at 1177, where the facts of the cited case below were about the same in *Ruffin*, but the Supreme Court determined that “Ruffin failed to support his theory of duress with sufficient evidence.” Here is where Justice Chandler’s argument fails: *every* case he cited in which the Supreme Court held that the duress/capital murder/lesser offense instruction was improper, the Court had determined that the defendant had failed to provide sufficient evidence to warrant an instruction on duress. Justice Chandler reasons that the natural corollary from this is that duress is not a defense to capital murder. **HOWEVER**, this is an erroneous leap in logic. Just because in every other case Justice Chandler cites, the defense failed to provide sufficient evidence that warranted a duress instruction, this does **not** mean that when a duress instruction is **proper**, that it cannot be used as a defense to capital murder. If duress is a defense to the underlying felony that is an essential element to the capital murder charge, then **duress is a defense to capital murder**, because the State will be unable to prove an essential element of the crime. Consequently, if the defendant provides sufficient evidence to warrant a jury instruction on the defense, then the instruction can include any lesser offenses that would normally be barred by the capital charge.

The **main take-away** is this: if one charge bars the inclusion of a particular lesser offense in a jury instruction, but the instruction includes a defense to the barring element that is supported by the record, then the instruction should be allowed and can include instructions on any lesser offenses, if applicable to the case. *Banyard v. State*, 47 So.3d 676, footnote 4 (Miss. 2010).

[DEFENDANT’S INSTRUCTION- DURESS/ MANSLAUGHTER – NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence that the State has failed to preserve any physical evidence whose contents or quality are in question in this case, and which the defendant could have had tested or analyzed by a qualified expert of his choosing, but for the State's having failed to cause that evidence to be preserved for independent, expert testing or analysis by the defense, then you may infer that such testing or analysis would have been favorable to the defendant and unfavorable to the State. However, if you choose to make the negative inference against the State, this would not necessarily result in the defendant's acquittal. If other evidence on this issue has been presented to you which either establishes the fact or resolves the issue to which the missing evidence is relevant, then you must weigh that evidence along with all other evidence. If, after considering all of the evidence, including the negative inference, you unanimously believe that the defendant has been proven guilty, beyond a reasonable doubt, then your verdict shall be, "We, the jury, find the defendant guilty."

COMMENT:

The above instruction was taken from a **dissent** in the Supreme Court; however, this case was a **5-4 decision**. In the dissent, Justice Kitchens wrote that when a key piece of evidence is at all times under the complete control of the State, and the State was fully aware of its importance as well as the defendant's desire to obtain an independent analysis of that evidence; then at the State's destruction of such evidence, the jury "should be given a negative-inference instruction." Harness v. State, 58 So.3d 1, 11 (Miss. 2011).

[DEFENDANT'S INSTRUCTION- EVIDENCE – NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a person has a fundamental right to use reasonable force to resist an unlawful arrest. The Court further instructs the jury that it is unlawful for a law enforcement officer to arrest a person for a misdemeanor offense not committed in his presence except where a warrant has issued.

If you should find, that the Defendant did injure the Officer, but that this was done in resisting an unlawful arrest and that the force he used was necessary under the circumstances, then you must find the defendant not guilty.

COMMENT:

The Supreme Court ruled it reversible error for a trial court to deny the above instruction when there was sufficient evidence to justify the lesser-included offense instruction to simple assault on a law enforcement officer. Denying the instruction hindered the Defense's ability to present its theory of the case. The Court reaffirmed the rules that "the granting of instructions should err on the side of inclusion rather than exclusion;" and "instructions should generally be granted if they are correct statements of law, are supported by the evidence, and are not repetitious." Jones v. State, 798 So.2d 1241 (Miss. 2001).

[DEFENDANT'S INSTRUCTION- RESISTING ARREST AS L.I.O. ALLOWED – NO. 4]

EYEWITNESS IDENTIFICATION

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that in reaching your verdict you are to consider all of the evidence concerning the entire case and the circumstances surrounding the crime. One of the issues in this case is the identification of John Doe as the perpetrator of the crime. As with each element of the crime charged, the State has the burden of proving identity beyond a reasonable doubt, and before you may convict John Doe you must be satisfied beyond a reasonable doubt of the accuracy of the identification of John Doe. If, after considering all of the evidence concerning the crime and the witness' identification of John Doe as the person who committed the crime, you are not convinced beyond a reasonable doubt he is the person who committed the crime, then you must find him not guilty. Identification testimony is an expression of belief or impression by the witness. You must judge its value and reliability from the totality of the circumstances surrounding the crime and the subsequent identification. In appraising the identification testimony of a witness, you should consider the following:

- 1) Did the witness have an adequate opportunity to observe the offender?
- 2) Did the witness observe the offender with an adequate degree of attention?
- 3) Did the witness provide an accurate description of the offender after the crime?
- 4) How certain is the witness of the identification?
- 5) How much time passed between the crime and the identification?

If, after examining all of the testimony and the evidence, you have a reasonable doubt that John

Doe was the person who committed the crime, then you must find John Doe not guilty.

COMMENT:

Defendant's conviction was affirmed but this instruction was approved as being a correct statement of the law. 568 So.2d 277 (Miss. 1990). However, in Hansen v. State, 592 So.2d 114, 140 (Miss. 1991) an eyewitness instruction was found to be properly refused by the trial judge. The instruction from Davis should be offered in appropriate cases to preserve the issue for appeal. *Howell v. State*, 860 So.2d 704 (Miss. 2003)

[DEFENDANT'S INSTRUCTION - EYEWITNESS IDENTIFICATION – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury the burden of proof of each and every element of the crime in this case charged against John Doe is upon the State of Mississippi, and if you have from the evidence and the circumstances in the case a reasonable doubt that the witness, Bill Smith, is honestly mistaken for any reason as to the fact that John Doe robbed the said Bill Smith, then you must find the Defendant not guilty.

COMMENT:

No authority has been found for this instruction but it has been granted. It may be subject to objection on the ground that it singles out the testimony of one witness, but may be worth offering in the appropriate case.

[DEFENDANT'S INSTRUCTION - EYEWITNESS IDENTIFICATION – NO. 2]

FLIGHT INSTRUCTION

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury flight is the evading of the course of justice by voluntarily withdrawing one's self in order to avoid arrest or detention or the institution or continuance of criminal proceedings, regardless of whether one leaves the jurisdiction.

COMMENT:

An objection should always be raised to a flight instruction and alternative reasons given for the defendant's absence. A flight instruction is only proper where the flight is unexplained and where the evidence has probative value. Evans v. State, 579 So.2d 1246, 1248 (Miss. 1991); Brock v. State, 530 So.2d 146, 153 (Miss. 1988); Pannell v. State, 455 So.2d 785 (Miss. 1984); Quarles v. State, 199 So.2d 58 (Miss. 1967); Lightsey v. State, 493 So.2d 375 (Miss. 1986). In Banks v. State, 631 So.2d 748, 751 (Miss. 1994), the Mississippi Supreme Court held it was error to give a flight instruction when the defendant raises self-defense, stating "a flight instruction should be automatically ruled out and found to be of no probative value."

In Jimmie Mack v. State, 91-DP-00764 (12/21/94), the Court held if the evidence of flight is probative of things other than guilt or guilty knowledge, such evidence or instruction should not be given.

[STATE'S INSTRUCTION - APPROVED - FLIGHT -NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury flight is a circumstance from which guilty knowledge and fear may be inferred. If you believe from the evidence in this case beyond a reasonable doubt the defendant, John Doe, did flee or go into hiding, such flight or hiding is to be considered in connection with all other evidence in this case. You will determine from all the facts whether such flight or hiding was from a conscious sense of guilt or whether it was caused by other things and give it such weight as you think it is entitled to in determining the guilt or innocence of the defendant, John Doe.

COMMENT:

This instruction was held to be proper in Evans v. State, 579 So.2d 1246, 1248 (Miss. 1991)

[STATE'S INSTRUCTION - APPROVED – FLIGHT – NO. 2]

INSERT INSTRUCTION.....

GRAND LARCENY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that you may not convict the defendant of the crime of grand larceny, unless you are convinced from the evidence beyond a reasonable doubt, [and to the exclusion of every reasonable hypothesis consistent with his innocence,] that the defendant not only took and carried away the property testified about worth more than \$250.00, but that he did so with the intent to permanently deprive the owner of the use or ownership thereof. You are further instructed that if you believe from the evidence beyond a reasonable doubt that the defendant did in fact unlawfully take said property but that it was not with such intent to permanently deprive the owner thereof, then you may convict the defendant of the crime of trespass less than larceny.

COMMENT:

General instruction focusing in on lack of intent to permanently deprive owner of property with lesser offense of trespass. [Bracketed material removed if the case is not circumstantial.]

**[DEFENDANT'S INSTRUCTION - GRAND LARCENY/LESSER OFFENSE, TRESPASS
- NO. 1]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that one (1) element of the crime of grand larceny is the specific intent to deprive the owner of the property. It is not grand larceny for a person to take another's property for a temporary purpose with the intention of returning it later. If you find from the evidence in this case that John Doe, on or about January 1, 1993 took and carried one power saw, worth more than \$250.00 belonging to Bill Smith, and at the time of the taking, John Doe intended on returning the property later, then you should find John Doe not guilty of grand larceny.

COMMENT:

General instruction focusing on the element of lack of intent to permanently deprive the owner of the property.

[DEFENDANT'S INSTRUCTION - GRAND LARCENY- NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if the property alleged to have been stolen is shown to have been taken openly and in the presence of the owner or third persons then this carries with it only evidence of trespass.

COMMENT:

Lawson v. State, 138 So.2d 361 (Miss. 1931); Oakman v. State, 39 So.2d 777 (Miss. 1949)

[DEFENDANT'S INSTRUCTION - GRAND LARCENY – NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that to constitute the offense of larceny, the property must be taken wrongfully or fraudulently, with the intent to convert it to the taker's own use, and make it his own property, or to deprive the owner of the property permanently.

If you do not believe beyond a reasonable doubt that such intention existed, then the taking amount to a trespass. If the taking be open, and in the presence of the owner, or other persons, this carries with it evidence that it was only a trespass.

COMMENT:

Instruction focuses on lack of intent and taking property from presence of owner.
Littlejohn v. Mississippi, 59 Miss. 273 (Miss. 1881)

[DEFENDANT'S INSTRUCTION - LESSER OFFENSE, TRESPASS – NO. 4]

IMPEACHMENT

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

You have been told that the defendant, John Doe, was found guilty in 1985 of embezzlement. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of the defendant's testimony you will believe in this trial. The fact that the defendant was previously found guilty of another crime does not mean that the defendant committed the crime for which the defendant is on trial, and you must not use this prior conviction as proof of the crime charged in this case.

COMMENT:

The defendant is entitled to a limiting instruction that his prior convictions are admitted only for the purpose of attacking his credibility. The Court may, and possibly should, grant an instruction even if the defendant's counsel fails to offer one. Pugh v. State, 584 So.2d 781 (Miss. 1991); Peterson v. State, 518 So.2d 632 (Miss. 1987).

[DEFENDANT'S INSTRUCTION - LIMITING USE OF PRIOR CONVICTION – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

You have heard the testimony of John Doe. You also heard testimony from others concerning their opinion about whether that witness is a truthful person or the witness's reputation, in the community where the witness lives, for telling the truth. It is up to you to decide from what you heard here whether John Doe was telling the truth in this trial. In deciding this, you should bear in mind the testimony concerning the witness's reputation for truthfulness as well as all the other factors already mentioned.

COMMENT:

General instruction.

[DEFENDANT'S INSTRUCTION - IMPEACHMENT BY UNTRUTHFUL CHARACTER – NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The testimony of a witness or witnesses may be discredited or impeached by showing that on a prior occasion they have made a statement which is inconsistent with or contradictory to their testimony in this case. In order to have this effect, the inconsistent or contradictory prior statement must involve a matter which is material to the issues in this case.

The prior statement of the witness or witnesses can be considered by you only for the purpose of determining the weight or believability that you give to the testimony of the witness or witnesses that made them. You may not consider the prior statement as proving the guilt or innocence of the defendant.

COMMENT:

In McGee v. State, 608 So.2d 1129 (Miss. 1992), the appellant's conviction was reversed and remanded due to failure of trial court to grant this instruction.

**[DEFENDANT'S INSTRUCTION - PRIOR INCONSISTENT STATEMENT]
[LESSER-OFFENSE INSTRUCTIONS – GENERALLY – NO. 3]**

See: Aggravated assault/simple assault rape

LESSER OFFENSE INSTRUCTIONS

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

A lesser-offense instruction should be granted if it can be said to arise out of a nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment. Berry v. State, 575 So.2d 1 (Miss. 1990). A lesser- offense instruction may be proper even though the lesser-offense is not an offense that has elements in common with the greater charge. Gangl v. State, 539 So.2d 132 (Miss. 1989). Trial courts have regularly submitted lesser-offense instructions in turn to deny the defense a manslaughter instruction, where the accused - - could have been lawfully indicted and prosecuted for manslaughter. Butler v. State, 608 So.2d 314, 320 (Miss. 1992). One factor to be considered in granting lesser-offense instructions is the disparity in the maximum punishments for the offense. Taylor v. State, 577 So.2d 381 (Miss. 1991).

(PAGE 1)

In Mease v. State, 539 So.2d 1324, 1330 (Miss. 1989), the Court set forth the following test which was adopted in Harper v. State, 478 So.2d 1017, 1021 (Miss. 1985).

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

In Ruffin v. State, 444 So.2d 838, 840 (Miss. 1984), the Court employed the following test for granting a lesser-offense instruction:

Harper employs slightly different language than Ruffin v. State, 444 So.2d at 840:

[O]nly if this Court can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, and considering that the jury may not be required to believe any evidence offered by the state, that no hypothetical reasonable jury could convict [the defendant] of simple murder, can it be said that the refusal of a lesser included offense instruction was proper.

A third test was enunciated in Monroe v. State, 515 So.2d 860, 863 (Miss. 1987):

"[T]he evidence in a particular case generally warrants granting a lesser offense instruction if a 'rational' or a 'reasonable' jury could find the

(PAGE 2)

defendant not guilty of the principal offense charged in the indictment yet guilty of the lesser included offense." Only where the evidence could **only** justify a conviction of the principal charge should a lesser offense instruction be refused. (emphasis added)

Ruffin v. State, 444 So.2d at 840; Fairchild, 459 So.2d at 800; Lee, 469 So.2d at 12231. Reflection makes clear that all of these tests are different ways of saying the same thing.

Generally, to be entitled to a lesser-included offense instruction there must be some evidence to justify the instruction. The Court in Welch v. State, 566 So.2d 680, 684 (Miss. 1990) held:

"[D]efendants are entitled to have instructions on their theory of the case presented to the jury for which there is foundation in the evidence, even though the evidence might be weak, insufficient, inconsistent, or of doubtful credibility, and even though the sole testimony in support of the defense is the defendant's own testimony. See also: U.S. v. Young, 464 F.2d 160, appeal after remand, 42 F.2d 993 (5th Cir. 1973).

Defendant's counsel should be mindful throughout the trial that some factual basis must be given to the trial Court to warrant an instruction, or to preserve the issue for appeal. In Roberts v. State, 458 So.2d 719 (Miss. 1984), the Court held that the statement "I didn't mean to do it baby, my baby," warranted a manslaughter instruction.

(PAGE 3)

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Mississippi Supreme Court, citing in Mease v. State, 539 So.2d (Miss. 1989), has stated that the accused is entitled to a lesser offense instruction under the following tests:

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

Harper employs slightly different language than Ruffin v. State, 444 So.2d at 840:

[O]nly if this Court can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, and considering that the jury may not be required to believe any evidence offered by the state, that no hypothetical reasonable jury could convict

(PAGE 4)

[the defendant] of simple murder, can it be said that the refusal of a lesser included offense instruction was proper.

A third and simpler version is found in Monroe v. State, 515 So.2d 860, 863 (Miss. 1987): "[T]he evidence in a particular case generally warrants granting a lesser offense instruction if a 'rational' or a 'reasonable' jury could find the defendant not guilty of the principal offense charged in the indictment yet guilty of the lesser included offense." Only where the evidence could **only** justify a conviction of the principal charge should a lesser offense instruction be refused. (emphasis added) Ruffin v. State, 444 So.2d at 840; Fairchild, 459 So.2d at 800; Lee 469 So.2d at 1231. Reflection makes clear that all of these tests are different ways of saying the same thing.

COMMENT:

The court went on to elaborate that Harper, supra, established that the defendant cannot be denied a jury instruction that is "inactfully drawn" if the instruction (a) "relates to a central feature of the case and, (b) where there is no other instruction before the Court which treats the matter.

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

If you find from the evidence in this case beyond a reasonable doubt:

1. On or about November 13, 200[5][,] in Lafayette County, Mississippi;
2. That the Deceased was a human being; and
3. That the Defendant did willfully or in any manner, advise, encourage, abet or assist the

Deceased in taking her life;

then you shall find the defendant guilty of assisting suicide.

If the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the Defendant not guilty of assisting suicide.

COMMENT:

The defense in the cited case proffered the above jury instruction, because if the jury found the Defendant not guilty of murder, then it could consider whether the State had proven the elements of the lesser crime of assisting suicide. The trial court and Court of Appeals both denied the instruction, because they believed that no evidence existed to warrant it; however, the Supreme Court held that the Court of Appeals “applied the facts of this case in too narrow a manner to the broad language of the assisted-suicide statute,” and that the Defendant was entitled to the instruction. Williams v. State, 53 So.3d 734 (Miss. 2010).

[DEFENDANT’S INSTRUCTION- ASSISTING SUICIDE – NO. 2]

LAWYER'S DUTY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

An attorney has a right, and it is his duty, to interview witnesses for the purpose of learning what testimony they will give. The fact that a witness has talked to an attorney and may have told the attorney what he would testify to on the trial does not discredit the testimony of the witness.

COMMENT:

General form - origin unknown and no authority.

[DEFENDANT'S INSTRUCTION - LAWYER'S DUTY – NO. 1]

MALICE

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that malice aforethought is required by Mississippi law to make a homicide a murder. Malice aforethought means intent to kill, without authority of law and not being under circumstances that would reduce the act to a lesser crime.

NOTE: Did not adequately define malice and error. *Russell v. State*, 789 So.2d 779 (Miss. 2001)

[STATE'S INSTRUCTION – MALICE – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury that the term “heat of passion” is defined as a state of violent, uncontrollable rage engendered by certain provocation given, and will reduce a homicide from the grade of Murder to that of Manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. [sic] The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Russell v. State, 789 So.2d 779 (Miss. 2001)0

[NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The court instructs the jury that “malice aforethought”, as defined, indicates a full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences; to calculate, plan, contemplate.

NOTE: Error not to give this instruction when there was no other instruction adequately defines “malice”. *Russell v. State*, 789 So.2d 779 (Miss. 2001).

[NO. 3]

MURDER / MANSLAUGHTER

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that to make an assault justifiable on the grounds of self-defense, the danger to the Defendant just be either actual, present and urgent, or the Defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the Defendant acts.

COMMENT:

This instruction has been specifically cited with approval by the Mississippi Supreme Court in Ward v. State, 479 So.2d 713 (Miss. 1985) and offered by the State in place of the defendant's instructions. It is submitted as a defense instruction because it adequately states the law of self-defense, however others appearing herein may be more favorably worded for the defense.

[STATE'S OR DEFENDANT'S INSTRUCTION - SELF-DEFENSE/GENERALLY – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the defendant is not required to prove that he shot the deceased in self-defense, but the State is required to prove beyond all reasonable doubt that the defendant did not shoot the deceased in self-defense, real or apparent, and unless the State has proven beyond a reasonable doubt that the defendant did not shoot the deceased in self-defense, then you must find the defendant not guilty.

COMMENT:

Not error to deny this instruction when others adequately covered the issue. Sloan v. State, 368 So.2d 228, 229 (Miss. 1979). This instruction correctly states the law and is frequently granted.

**[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/
NOT REQUIRED PROVE - NO. 2]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that every killing is not murder, and that it is never incumbent upon the accused to prove conclusively that the act was committed in self-defense. All that is necessary for the accused to prove in order to establish self-defense is that at the time of the killing the Defendant had reasonable grounds to apprehend danger of his life or good reason to believe that his life was in danger on account of the actions of the deceased.

COMMENT:

Granted by trial court in Turnage v. State, 518 So.2d 1217 (Miss. 1988) and cited by the court on appeal.

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/GENERALLY – NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is not incumbent upon an accused to prove that he acted in necessary self-defense, but to the contrary the burden is upon the State to prove beyond a reasonable doubt that at the time of the slaying he did not act in necessary self-defense, and if there is a reasonable doubt thereto, the accused is entitled to an acquittal.

COMMENT:

Dedeaux v. State, 11/24/93, No. 91-KA-0164.

[DEFENDANT'S INSTRUCTION – SELF DEFENSE GENERAL – NO. 3A

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The court instructs the jury that it is not the duty of the Defendant to prove that he acted in justifiable self-defense, but only that he raise a reasonable doubt of his guilt of the charge against him, unjustifiable homicide.

COMMENT:

Dedeaux v. State, 11/24/93, No. 91-KA-0164.

[DEFENDANT'S INSTRUCTION – SELF-DEFENSE GENERALLY – NO. 3B]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a person has a right to use reasonable force to resist and to protect himself or another person against unwarranted or unjustified attacks or imminent danger of great physical injury. The right is generally called "self-defense".

If you find that Mr. Bully made an unwarranted or unjustified attack upon Defendant John Doe, to cause Defendant John Doe imminent danger of great physical injury and that Defendant John Doe used reasonable force to resist the attack or to protect himself against imminent danger of great physical injury by Mr. Bully, or others, then Defendant John Doe lawfully exercised his right to "self-defense", and it is your sworn duty to find for Defendant John Doe and to return a verdict of "not guilty".

COMMENT:

This instruction was not granted by the trial court in Williams v. State, 590 So.2d 1374, 1380 (Miss. 1991). The denial was affirmed on appeal because other instructions were granted that covered the issues. The instruction may be suitable in other cases.

[DEFENDANT'S INSTRUCTION - SELF/DEFENSE/GENERALLY- 4

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that in deciding upon the guilt or innocence of John Doe, you should determine what an ordinary and reasonable man might have reasonably inferred from all the facts and circumstances by which the evidence shows that John Doe was at the time surrounded, and, in doing so must not try him in the light of subsequent developments, nor must you require of him the same cool judgment that the jury can now bring to bear upon the occurrence. The jury must put themselves, as far as possible, in John Doe's place, and then judge whether the danger was apparent, or should have been considered apparent, or should have been considered apparent by a man of ordinary caution and prudence in like condition.

The Court instructs the jury that although you may find in this case that John Doe was armed at the time he was stopped by the deceased on the night in question, if you also believe that John Doe never had any intent to kill Mr. Deceased, and that he was then and there faced with a situation where the deceased pulled his pistol and shot in the direction of John Doe and that John Doe then and there reasonably believed that Mr. Deceased was attempting to shoot him and that John Doe had reasonable cause to believe and did believe that he was in imminent danger of being killed or receiving serious bodily harm at the hands of Mr. Deceased and that it was

necessary to shoot at him to save his own life, then in that event you should find John Doe not guilty.

COMMENT:

Granted in Lanier v. State, 450 So.2d 69 (Miss. 1984)

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/GENERALLY – NO. 5]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court charges the jury for the defendant that even though you might believe from the evidence that previous to the fatal shot the defendant had malice toward the deceased, and had designed to kill him, and had armed himself with a pistol for the purpose of killing him and was expecting a meeting with the deceased, yet, if they believe that when the defendant approached the deceased he did so in a friendly manner and without making any overt act or provoking the difficulty with the deceased, and it became necessary for the defendant to shoot the deceased, because it was apparent to the defendant that he was in danger of losing his life, or suffering great bodily harm at the hands of the deceased, and he shot the deceased because of such apparent danger, and not in pursuance of his original intention to kill the deceased, you should find the defendant not guilty. Refused.

COMMENT:

The Mississippi Supreme Court held it was error to deny this instruction. (Error also rested upon the denial of another instruction and introduction of certain testimony.) The instruction is helpful in explaining self-defense, especially when the defendant is shown by the State's proof to have armed himself originally or had "malice, hostility, etc." toward the deceased. Wood v. State, 144 So. 545, 547 (Miss. 1932)

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/DEFENDANT'S ORIGINAL MALICE – NO. 6]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that self-defense is a law of necessity. Every human being has a right to defend himself against death or serious bodily harm. But in order to justify the use of deadly force in defense, it must appear that the person attacked was so situated and endangered that he honestly believed, and that he had reasonable grounds for believing, that he was in imminent danger of death or serious bodily harm.

The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the belief that the other person was then about to kill him, or to do him serious bodily harm.

Therefore, if you the jury, believe that the actions, if any, of _____ gave _____ reasonable grounds to fear that _____'s life was in danger or that there was imminent danger of serious personal injury to _____; and that _____ used no more force than was necessary under the circumstances then and there existing to protect himself from such imm (where is rest of instruction?)

COMMENT:

Approved in Calhoun v. State, 526 So.2d 531 (Miss. 1988) Reversed due to trial court's failure to instruct jury on defendant's right to defend others.

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE OF SELF AND OTHERS – NO. 7]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that the defendant is not to be judged by the cool light of after-developed facts, but that they are to put themselves in his place and find their verdict according to the existing circumstances at the time of the alleged killing, and render their verdict accordingly.

(B) The Court instructs the jury that in passing upon the action of the defendant the jury should not try him by the light of after-developed events - not hold him to the same cool and correct judgment which they are able to form. They should put themselves in his place and judge of his acts by the facts and circumstances by which he was surrounded.

COMMENT:

Error to refuse these instructions. (A) Johnson v. State, 42 So. 166; (B) Scott v. State, 42 So. 184 (Miss. 1906). Also Windham v. State, 45 So. 861, 862 (Miss. 1908)

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/AFTER DEVELOPED FACTS – NO. 8]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if, after reviewing all the evidence, the jury believe that the fatal shot was fired by Mr. Defendant when he had reasonable cause to believe and did believe that he was in imminent and immediate danger of being killed by Mr. Deceased, or of receiving great bodily harm at the hands of Mr. Deceased, then the jury will find for the defendant, even though it may now appear that the defendant was not at the time in immediate danger of being killed by Mr. Deceased or of receiving great bodily harm at his hands.

COMMENT:

This instruction is another more detailed version of the "after developed facts" instruction. Error not to grant this instruction in murder trial. Scott v. State, 42 So. 184 (Miss. 1906)

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/AFTER DEVELOPED FACTS – NO. 9]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that in deciding upon the guilt or the innocence of the defendant they shall determine it an ordinary and reasonable man might have inferred from all of the facts and circumstances surrounding defendant at the time, as shown by the evidence, and in doing so must not try him in the light of subsequent developments, nor must they require of him the same cool judgment that the jury can now bring to bear upon the occurrence; they must put themselves, as reasonable men, as nearly as possible in the place of the defendant at the time of the difficulty and then judge whether the danger was apparent or would have been considered apparent by a man of ordinary caution and prudence under like circumstances; the danger to his life or great bodily harm need not have been real, present or urgent at the very moment he fired the shot but only apparently so. The question is: Was the danger so eminent and present at the time the defendant fired the shot that a reasonable and prudent man situated as the defendant was at the time he fired the shot would believe it was necessary to fire the shot to avoid loss of his life or to prevent great bodily harm being done to him, and if from all the facts in this case, the jury has a reasonable doubt whether such was the case when the defendant shot the deceased, then the jury must find the defendant not guilty.

COMMENT:

Sloan v. State, 368 So.2d 228 (Miss. 1979)

This instruction was granted but not copied in the published opinion. A copy of the instruction was obtained from the transcript on file with the Clerk of the Mississippi Supreme Court.

[DEFENDANT'S INSTRUCTION - AFTER-DEVELOPED FACTS – NO. 10]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that the defendant is not to be judged by the cool light of after-developed facts, but that they are to put themselves in his place and find their verdict according to the existing circumstances at the time of the alleged killing, and render their verdict accordingly.

(B) The Court instructs the jury that in passing upon the action of the defendant the jury should not try him by the light of after-developed events – not hold him to the same cool and correct judgment which they are able to form. They should put themselves in his place and judge of his acts by the facts and circumstances by which he was surrounded.

COMMENT:

Error to refuse these instructions (A) Johnson v. State, 42 So. 166. (B) Scott v. State, 42 So. 184 (Miss. 1906). Also, Windham v. State, 45 So.861, 862 (Miss. 1908).

**[DEFENDANT’S INSTRUCTION – SELF-DEFENSE/AFTER DEVELOPED FACTS –
NO. 10A]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if, after reviewing all the evidence, the jury believe that the fatal shot was fired by _____ when he had reasonable cause to believe and did believe that he was in imminent and immediate danger of being killed by _____, then the jury will find for the defendant, even though it may not now appear that the defendant was not at the time in imminent danger of being killed by _____ or of receiving great bodily harm at his hands.

COMMENT:

This instruction is another more detailed version of the “after developed facts” instruction. Error not to grant this instruction in murder trial. Scott v. State, 42 So. 184 (Miss. 1906).

**[DEFENDANT’S INSTRUCTION – SELF DEFENSE/AFTER DEVELOPED FACTS –
NO. 10B]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that you are not to judge the actions of the Defendant in the cool, calm light of after-developed facts, but instead you are to judge his actions in the light of the circumstances confronting the Defendant at the time, as you believe from the evidence that those circumstances reasonably appeared to him on that occasion; and if you believe that under those circumstances it reasonably appeared to the Defendant, at the instant that he took up a weapon, that the Defendant then and there had reasonable ground to apprehend a design on the part of the Deceased to kill the Defendant or his daughter or to do the Defendant and his daughter some great personal injury, and there reasonably appeared to the Defendant to be imminent danger of such designs being accomplished; then the Defendant was justified in anticipating an attack and using reasonable means to defend such attack; then you must find the Defendant not guilty of the murder of the Deceased.

COMMENT:

The Mississippi Supreme Court held that this instruction more fully defines self-defense. The trial court and the Court of Appeals found that the two self-defense instructions actually given to jury sufficiently stated the law of self-defense; however, neither instruction addressed the Defendant's asserted self-defense theory to include "defense-of-others" rationale. Furthermore, neither of those instructions included the language, "you are not to judge the actions of the Defendant *in the cool, calm light of after-developed facts.*" Maye v. State, 49 So.3d 1124, 1130-32 (Miss. 2010).

[DEFENDANT'S INSTRUCTION- SELF-DEFENSE – NO. 10C]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that in this State, no one is required to flee in the face of threatened assault, but may stand his ground, and in a proper case may anticipate an attack and, if reasonably necessary, slay his adversary to save his own life.

COMMENT:

Granted by the trial court and cited on appeal in Turnage v. State, 518 So.2d 1217 (Miss. 1988)

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/NO DUTY TO FLEE – NO. 11]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a person claiming the right to self-defense is not required to retreat or to consider whether she could safely retreat. If she is honestly and reasonably in fear of death or serious bodily harm she may stand her ground and use whatever force is reasonably necessary under the circumstances, even to the extent of taking the life of the attacker.

COMMENT:

Granted by the trial court and cited with approval on appeal. May v. State, 460 So.2d 778, 784 (Miss. 1985)

[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/NO DUTY TO FLEE – NO. 12]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if they believe from the evidence that the defendant had reasonable grounds to apprehend a design on the part of the deceased to do him some great personal injury, **and that the defendant was not the aggressor in the difficulty**, and that there was **imminent** danger of such design being accomplished, then _____ was justifiable in acting upon such appearances (if they indicated danger) even to the taking of the life of the deceased.

COMMENT:

It was reversible error for the trial Court to modify this instruction with the italicized language. The instruction should have been granted as written. Scott v. State, 42 So. 184 (Miss. 1906)

NOTE: Instructions are frequently offered by the State cutting off the defendant's right of self-defense. The Mississippi Supreme Court has repeatedly held these instructions should rarely be given.

[DEFENDANT'S INSTRUCTIONS - SELF-DEFENSE/ ACTING ON DECEASED APPEARANCE – NO. 13]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the defendant, John Doe, was entitled to act upon appearances, and if the conduct of the deceased was such as to induce in the mind of a reasonable person, situated as he was, under all the circumstances then existing, and viewed from the standpoint of the defendant, a fear that death or great bodily harm was about to be inflicted by the deceased on him, it does not matter if there was no such danger provided that the jury believe that the defendant acted in self-defense from real and honest conviction, then the jury should find him "not guilty", even though they believe that at the time he was mistaken and that he was not in any great danger.

COMMENT:

Granted by the trial court and cited on appeal in Turnage v. State, 518 So.2d 1217 (Miss. 1988)

**[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/
ACTING ON DECEASED APPEARANCE – NO. 14]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if there was any overt act on the part of the deceased, Mr. Bully toward the defendant at the time defendant fired the shot or just prior hereto, which indicated to the defendant as a reasonable man that the deceased was about to kill him or do him harm, and as a reasonable man the defendant did so believe, then he had a right to shoot the deceased; but whether there was such real or apparent danger are matters of fact to be determined by the jury from all of the evidence in this case. No exact accurate definition of an overt act can be given as it may be a gesture, motion, conduct or demonstration or anything else which evidenced a design on the part of the deceased to take the life of the defendant or to do him great bodily harm; and if there was such an overt act on the part of the deceased which reasonably led the defendant as a reasonable man to believe that his life was in danger or he was in danger of great bodily harm, then he had the right to shoot the deceased, and you will find him not guilty.

COMMENT:

Sloan v. State, 368 So.2d 228, (Miss. 1979)

[DEFENDANT'S INSTRUCTION - DECEASED'S ACTIONS – NO. 15]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

You are instructed that under the law a man is justified in carrying a weapon if his life has been threatened or he has been threatened with great bodily harm and he has a good and sufficient reason to apprehend an attack from an enemy, and if you believe from the testimony in this case that the defendant's life had been threatened with great bodily harm, and therefore had reason to apprehend a serious attack, then the defendant was justified in carrying a pistol.

COMMENT

The Mississippi Supreme Court overruled three (3) prior cases by holding that the defendant may have the jury instructed of his right to carry a concealed weapon under certain circumstances, i.e., threat on his life. Ray v. State, 381 So.2d 1032 (Miss. 1980); Mississippi Code Annotated, '97-37-9 (Supp. 1992) There must be evidence to support the granting of this instruction.

**[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/
RIGHT TO CARRY FIREARM – NO. 16]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court charges the jury for the defendant, that, if the defendant had been informed and believed that his life had been threatened, or that he was threatened with great bodily harm, that he had a lawful right to carry a concealed deadly weapon. And the court charges the jury further that while so armed, he had a lawful right to approach the deceased, Mr. Bully, on any peaceable mission or purpose and to use the said deadly weapon in defense of his life, or himself from great bodily harm from an attack made upon him by Mr. Bully.

COMMENT:

Error to refuse this instruction in murder case. Wood v. state, 144 So. 545, 546 (Miss. 1932); Austin v. State, 324 So.2d 245 (Miss. 1975)

**[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/
RIGHT TO CARRY FIREARM – NO. 17]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a man has a right to use a deadly weapon to defend himself against an attack made on him by the assaulted party if it reasonably appeared to him to be necessary to protect himself from death or great bodily harm. If you find from the evidence that it reasonably appeared necessary to Mr. Defendant to fire a gun at the deceased to **protect himself, or others (name them), from great bodily harm**, then you must find the defendant not guilty. (Emphasis added).

COMMENT:

Conviction reversed because trial court gave self-defense instruction that did not inform jury that defendant could act in self-defense if he reasonably believed another person, in addition to himself, might be in danger of imminent death or great bodily harm. Calhoun v. State, 526 So.2d 531, 533 (Miss. 1988); Folks v. State, 230 Miss. 217, 92 So.2d 461 (Miss. 1957)

**[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/
DEFENSE OF SELF OR OTHERS- NO. 18]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the law is that a person assaulted, or about to be assaulted by any means likely to produce death is not required by the law to wait until his adversary is on equal terms with him, but may rightfully anticipate his adversary's action and kill his adversary, when to strike in anticipation reasonably appeared to be necessary to self-defense; and, unless you, the jury, are satisfied in your minds beyond a reasonable doubt that the deceased, at the time of the killing, was not attempting to assault defendant with a bottle, then you, the jury, must find the defendant not guilty.

COMMENT:

Denied by the trial court and affirmed on appeal because other instructions adequately covered the issue. Turnage v. State, 518 So.2d 1217 (Miss. 1988), however the instruction was not held to be improper.

**[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/
ANTICIPATE ACTS OF DECEDENT – NO. 19]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the defendant had a perfect right to keep a pistol in her house where she was living, and she had a right to use said pistol and kill Mr. Bully, even though he was her husband, if it reasonably appeared to her as a reasonable woman at the time that the said Mr. Bully was undertaking to force an entrance into her house, with the design to do her some great personal injury.

COMMENT:

The above instruction was cited with approval by the Mississippi Supreme Court in Hull v. State, 350 So.2d 60, 63 (Miss. 1977)

[DEFENDANT'S INSTRUCTION - DEFENSE OF HABITATION – NO. 20]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if the deceased was a much larger and stronger man than the defendant, so much so that the defendant was absolutely incapable of coping with him in a physical combat, and was liable to receive serious and great bodily injuries at the hands of the deceased in the event that they became engaged in such combat, and if you believe that the defendant apprehended such combat then the defendant was justified in shooting the deceased or in using a deadly weapon to defend herself from the attack of the deceased, even though the deceased had been wholly unarmed, and the defendant was in no danger from the deceased, except such as might be inflicted by the deceased with his hands and feet.

COMMENT:

The above instruction was cited with approval in Hull v. State, 350 So.2d 60, 62 (Miss. 1977)

**[DEFENDANT'S INSTRUCTION - SELF-DEFENSE/
LARGER UNARMED ADVERSARY – NO. 21]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

If the evidence shows that the deceased was a much larger and stronger man than the defendant and was capable of inflicting great and serious bodily harm upon the defendant with his hands and a bottle, or either, and that the defendant had reason to believe and did believe as a man of ordinary reason that he was then and there in danger of such harm at the hands of the deceased, and used his knife, with which he fatally cut the deceased, to protect himself from such harm, then the defendant was justified, and your verdict will be “not guilty”, even though the deceased was not armed.

COMMENT: Manuel v. State, 92-KA-00625-S.Ct. (11/30/95)

**[DEFENDANT’S INSTRUCTION – SELF DEFENSE AGAINST LARGER ADVERSARY
- NO. 22]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the killing of a human being is excusable homicide if you find from the evidence, if any, that the defendant John Doe's act which caused the death of Mr. Bully was the result of an accident and misfortune, in the heat of passion, upon sudden and sufficient provocation, and if you further find that Mr. Bully's death was caused by an accident resulting from someone hitting John Doe's arm as he attempted to shoot his gun up into the air, then the homicide is excusable.

COMMENT:

This instruction was given by the trial court for the accused in Wadford v. State, 385 So.2d 951 (Miss. 1980)

[DEFENDANT'S INSTRUCTION - ACCIDENTAL SHOOTING – NO. 23]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence, or have a reasonable doubt therefrom that the Defendant while in the possession of the gun, a deadly weapon, and in the heat of passion during an altercation between the Deceased and the Defendant without any design or deliberation to cause the death of the Deceased, fired the fatal shot accidentally and through misfortune, upon sudden and sufficient provocation, then it is your sworn duty to find the Defendant not guilty.

COMMENT:

The Supreme Court of Mississippi held that the trial judge and Court of Appeals committed reversible error in denying the above instruction. The Prosecutor at the trial level objected to this instruction because, he believed, it tried to combine self-defense and accidental shooting theories of the case. And the trial court denied the instruction because it had already given a self-defense instruction submitted by the State. However, the Supreme Court held that the defendant was entitled to this instruction, commenting that, "Certainly, a properly worded accidental-shooting jury instruction may have been the difference between a guilty verdict and a not-guilty verdict." The Court also reaffirmed the following, *important*, rule in light of this case: "**We urge our trial judges to remember that if 'serious doubt exists as to whether an instruction should be included, the doubt should be resolved in favor of the accused.'**" Brown v. State, 39 So.3d 890,896 (Miss. 2010).

[DEFENDANT'S INSTRUCTION- SELF-DEFENSE/ ACCIDENTAL SHOOTING – NO. 23A]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find beyond a reasonable doubt from the credible evidence that the defendant did kill the deceased but that same was not done with premeditation or malice aforethought but was done in a sudden heat of passion, then you may find the defendant guilty of manslaughter and the form of your verdict may be:

"We, the jury, find the defendant guilty of manslaughter."

COMMENT:

Reversible error not to grant manslaughter instruction in any case where testimony shows a fight between two persons in a "heated atmosphere". Ruffin v. State, 444 So.2d 839 (Miss. 1984). See also: Roberts v. State, 458 So.2d 719 (Miss. 1984); Martin v. State, 112 Miss. 365, 73 So. 64 (1916).

Permit no instructions that shift any burden on the defendant to prove heat of passion. Mulhaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

[DEFENDANT'S INSTRUCTION – MANSLAUGHTER/HEAT OF PASSION – NO. 24]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the killing of any human being by the act of another shall be excusable when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation.

In this case if you shall find from the evidence, or have a reasonable doubt therefrom, that the defendant, in the heat of passion, upon any sudden and sufficient provocation by Mr. Deceased, accidentally fired the defendant's shotgun, and said shotgun accidently and/or through misfortune killed Mr. Deceased, then it is your sworn duty to find the defendant not guilty.

COMMENT:

The Mississippi Supreme Court held it was error to deny this instruction, because the defendant was entitled to have jury instructions given which present his alternative heat-of-passion theory of the case. The pertinent language of this instruction directly parallels that of Mississippi Code Section 97-3-17(b). The Court also reaffirmed that a criminal defendant has a right to assert alternative theories of defense, *even inconsistent alternative theories*. Clayton v. State, 106 So. 3d 802,804-06 (Miss. 2012).

[DEFENDANT'S INSTRUCTION- HEAT OF PASSION – NO. 24A]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that:

1. Mr. Deceased was a living human being; and
 2. Mr. Deceased died as a result of John Doe operating his automobile in a culpably negligent manner; and
 3. The acts of John Doe caused the death of Mr. Deceased in that his acts at said time and place exhibited a wanton or reckless disregard for the safety of human life, to-wit: by driving his automobile at an excessive rate of speed while under the influence of intoxicating liquors; **failing to maintain a proper lookout for other vehicles** then and there on the highway; and striking in the rear of the vehicle [sic] then and there occupied by Mr. Deceased; and
 4. That said killing and slaying occurred on the 2nd day of March, 1985 in the Second Judicial District of Jasper County, Mississippi,
- then you should find the defendant, John Doe, guilty of manslaughter.

COMMENT:

The granting of above instruction was held in error because there was no evidentiary basis to support the instruction. The Court also noted that it was not deciding on the propriety of listing specific instances that would constitute culpable negligence.

Moffett v. State, 540 So.2d 1313, 1318 (Miss. 1989)

[STATE'S INSTRUCTION - MANSLAUGHTER/ CULPABLE NEGLIGENCE – NO. 25]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

It is reversible error to give an instruction in such cases which contains language to the effect that malice aforethought may exist at the very instant that a fatal shot is discharged if an objection is made to the instruction.

COMMENT:

Reversible error to give an instruction which did not contain language that malice aforethought may exist. Patterson v. State, 289 So.2d 685 (Miss. 1974)

[DEFENDANT'S INSTRUCTION - MURDER/GENERALLY – NO. 26]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that "malice aforethought" as charged in the indictment in this case and as referred to in other instructions of the Court is a state of mind and does not have to exist in the mind of the slayer for any given length of time, and if the defendant at the very moment of the fatal blow did so with the deliberate design to take the life of the deceased, and not in necessary self-defense, real or apparent, then it was malice aforethought, and that was truly murder, as if the deliberate design had existed in the mind of the defendant for minutes, hours, days, or weeks, or even years.

COMMENT:

The above instruction was approved in Stevens v. State, 458 So.2d 726, 730 (Miss. 1984); Pittman v. State, 297 So.2d 888, n.1. (Miss. 1974) Contra: See Duvall v. State, 634 So.2d 524, 526 (Miss. 1994) wherein the Court found it was error to give a "deliberate design" instruction together with a manslaughter instruction. The two instructions were in hopeless conflict. Windham v. State, 520 So.2d 123, 126 (Miss. 1987)

[STATE'S INSTRUCTION - EXISTENCE OF MALICE AFORETHOUGHT – NO. 27]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury for the State that the malice aforethought mentioned in the indictment does not have to exist in the mind of the slayer for any given length of time, then it was as truly malice and the act was as truly murder as if the deliberate design had existed in the mind of the defendant for minutes, hours, days, weeks, or even years.

COMMENT:

Above instruction or versions similar have been approved by the Mississippi Supreme Court. Peterson v. State, 242 So.2d 420, 427 (Miss. 1970); Pittman v. State, 297 So.2d 888, n.1 (Miss. 1974)

[STATE'S INSTRUCTION - EXISTENCE OF MALICE, AFTERTHOUGHT- NO. 28]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury for the State of Mississippi that while malice aforethought is a necessary ingredient to the crime of murder, still **"malice aforethought" means the same thing as killing a human being with the deliberate design to effect the death of the person killed;** and that malice aforethought and deliberate design do not necessarily mean hatred or ill will, and need not exist in the mind of the defendant for any definite time, not for days or hours or even minutes, **but if the deliberate design to kill exists but for an instant at the very time the fatal blow was struck, this is sufficient premeditation and deliberation to constitute the offense of murder.** (Emphasis supplied).

(B) The Court instructs the jury for the State of Mississippi, that while malice aforethought is a necessary ingredient to the crime charged, still "malice aforethought" means the same thing as cutting a human being with a deadly weapon with the deliberate design to effect the death of any human being; and this malice aforethought and deliberate design do not necessarily mean hatred or ill will, and need not exist in the mind of the defendant for any definite time, not for days or hours or even minutes, but if the deliberate design to kill exists but for an instant at the very time the deadly weapon is used, this is sufficient premeditation and deliberation to constitute "malice aforethought."

COMMENT:

The above instructions were held to be error in (a) Pittman v. State, 297 So.2d 888, 893 (Miss. 1974), and (b) Toney v. State, 298 So.2d 716, 720 (Miss. 1974). The instructions fail to advise the jury that there are instances in which a deliberate design to kill may exist at the moment of the death, yet the homicide may be justifiable (Mississippi Code Annotated, '97-3-15 (Supp. 1992) or excusable (Mississippi Code Annotated, '97-3-17 (Supp. 1992).

[STATE'S INSTRUCTION - MURDER/DEFINING MALICE – NO. 29]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that under the laws of the State of Mississippi, fear, coercion or duress is no defense to the charge of murder, and this is true regardless of who struck the fatal blow. Accordingly, if you find from the evidence in this case, beyond a reasonable doubt, that the Defendant was an accessory before the fact to the murder of Mr. Deceased as defined by the Court's Instructions, then **even if the Defendant was frightened, coerced, or forced, such is not to be considered by you and is no defense in this case.** (Emphasis added).

COMMENT:

Welch v. State, 566 So.2d 680, 684 (Miss. 1990). Improper instruction because it diminishes the mens rea that a defendant must possess.

**[STATE'S INSTRUCTION - IMPROPER TO RESTRICT
DEFENSE/MENS REA NECESSARY INGREDIENT – NO. 30]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that to make a homicide justifiable on the grounds of self-defense or defense of another, the danger to the defendant must be either actual, present and urgent or the defendant must have reasonable grounds to apprehend a design on the part of the deceased to kill him, or to do him some great bodily harm, and in addition to this, there was imminent danger of such design being accomplished; and hence mere fear, apprehension or belief, however sincerely entertained by one person that another designs to take his life or do some great bodily harm will not justify the former in taking the life of the latter party. A party may have an apprehension that his life is in danger, and believe the grounds of his apprehension just and reasonable, and yet he acts at his peril. He is not the final judge; the jury may determine the reasonableness of the ground upon which he acted.

(B) The Court instructs the jury to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts.

COMMENT:

(A) Instructions offered by the State in this form have been condemned. Haynes v. State, 451 So.2d 227, 229 (Miss. 1984); Robinson v. State, 434 So.2d 206, 207 (Miss. 1983); Lenoir v. State, 445 So.2d 1371, 1372 (Miss. 1984); Scott v. State, 446 So.2d 580 (Miss. 1984)

(B) This instruction was approved in Robinson v. State, 434 So.2d 206, 207 (Miss. 1983).

[STATE'S INSTRUCTION - SELF DEFENSE – NO. 31]
(A) Defendant acting at own peril – condemned.
(B) Jury the final judge of defendant's actions – approved.

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that for John Doe that not every taking of human life is a violation of the law because some forms of homicide are excused by law.

In the case now being submitted for your decision, John Doe cannot be convicted of manslaughter if at the time of the taking of human life he had reasonable grounds to believe and did believe that he was in danger of death or serious bodily harm at the hands of the deceased.

You are further instructed that in this regard John Doe is entitled to the benefit of any and all reasonable doubt, either from the evidence or from the lack of evidence presented in this case.

COMMENT:

Instruction granted for the defendant by lower court and cited by Mississippi Supreme Court in opinion. Buchanan v. State, 567 So.2d 194, 199 (Miss. 1990). The prosecution was also granted the pattern instruction set forth in Robinson v. State, 434 So.2d 206, 207 (Miss. 1983).

**[DEFENDANT'S INSTRUCTION – SELF-DEFENSE GENERALLY – NO.
32]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that mere trespass or refusal to leave the No Name Lounge is insufficient provocation to warrant the use of a deadly weapon in evicting Bill Smith. If you find from the evidence that the defendant provoked the encounter with Bill Smith, and the defendant armed himself with a gun in advance, intending if necessary to use the gun to overcome Bill Smith, then the defendant has deprived himself of the right of self-defense.

COMMENT:

Improper instruction that had no evidentiary support. The Court stated it disliked instructions that attempt to preempt a defendant's right to self-defense, and such instructions should be rarely given. Thompson v. State, 602 So.2d 1185, 1189 (Miss. 1992)

[STATE'S INSTRUCTION – ATTEMPT TO PREMPT SELF-DEFENSE – NO. 33]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

One who is the aggressor in a confrontation may not claim the right of self-defense so long as he remains the aggressor and does not withdraw from the confrontation. If you find from the evidence the defendant was the aggressor in this matter and brought on the difficulty with Bill Smith, and he entered the encounter with a gun, intending to use it when he provoked or brought on the encounter, if necessary to overcome Bill Smith in the course of the encounter, then the defendant may not claim the right of self-defense.

COMMENT:

Instruction improper because it preempted defendant's right to self-defense. Thompson v. State, 602 So.2d 1185, 1189 (Miss. 1992) Instructions that estopp one from raising self-defense are proper only in rare cases.

STATE'S INSTRUCTION – ESTOPPS SELF-DEFENSE – NO. 34]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that where the Defendant is the only eyewitness to the alleged homicide, his version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the State, or by the physical facts or by the facts of common knowledge.

COMMON:

This instruction was granted in Wilcher v. State, 455 So.2d 727, 735 (Miss. 1984). The instruction correctly states what is known as the Weathersby Rule but is not a subject for an instruction. Also Griffin v. State, 495 So.2d 1352, 1355 (Miss. 1986). Blanks v. State, 547 So.2d 29, 34 (Miss. 1989)

[WEATHERBY RULE OF LAW – NO. 35]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

You are instructed that it is the duty of each and every member of the jury in this case to decide the issues presented for himself and if, after a careful consideration of all of the evidence in the case and the instructions of the Court on the law and free consultation with your fellow jurors, there is any single juror who has a reasonable doubt of the defendant's guilt it is your duty under oath to stand by your conviction and favorable to a finding of "not guilty". You should never yield your conviction simply because every other single one of the jury may disagree with you.

COMMENT:

The jury should be told in every trial that their verdict must be unanimous. If the jury is not so instructed, a "one-juror" instruction should be given. In Edlin v. State, 523 So.2d 42-48 (Miss. 1988) the Appellant's conviction was reversed and remanded when the trial Court refused the above instruction. The error may not be reversible if the jury is told in other instructions that their verdict must be unanimous.

[DEFENDANT'S INSTRUCTION – ONE JUROR – NO. 36]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court charges the jury that it is your duty to vote on each and every ballot of the jury for an acquittal of John Doe, unless, after conferring with the other jurors, your mind is convinced beyond a reasonable doubt. You cannot, under your oath as a juror, compromise your honest convictions from the evidence, or lack of evidence, as to the guilt or innocence of John Doe for the purpose of bringing in a verdict. Under your oath and under the law, you should never surrender such conviction simply because every other member of the jury may disagree with you or insist that you yield your honest conviction to save the time of the court or prevent a “hung jury”, or because of anything or reason whatsoever, or for any purpose whatsoever. You should vote not guilty as long as, after a consultation of the evidence in this case, the State has failed to prove John Doe’s guilt beyond a reasonable doubt [and to the exclusion of every reasonable theory consistent with innocence.]

COMMENT:

The Mississippi Supreme Court has held that a “one-juror” instruction should be granted upon request in proper cases.

[DEFENDANT’S INSTRUCTION – ONE JUROR/ANOTHER FORM – NO. 37]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs you that the killing of another human being shall be justifiable when committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or in any occupied vehicle in which such person shall be.

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

COMMENT:

The Mississippi Supreme Court held this instruction correctly states the “newly revised ‘Castle Doctrine;’ that was codified in Mississippi Code Section 97p-3-15(3)-(4) (Rev. 2006). The new “no duty to retreat” rule “curtailed the duty to retreat and created a presumption that the defendant reasonably feared imminent death, great bodily harm, or the commission of a felony upon him from a person who has unlawfully and forcibly entered the immediate premises of a dwelling” where the defendant had a right to be. The revised “Castle Doctrine” statute implicated

by this instruction was a matter of first impression before the Court in the cited case below. Therefore, the Court provided the following, important analysis involving this revised doctrine and the above jury instruction:

“So the statute requires the person who used defensive force to have been ‘occupying’ his vehicle, but it does not expressly refer to *when* exactly that person must have used defensive force. This ambiguity lends itself to **two possible interpretations**.

[The Wrong Interpretation] Perhaps the person who uses defensive force must be occupying his vehicle *at the moment he uses defensive force*. This is the construction given by the trial court.

[The Right Interpretation] But the statute also may mean that the person who uses defensive force must be occupying his vehicle *when the person against whom defensive force is used takes the actions that result in its use*. We think this is the most reasonable interpretation of the statute. . . . We do not believe that the Legislature intended for persons threatened by physical violence in their own automobiles to remain inside the vehicle at all costs to be entitled to the presumption in Section 97-3-15(3).”

And since the Supreme Court has taken this approach to the “no duty to retreat” rule, it held that the trial court abused its discretion by refusing the above instruction. Newell v. State, 49 So.3d 66, 77 (Miss. 2010).

**[DEFENDANT’S INSTRUCTION- NO DUTY TO RETREAT RULE PRESUMPTION –
NO. 38]**

IN THE CIRCUIT COURT OF _____ COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs.

CAUSE NO. _____

LITTLE JOHNNY

JURY INSTRUCTION

The Court instructs the jury that a homicide may be justifiable under the law in Mississippi, and the burden is on the State of Mississippi to prove to your satisfaction beyond a reasonable doubt the homicide was committed “without authority of law” as charged in the indictment. If you find from the evidence and testimony presented that Little Johnny (1) was not the first aggressor, (2) committed the homicide in the lawful defense of his own person or any other human being, (3) had reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and (4) there was imminent danger of such design being accomplished, it is your sworn duty to find the Defendant “not guilty.”

Miss. Code Ann. § 97-3-15(1)(f).

**[DEFENDANT’S INSTRUCTION- CASTLE DOCTRINE – NO. 38A – DONATED
FROM PHIL BROADHEAD]**

IN THE CIRCUIT COURT OF _____ COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs.

CAUSE NO. _____

LITTLE JOHNNY

JURY INSTRUCTION

The Court instructs the jury that if you find from the evidence and testimony presented (1) the person against whom the defensive force was used was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling [*occupied vehicle, business, place of employment*]² or the immediate premises thereof or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that dwelling [*occupied vehicle, business, place of employment*] or the immediate premises thereof and (2) the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred, the Defendant is presumed to have reasonably feared imminent death or great bodily harm or the commission of a felony upon him. If you find both circumstances set out above existed at the time of the homicide you shall presume Little Johnny reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or upon his dwelling [*car, or place of business or employment*] in the claim of necessary self-defense.

Miss. Code Ann. § 97-3-15(1)(e) and (3).

**[DEFENDANT'S INSTRUCTION- CASTLE DOCTRINE – NO. 38B – DONATED FROM
PHIL BROADHEAD]**

² Word the instruction to fit the factual circumstances of your case.

IN THE CIRCUIT COURT OF _____ COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs.

CAUSE NO. _____

LITTLE JOHNNY

JURY INSTRUCTION

The Court instructs the jury that if you find from the evidence and testimony presented that the Defendant was (1) not the first aggressor, (2) was not engaged in unlawful activity, and (3) was in a place where he had a right to be, then the Defendant had no duty to retreat before using deadly force, and the jury is not permitted to consider the Defendant's failure to retreat as evidence that the Defendant's use of force in self-defense was unnecessary, excessive or unreasonable.

Miss. Code Ann. § 97-3-15(4).

[DEFENDANT'S INSTRUCTION- CASTLE DOCTRINE – NO. 38C – DONATED FROM PHIL BROADHEAD

OTHER CRIMES

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

Members of the jury, evidence has been offered by the State that the defendant committed crimes against Mr. Victim, other than that of armed robbery. The defendant is on trial for the offense of armed robbery and that offense only. You cannot convict the defendant in this case unless the State has proven beyond a reasonable doubt each and every element of armed robbery as set out in Instruction S-1.

COMMENT:

The above instruction was granted by the trial court over the defendant's objection that "it assumes the allegations by the State are true." An instruction of this nature should usually be given when separate and distinct crimes are admitted under Mississippi Rules of Evidence, Rule 404(b). Brock v. State, 530 So.2d 146, 153 (Miss. 1988)

[COURT'S INSTRUCTION - OTHER CRIMES – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

John Doe has entered his plea of not guilty. The effect of this plea is to require the state to prove each material allegation of the indictment beyond a reasonable doubt [and to the exclusion of every reasonable hypothesis consistent with innocence before you may find John Doe guilty.

COMMENT:

General form, no authority known. [Bracketed material should be removed if case is not circumstantial.]

[DEFENDANT'S INSTRUCTION – NOT GUILTY – NO. 2]

POSSESSION

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the concept of “possession” is a question which is not susceptible of a specific rule. However, there must be sufficient facts to warrant a finding that the Defendant was aware of the presence and character of a controlled substance and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control.

If the State has failed to prove beyond a reasonable doubt that the Defendant was aware of the presence and character of the controlled substance and was intentionally and consciously in possession of it, you must return a verdict of not guilty.

[DEFENDANT’S INSTRUCTION – POSSESSION – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury if you believe from the evidence that the defendant did not know what the package he delivered to Mr. Smith contained, then it is your sworn duty to find the defendant not guilty.

COMMENT:

Conviction reversed and remanded due to trial court's refusal to grant this instruction.
Broadus v. State, 392 So.2d 203 (Miss. 1980)

[DEFENDANT'S INSTRUCTION - LACK OF KNOWLEDGE – NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is unlawful to knowingly or intentionally possess one (1) ounce or less of marijuana. If you find from the evidence in this case that John Doe knowingly or intentionally had possession of one (1) ounce or less of marijuana, then under your oath you may find him guilty of such charge and the form of your verdict should be:

"We the jury, find John Doe guilty of knowingly or intentionally possession one (1) ounce or less of marijuana."

COMMENT:

This instruction can be given in intent to sell cases when you intend to argue the accused was only a possessor, not a seller.

[DEFENDANT'S INSTRUCTION - LESSER OFFENSE – NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that before you may convict John Doe of the crime charged you must be convinced from the evidence, beyond a reasonable doubt [and to the exclusion of every reasonable hypothesis consistent with innocence,] not only that the quantity of marijuana was less than a kilogram but more than one (1) ounce, but further, before you may convict John Doe, you must be convinced from the evidence beyond a reasonable doubt [and to the exclusion of every reasonable hypothesis consistent with John Doe's innocence that,] at the time and place testified about, John Doe was aware of the presence and character of the particular substance, and further that John Doe was intentionally and consciously in possession of it, and further that this possession, if any, was accompanied by an intent on the part of John Doe to distribute this substance to other persons.

If the State has failed to prove any one of these essential elements beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with John Doe's innocence, then you should find John Doe "not guilty".

COMMENT:

Instruction placing elements in light more favorable to accused. This instruction can be easily altered to highlight any of the particular elements. Bracketed material for use only in circumstantial cases.

[DEFENDANT'S INSTRUCTION – LACK OF KNOWLEDGE AND INTENT – NO. 4]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence that the State has failed to prove, beyond a reasonable doubt any one of the elements of the crime of Sale of Cocaine within 1000 Feet of a City Owned Park, then you may consider whether the Defendant is guilty of the crime of Sale of a Substance Falsely Represented as a Controlled Substance. If you find from the evidence beyond a reasonable doubt that (1) the Defendant (2) willfully and unlawfully; (3) sold; (4) a substance falsely represented to be a controlled substance, to wit: cocaine; then you should find: the Defendant guilty of Sale of Substance Falsely Represented as a Controlled Substance.

COMMENT:

The trial court refused this instruction, and defense counsel objected, arguing that the Defendant was entitled to a “lesser included offense” instruction. However, falsely representing a substance to be a controlled substance is not a “lesser-*included* offense” of the offense of sale of a controlled substance, but it is rather a “lesser, *non-included* offense”; and the Court of Appeals held that the Defendant “failed to preserve the issue for appeal because he failed to accurately argue his objection in the trial court.” **However**, the Supreme Court did not agree that the Defendant failed to preserve the issue for appeal, because the Defendant “did timely object at trial to the refusal of his jury instruction . . . [and] the fact that counsel did not argue his point as precisely as he could have does not warrant depriving [the Defendant] the opportunity to have the jury instructed on his theory of the case. Green v. State, 884 So.2d 733,736 (Miss. 2004).

[DEFENDANT’S INSTRUCTION- SALE/ DRUGS/ SUBSTANCE FALSELY REPRESENTED AS DRUGS – NO. 5]

**POSSESSION RECENTLY STOLEN
PROPERTY**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the possession of property recently stolen is a circumstance which may be considered by the jury and from which, in the absence of a reasonable explanation, the jury may infer guilt of larceny.

COMMENT:

This form is the only proper form approved by the Mississippi Supreme Court. Robinson v. State, 418 So.2d 749, 756 (Miss. 1982)

[STATE'S INSTRUCTION - POSSESSION RECENTLY STOLEN PROPERTY – NO. 1]

PREMOTORY INSTRUCTION

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that under the evidence presented in this case, you must return a verdict of "Not Guilty."

COMMENT:

Preemptory instruction. In several recent cases, defense counsel have failed to request a preemptory instruction, or orally renew their motions at the close of all the testimony. Failure to make a request for a preemptory cuts off the defendant's right to argue that the verdict is against the overwhelming weight of the evidence. (Cite recent case)

[DEFENDANT'S INSTRUCTION – NO. 1]

**PRESUMPTION OF INNOCENCE-
REASONABLE DOUBT**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a verdict of Not Guilty means you are not satisfied the prosecution has proven the Defendant's guilt beyond a reasonable doubt. You need not be convinced the Defendant is innocent before you may return a verdict of Not Guilty. To return a verdict of Not Guilty, it is only necessary that you have a reasonable doubt as to the guilt of the Defendant, John Doe.

COMMENT:

The Mississippi Supreme Court did not hold it was error for the trial court to deny this instruction because other instructions were given that covered this principle. This instruction is very useful since it allows the defense attorney to focus the jury's attention on the poor presentation or lack of proof by prosecutor. Many times it is more effective to argue acquittal via lack of proof rather than actual innocence. See: Evans v. State, 579 So.2d 1246, 1249 (Miss. 1991)

The burden of proof never shifts to the defendant. The trial judge must instruct the jury if requested. Cumberland v. State, 110 Miss. 521, 70 So. 695 (1916).

**[DEFENDANT'S INSTRUCTION - DON'T HAVE TO KNOW
DEFENDANT INNOCENT – NO. 1]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court further instructs the jury that the indictment this case is, of itself, nothing more nor less than a formal accusation or charge against the defendant, and it is not, of itself, any evidence whatever of the guilt of the defendant; and a juror should not permit himself to be to any extent influenced against the defendant because of or on account of the indictment in this case, but the defendant's innocence is presumed and this presumption continues with the defendant throughout the entire trial or until removed by competent evidence which convinces your minds of the guilt of the defendant beyond every reasonable doubt.

COMMENT:

Sloan v. State, 368 So.2d 228 (Miss. 1979)

[DEFENDANT'S INSTRUCTION - PRESUMPTION AND INDICTMENT – NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State of Mississippi the burden of proving the defendant guilty of every material element of the crime with which he is charged. Before you can return a verdict of guilty the State must prove the defendant is guilty beyond a reasonable doubt. The presumption of innocence attends the defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the jury of his guilt beyond a reasonable doubt. The defendant is not required to prove his innocence.

COMMENT:

General instruction cited with approval. Evans v. State, 579 So.2d 1246, 1249 (Miss. 1991) Sometimes the presumption of innocence instruction and reasonable doubt are together. Counsel should always request a separate presumption of innocence instruction. Stewart v. State, 355 So.2d 94 (Miss. 1998); Gentry v. State, 108 Miss. 505, 66 So.2d 982 (1914).

[DEFENDANT'S INSTRUCTION - PRESUMPTION OF INNOCENCE – NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that under the law, the term "reasonable doubt" as used by the Court in instructions to juries, as the law in the trial of cases, is a sacred and substantial right of this defendant, John Doe, charged with this crime, given and guaranteed unto him by the law of the land, and such reasonable doubt may arise from the testimony, and under the law, it is the sworn duty of the jury, and each member thereof, that if there is a reasonable doubt in the mind of any member of this jury as to the guilt of the Defendant, it is your sworn duty to return a verdict of not guilty.

COMMENT:

Wilcher v. State, 455 So.2d 727, 735 (Miss. 1984). This instruction seems to define reasonable doubt but it was given in Wilcher. The instruction strongly emphasizes the reasonable doubt and is one of my personal favorites. The Mississippi Supreme Court has informally held that the trial court may not grant instructions defining reasonable doubt. Gray v. State, 351 So.2d 1342 (Miss. 1977); Pittman v. State, 350 So.2d 67 (Miss. 1977). See Klice v. State, 78 Miss. 456, 28 So.827 (1900) for a discussion of reasonable doubt that could be turned into a voir dire examination, e.g., reasonable doubt is for the jurors it is not what is in "the mind of the prosecutor or the court."

[DEFENDANT'S INSTRUCTION - REASONABLE DOUBT – NO. 4]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court charges the jury that it is your sworn duty to vote on each and every ballot of the jury for an acquittal of John Doe, unless, after conferring with the other jurors, your mind is convinced beyond a reasonable doubt and not from the guilt of John Doe. You cannot, under your oath as a juror, compromise your honest convictions from the evidence, or lack of evidence, as to the guilt or innocence of the Defendant for the purpose of bringing in a verdict. Under your oath and under the law, you should never surrender such conviction simply because every other member of the jury may disagree with you or insist that you yield to save the time of the Court or prevent a mistrial, or shorten the labors of the jury panel, or because of anything or reason whatsoever, or for any purpose whatsoever. You should vote not guilty as long as, after a consultation of the evidence, or the lack of evidence in this case, the State has failed to prove Defendant's guilt to a moral certainty.

COMMENT:

This instruction was refused in Wilcher v. State, 455 So.2d 727, 735 (Miss. 1984), and was not held to be error because of other instructions that were given. This instruction has been frequently granted.

[DEFENDANT'S INSTRUCTION – REASONBLE DOUBT – NO. 5]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the defendant, John Doe, is never required to prove his innocence, and in order for him to be acquitted it is not necessary the jury be satisfied in their minds he is in fact innocent, but whenever there arises out of the evidence a reasonable probability that he is innocent, then he is entitled to an acquittal for reasonable probability of innocence is always reasonable doubt of guilt. In other words, although the theory that he is guilty is more reasonable than the theory that he is innocent, yet, if there arises out of the evidence, any reasonable theory under which the defendant may probably be innocent, he is entitled to be acquitted.

COMMENT:

Cited with approval in Wilcher v. State, 455 So.2d 727 (Miss. 1984)

[DEFENDANT'S INSTRUCTION – REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE – NO. 6]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the burden of proof is upon the State to establish the Defendant's guilt of the crime charged in the indictment, and it must do, not simply by more and better evidence than that is offered for his acquittal, but the State must prove his guilt so clearly and conclusively as to exclude from the mind of every single person on the jury every reasonable doubt of his guilt, and to make his guilt morally certain. The defendant is bound to offer no proof, or if he has offered any, he is entitled to an acquittal on the whole evidence, unless that evidence has convinced you beyond a reasonable doubt and to a moral certainty that he is guilty of the crime charged in the indictment and so long as it is reasonably possible to account for the evidence on any theory or hypothesis consistent with his innocence, he must acquitted, however strongly you believe him to be guilty. You may even believe it highly probable that he is guilty and yet, in such case, you must vote, "Not Guilty".

COMMENT:

Cited in Wilcher v. State, 455 So.2d 727, 736 (Miss. 1984)

Each and every element must be proven beyond a reasonable doubt. Watson v. State, 65 So.2d 1025 (Miss. 1985)

[DEFENDANT'S INSTRUCTION – REASONABLE DOUBT NO. 7]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the doctrine of reasonable doubt is an essential substantial part of the law of the land, and it is binding upon the jury in this case; and under law, it is the duty of the jury to consider all of the testimony in the case fairly and impartially in reaching their verdict; and if after such fair and impartial consideration of the testimony in the case, the minds of the jury are left in a state of uncertainty as to the guilt of John Doe, and there arises out of the evidence or from the want of evidence, a reasonable doubt of the existence of a single material fact upon which the guilt of John Doe depends, then it is the law, and it is the duty of the jury in such case to give John Doe the benefit of that doubt and to find him "not guilty".

COMMENT:

Simpson v. State, 497 So.2d 424, 429 (Miss. 1986) This is another one of my favorite reasonable doubt instructions.

[DEFENDANT'S INSTRUCTION - REASONABLE DOUBT – NO. 8]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a reasonable doubt of guilt may arise from the evidence, from the lack of evidence, from an insufficiency of the evidence, or from a conflict in the evidence, and however it arises, if it does arise in your mind, then in that event you should return a verdict of “Not Guilty”.

COMMENT:

This instruction was referred to as abstract and confusing but still frequently granted. It is generally considered a favorable instruction for the defendant. Hunter v. State, 489 So.2d 1086, 1089 (Miss. 1986). See also Howell v. State, 98 Miss. 439, 53 So. 954 (1911).

[DEFENDANT'S INSTRUCTION - REASONABLE DOUBT – NO. 9]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a reasonable doubt of guilt may arise from the evidence, from the lack of evidence, from the insufficiency of evidence, or from a conflict in the evidence; but however it arises, if it does arise in your mind, then it both justifies and demands, under your oaths, that you return a verdict of “Not Guilty”.

COMMENT: Hunter v. State, 489 So.2d 1086 (Miss. 1986).

[DEFENDANT’S INSTRUCTION – REASONABLE DOUBT – NO. 10]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that you cannot convict John Doe upon mere suspicion, probabilities and speculation as to his guilt, and unless the State of Mississippi has proved his guilt beyond a reasonable doubt, and to the exclusion of every reasonable theory consistent with innocence, then it is your sworn duty to find John Doe not guilty.

COMMENT:

General form reasonable doubt/probability. No authority found but this instruction is frequently granted.

[DEFENDANT'S INSTRUCTION - REASONABLE DOUBT – NO. 11]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State of Mississippi the burden of proving the Defendant guilty of every material element of the crime with which he is charged. Before you can return a verdict of guilty the State must prove that the Defendant is guilty beyond a reasonable doubt. The presumption of innocence attends the Defendant throughout the trial and prevails at its close unless overcome by evidence which satisfies the jury of his guilt beyond a reasonable doubt. The Defendant is not required to prove his innocence.

COMMENT:

General form. Less favorable in using than the previous instruction.

[DEFENDANT'S INSTRUCTION - PRESUMPTION OF INNOCENCE – NO. 12]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The defendant in every criminal case is presumed to be innocent unless his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the defendant, every material allegation of the indictment must be proven by the evidence to the exclusion of and beyond every reasonable doubt. The presumption accompanies and abides with the defendant as to each and every material allegation of the indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any of the material allegations of the indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give the defendant the benefit of the doubt and find him not guilty.

COMMENT:

General form. Frequently objected to because it uses the phrase beyond every reasonable doubt rather than beyond a reasonable doubt.

[DEFENDANT'S INSTRUCTION - PRESUMPTION OF INNOCENCE – NO. 13]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that you do not have to actually know the defendant is guilty before you can convict him; but that it is only necessary that you should find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that he is guilty; and if you do find from all the evidence in this case, beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis than guilt that the defendant is guilty, it is your sworn duty to find him guilty as charged.

COMMENT:

The Mississippi Supreme Court did not hold that this instruction was reversible error, possibly because there was no objection by defense counsel. The Court noted the instruction was "not necessary and we do not place our stamp of approval on it". Whittington v. State, 523 So.2d 966, 977 (Miss. 1988) See also: Howell v. State, 53 So. 954, 955 (Miss. 1911, prohibiting the "you don't have to know the defendant is guilty." See also, Keith v. State, 197 So.2d 480 (Miss. 1967); Murphy v. State, 195 So.2d 847 (Miss. 1967).

[STATE'S INSTRUCTION - YOU DON'T HAVE TO KNOW – NO. 14]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that you do not have to actually know that the defendant is guilty before you can convict him; but that it is only necessary that you should find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis that he is guilty; and if you do find from all the evidence in this case, beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis than guilt that the defendant is guilty, it is your sworn duty to find him guilty as charged.

COMMENT:

Whittington v. State, 523 So.2d 966 (Miss. 1988)

[YOU DO NOT HAVE TO KNOW INSTRUCTION – NO. 15]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the doctrine of reasonable doubt is an essential substantial part of the law of the land, and that it is binding upon the jury in this case; and under law, it is the duty of the jury to consider all of the testimony in the case fairly and impartially in reaching their verdict; and if after such fair and impartial consideration of the testimony in the case, the minds of the jury are left in a state of uncertainty as to the guilt of the defendant, and there arises out of the evidence or from the want of evidence, a reasonable doubt of the existence of a single material fact upon which the guilt of the defendant depends, then it is the law, that it is the duty of the jury in such case, to give the defendant the benefit of that doubt and to find him “not guilty” as charged in the indictment.

COMMENT:

Wilcher v. State, 455 SO.2d 727 (Miss. 1984).

[DEFENDANT’S INSTRUCTION – REASONABLE DOUBT – NO. 16]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that under the law, the term “reasonable doubt” as used by the Court in instructions to juries as the law in the trial of cases, is a sacred and substantial right of this defendant, charged with this crime, given and guaranteed unto him by the law of the land, and that *such reasonable doubt may* arise from the testimony, *or the lack of testimony*, and that under the law, it is the sworn duty of the jury, and each member thereof, that is [sic] there is a reasonable doubt in the mind of any member of this jury as to the guilt of the defendant, it is your sworn duty to return a verdict of “Not Guilty”. (Emphasis theirs)

[DEFENDANT’S INSTRUCTION – REASONABLE DOUBT – NO. 17]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The court further instructs the jury that the indictment in this case is, of itself, nothing more nor less than a formal accusation or charge against the defendant, and it is not, of itself, any evidence whatever of the guilt of the defendant; and each jury should permit himself to be to any extent influenced against the defendant because of or on account of the indictment in this case, but the defendant's innocence is presumed and this presumption continues with the defendant throughout the entire trial until removed by competent evidence which convinces your minds of the guilt of the defendant beyond every reasonable doubt.

COMMENT: Sloan v. State, No. 17,934.

[DEFENDANT'S INSTRUCTION – PRESUMPTION AND INDICTMENT – NO. 18]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury for the State that while it is true in this case, as in all criminal cases, the defendant is presumed to be innocent until he is proven guilty, and that his presumption of innocence goes with the defendant until he is proven guilty and that this presumption of innocence goes with the defendant throughout the trial, unless overcome by competent testimony, and that while it is further true, that the burden of proof in this case, as in all criminal cases, is upon the State to satisfy the minds of the jury of the guilt of the defendant from the evidence beyond a reasonable doubt, yet the Court now says to you that this presumption of innocence, which the law throws around the defendant as a shield and safeguard is not intended to shield from punishment from punishment anyone who is in fact guilty, but is simply a humane provision of law to guard against the conviction of any innocent person and the Court further says to you **positively** that if you believe from the evidence in this case beyond a reasonable doubt that the defendant is guilty as charged in the indictment then it is your sworn duty to say guilty by your verdict, regardless of the presumption of innocence and the further fact that the burden of proof is upon the State.

COMMENT:

This instruction has been condemned.

Gilleylen v. State, 255 So.2d 661,664 (Miss. 1971) Also, Nobles v. State, 241 So.2d 826, 828 (Miss. 1970)

[STATE'S INSTRUCTION – SHIELD THE GUILTY- NO. 19]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury for the State of Mississippi that you do not have to actually know that the Defendant is guilty before you can convict him; but that it is only necessary that you should believe from the evidence in this case beyond a reasonable doubt that he is guilty; and if you do believe from all the evidence in this case, beyond a reasonable doubt, that the defendant is guilty, it is your sworn duty to find him guilty as charged.

COMMENT:

Reversible error for the trial Court to grant the State this instruction.

Gilleylen v. State, 255 So.2d 661, 664 (Miss. 1971) See also: Nobles v. State, 241 So.2d 826, 828 (Miss. 1970)

**[STATE'S INSTRUCTION – YOU DON'T HAVE TO KNOW DEFENDANT
IS GUILTY –CONDEMNED – NO. 20]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court further instructs the Jury that if you unanimously find beyond a reasonable doubt that the Defendant is NOT GUILTY of either “Capital Murder” or “Murder,” then the verdict shall be in the following form, WRITTEN ON A SEPARATE SHEET OF PAPER:

“We the Jury [find] the Defendant NOT GUILTY of Capital Murder AND the jury finds the Defendant NOT GUILTY of Murder.”

COMMENT:

The granting of the state’s above instruction was held to be “obviously erroneous” because “it is axiomatic that the burden of proof never shifts to a defendant during a criminal trial, and there is no requirement that the defendant be found *not* guilty *beyond a reasonable doubt*.” The State argued that a general burden-of-proof instruction “cured” the defect in the above instruction. However, the Court clarified that “[a] material error in an instruction, complete in itself, is not cured by a correct statement of law in another instruction, for the jury cannot know which instruction is correct and the court cannot know which instruction influenced the jury.” Banyard v. State, 47 So.3d 676, footnote 4 (Miss. 2010).

**[STATE’S INSTRUCTION- ATTEMPT TO SHIFT BURDEN OF PROOF TO
DEFENDANT – NO. 21]**

WITNESSES

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury, for the state, in passing upon the credibility of the witnesses who testified in the case, you have the right to consider the interest and the motive of the witness for testifying falsely, if any appear from the evidence and the manner of the witness upon the witness stand, connected with all the other evidence in the case; and if you believe that any witness has testified falsely on any material facts, you have a right to disregard the testimony of such witness altogether.

COMMENT:

Improper instruction. In some instances the State or the court will present an instruction concerning the interests of persons testifying. You may find the instruction harmful in some cases. Your objection may be based on Howell v. State, 53 So. 954, 955 (Miss. 1911) Howell also prohibits use of the instructions, "you don't have to know the defendant is guilty." If the accused does not testify than you may wish to offer this instruction or some similar version.

[STATE'S INSTRUCTION – INTEREST OF WITNESS TESTIFYING – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

An attorney has a right, and it is his duty, to interview witnesses for the purpose of learning what testimony they will give. The fact that a witness has talked to an attorney and may have told the attorney what he would testify to on the trial does not discredit the testimony of the witness.

NO. 2

**ROBBERY/ARMED
ROBBERY/DEADLY WEAPON**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The essential elements of robbery are: (1) Felonious intent, that is, the specific intent to steal and to permanently deprive the owner of his property and (2) Force or putting in fear as a means of acting upon the intent, and (3) Then taking, stealing, and carrying away the property of another from his person or in his presence with the specific intention to permanently deprive the owner of his property.

The specific intent to steal, that is, the specific intent to permanently deprive the owner of his property is an indispensable element of robbery. The issue of specific intent is a question for the jury.

* * * * *

If you find that the State has failed to prove beyond a reasonable doubt that John Doe specifically intended to steal and to permanently deprive Mr. Victim of his property, then it is your sworn duty to find for defendant John Doe upon the charge of Robbery with a Deadly Weapon and to return a verdict of "Not Guilty".

COMMENT:

The following instruction was cited with approval in Williams v. State, 590 So.2d 1374, 1380 (Miss. 1991)

**[DEFENDANT'S INSTRUCTION - ARMED ROBBERY/
LACK OF INTENT TO STEAL – NO. 1]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that before you can find the defendant guilty of armed robbery you must find, beyond a reasonable doubt that the weapon if any, was capable of causing bodily harm. If this fact is not proved beyond a reasonable doubt then you cannot find the defendant guilty of armed robbery.

COMMENT:

This instruction along with defendant's instructions A/R #2 and #3 were refused by the trial court and affirmed on appeal as being repetitious to the State's instructions. See: armed robbery #4 and #5. Other than the repetitious objection the instructions properly instruct the jury. Davis v. State, 530 So.2d 694, 699 (Miss. 1988).

[DEFENDANT'S INSTRUCTION – ARMED ROBBERY- NO. 2]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that robbery is the lesser included offense of armed robbery.
In this case you can consider as one (1) of your options for a verdict the crime of robbery.

COMMENT:

Davis v. State, 530 So.2d 694,699 (Miss. 1988)

[DEFENDANT'S INSTRUCTION - ARMED ROBBERY – NO. 3]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a deadly weapon is any object, article, or means which when used as a weapon, is under the existing circumstances, reasonably capable or likely to produce death or serious bodily harm to a human being upon whom the object, article or means is used as weapon.

The Court further instructs the jury that if you find that the weapon, if any, was not capable at the time of producing death or serious bodily injury to a human being then the Defendant cannot be convicted of the crime of robbery with a deadly weapon.

COMMENT:

Davis v. State, 530 So.2d 694, 699 (Miss. 1988)

[DEFENDANT'S INSTRUCTION - ARMED ROBBERY – NO. 4]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The defendant, John Doe, has been charged with the crime of Robbery with a Deadly Weapon.

If you find from the evidence in this case beyond a reasonable doubt that:

- 1) One (1) wallet was the personal property of Bill Smith; and,
- 2) On January 1, 1993, the defendant took the said property from Bill Smith from his person by putting Bill Smith in fear of immediate personal injury by the exhibition of a deadly weapon, to-wit: a pistol; and
- 3) That said taking was against the will of Bill Smith then you shall find the defendant, John Doe, guilty of Robbery with a Deadly Weapon.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the defendant not guilty.

COMMENT:

Davis v. State, 530 So.2d 694, 700 (Miss. 1988)

[STATE'S INSTRUCTION - ARMED ROBBERY – NO. 5]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

It is a question of fact for the jury to determine whether the pistol claimed to have been used by John Doe was a deadly weapon in the manner claimed to have been used in this case.

A deadly weapon may be defined as any object, article or means which, when used as a weapon is, under the existing circumstances, reasonably capable or likely to produce death or serious bodily harm to a human being upon whom the object, article or means is used as a weapon.

COMMENT:

Davis v. State, 530 So.2d 694, 700 (Miss. 1988)

[STATE'S INSTRUCTION - ARMED ROBBERY – NO. 6]

STATE INSTRUCTIONS, GENERALLY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

A person is presumed to have intended the natural and probable consequences of his voluntary and deliberate acts.

COMMENT:

The Supreme Court strongly condemned the above instruction. The defendant in the cited case was charged with deliberate design murder, which has an essential element of “intent” for the crime upon which the State was required to prove the defendant’s guilt beyond a reasonable doubt. The above instruction “created a mandatory presumption which could allow a conviction based upon a presumption as opposed to evidence beyond a reasonable doubt.” The state argued that this instruction did not employ the mandatory terms “shall” or “will,” and, therefore, merely created a permissive inference for the jury. However, the Court said that “the absence of ‘shall’ or ‘will’ does not automatically render [an instruction] permissive.” Rather, the Court pointed to Webster’s *Dictionary of Synonyms* to show that “presume,” which is analogous to “assume,” negates any permissiveness because both words “stress the arbitrary acceptance as true of something which has not yet been proven.” And since this instruction required the jury to “presume” an essential element of the crime, it erroneously shifted the burden of proof to the defendant. Williams v. State, 111 So.3d 620,623 (Miss. 2013).

[STATE’S INSTRUCTION- ELEMENT OF CRIME CANNOT BE PRESUMED –NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

If you find from the evidence in this case beyond a reasonable doubt that:

1. The Defendant [**Name**];

2. On or about [**Date**];

3. In the Judicial District of [**Location**], Mississippi;

4. Did *shoot* and take the life of the Deceased, acting on his actual and bona fide belief that such was necessary to protect himself from great bodily harm or death at the hands of the Deceased, but that such belief by the Defendant was not a reasonable belief under the circumstance; then you may find the Defendant guilty of the lesser-included offense of manslaughter.

COMMENT:

The cited case was reversed and remanded because the trial court allowed a sentence enhancement for use of a firearm without submitting instructions that “specifically mentioned the term firearm (or the like), a critical element of Section 97-37-37.” While the use of a firearm by the defendant could sufficiently be inferred from the evidence, it could not be inferred from the jury’s findings beyond a reasonable doubt. And the “rule of Apprendi is that, ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’” The State argued that the above instruction informed the jury of the firearm enhancement; however,

the Court ruled that the language contained in the above instruction did not suffice. Waits v. State, 119 So.3d 1024 (Miss. 2013).

**[STATE'S INSTRUCTION- FACTS THAT RAISE PENALTY MUST BE SEPERATLY
SUBMITTED – NO. 2]**

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

Deliberate design may be presumed from the unlawful and deliberate use of a deadly weapon.

COMMENT:

This improper instruction would relieve the State of its burden to prove guilt beyond a reasonable doubt on an essential element. The Supreme Court noted that this type of instruction has been proffered multiple times by The State in the past, but the Court finally held that the granting of this type of instruction is error, and that such error is *not* harmless. The Court ruled the following way: “Deliberate design may not be presumed, and we overrule our prior cases to the extent that they conflict with this principle. We admonish the circuit courts not to grant an instruction which relies upon a presumption of intent, as it conflicts with the presumption of innocence, relieving the State of its burden to prove guilt beyond a reasonable doubt on an essential element of the offense.” Reith v. State, 135 So.3d 862,867 (Miss. 2014).

[STATE’S INSTRUCTION- PRESUMPTION OF INTENT IMPROPER – NO. 3]

SEXUAL BATTERY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence beyond a reasonable doubt that John Doe engaged in sexual penetration with Jane Doe on January 1, 1993, it is not required that there be a showing of force or violence. Further, the Court instructs the jury that there is no requirement that there be lacerations or tearing to the vagina if you find that there was sexual penetration.

[STATE'S INSTRUCTION – SEXUAL BATTERY – NO. 1]

SHARPLIN

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

Counsel for the accused should not permit the Court to make any oral comments or instructions to the jury. Brantley v. State, 610 So.2d 1139 (Miss. 1992) The Mississippi Supreme Court has approved instructions for the trial court to give in cases where a jury is deadlocked, however it is generally advisable to object to the granting of these instructions.

Brantley, supra, pg. 1142, citing Mississippi Model Jury Instructions, Volume I, page 50.

COMMENT: Trial Courts often attempt to give oral instructions to the jury or improper Sharplin/Allen charges. Counsel must remain vigilant to these issues when the jury indicates it is deadlocked. The Mississippi Supreme Court has authorized only two instructions to the jury in this instance. The first is "Please continue your deliberations". The other is the instruction from the Mississippi Model Jury Instructions. Instructions informing the jury that "too much work and time has gone into this case" are improper. Brantley v. State, 610 So.2d 1139 (Miss. 1992); Herrington v. State, _____ So.2d _____ (Miss. 1977).

[DEFENDANT'S INSTRUCTION - SHARPLIN/ALLEN/DYNAMITE CHARGE – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

Well, speaking to all of you, let me say that if there is any ray of hope, any slight chance of your reaching a unanimous decision, the law compels, it requires you to do so. If you are unable to succeed in doing that, that's not the end of the day. Certainly not the end of the case. *We will call back another jury that hopefully will be reasonable and fair, and one that can be successful in reaching a decision. I hope not to put the County and the State to the expense if I can get around it.* But if you tell me you're hopelessly deadlocked, I will accept your decision.

COMMENT:

The Supreme Court held the above instruction to be highly prejudicial and erroneous. A trial judge gave the instruction because the jury could not come to a unanimous verdict. In the cited case, the defense failed to object contemporaneously when the judge made the inappropriate comments; however, the Court held that the above instruction violated the substantive and fundamental rights of the defendant, and even though the defense failed to timely object, this instruction is still improper under the "plain-error" doctrine. The Court reaffirmed that, upon learning the jury is deadlocked, a trial judge may only give one of **two** instructions stated in *Sharplin v. State*, 330 So.2d 591 (Miss. 1976). Any deviation from these two delineated instructions is deemed "incurable reversible error." Furthermore, the Court added, "A trial judge has great credibility with the jury, and the potential of coercion and influence is too great. . . . [A]ddressing the costs of trial and the possibility of calling another jury that is fair and reasonable is not an option." *Lafayette v. State*, 90 So.3d 1215 (Miss. 2012).

**[COURT'S INSTRUCTION- PLAIN-ERROR WHEN COURT DEVIATES FROM
SHARPLIN INSTRUCTION- NO. 2**

RIGHT OF SILENCE

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury for the defendant that you may not draw any unfavorable inference against the defendant because he did not testify in this case.

COMMENT:

This is one form of approved instruction. It is preferable to omit references to instructions being for “the defendant” or “the State”. Instructions embody the law and should not be considered as the defendant’s or the State’s.

Error for the trial court to refuse this instruction. Wood v. State, 221 Miss. 901, 907 (Miss. 1954).

See also: Fanches v. State, 125 Miss. 140, 87 So. 487 (1921); Haynes v. State, 27 So. 601 (Miss. 1900).

[DEFENDANT'S INSTRUCTION - RIGHT NOT TO TESTIFY – NO. 1]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

A defendant is entitled to have the jury instructed on his theory of defense. See also: Lesser Included Offense. It is the duty of the trial jury to “see that instructions are placed in proper form for submission to the jury”. Manuel v. State, 92-KA-00625-S.Ct. (11/30/95). Counsel must request the judge to explain why an instruction is being used and request that it be placed in proper form. If the trial court alters an instruction to a form that counsel believes does not state the law, counsel should note his objection to the correction, state what he believes the changes should be, and let the instruction go to the jury. The Mississippi Supreme Court has said that counsel can accept a trial court’s ruling and complete the trial without waiving his objection. Adding the phrase, “if you believe from the evidence that...” after removes any objection that the prosecution or judge may have to the instruction being preemptory. Manuel, supra.

[DEFENDANT’S INSTRUCTION – RIGHT NOT TO TESTIFY – NO. 2]

THEORY OF DEFENSE

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the fact that the Defendant, did not take the witness stand and testify cannot be considered by you for any purpose, and no inference whatsoever can be drawn against the Defendant, because of her decision not to take the stand and testify. The law gives every person charged with a crime the absolute and unqualified privilege of not testifying, if they so choose, and the law further requires that no inference adverse to that person can be drawn by you, the jury, because of her decision not to testify.

COMMENT:

The defense in the cited case originally proposed that the court instruct the jury that the State had no power to call the Defendant to the stand. However, the defense and the prosecution agreed upon the above instruction. And the Supreme Court held that this instruction is a correct statement of the law. Hughes v. State, 90 So.3d 613,623 (Miss. 2012).

**[DEFENDANT'S INSTRUCTION- JURY CANNOT CONSIDER DEFENDANT'S
REFUSAL TO TESTIFY- NO. 1]**

UNLAWFUL ARREST – RIGHT TO RESIST

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a person has a right to use reasonable force to resist an unlawful arrest, or to aid another, in resisting an unlawful arrest.

If you should find therefore, that Mr. Defendant did injure Mr. Victim with a knife, but that this was done either in resisting an unlawful arrest or in aiding another to resist an unlawful arrest, and that the force he used was necessary under the circumstances, then you should find the defendant not guilty.

COMMENT:

Reversible error for the trial court to refuse the above instruction. Boyd v. State, 406 So.2d 824, 826 (Miss. 1981)

[DEFENDANT'S INSTRUCTION - RIGHT TO RESIST UNLAWFUL ARREST – NO. 1]

VENUE

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt that at the time and place charged in Count Two of the indictment and testified about, the Defendant, did willfully, unlawfully and feloniously touch the person of the Victim, a male child under the age of sixteen (16) years for the purpose of gratifying his lust and indulging his depraved licentious sexual desires, at a time when he, the said Defendant, was a male person above the age of eighteen (18) years, then it is your duty to find the Defendant guilty as charged in Count Two.

COMMENT:

The Supreme Court held the above instruction in error. Venue is an essential element to a criminal prosecution, and the Court noted that “[t]he phrase ‘at the time and place charged in Count Two of the indictment and testified about,’ did not apprise the jury that the crime must have occurred in Scott County, Mississippi [the venue element for the cited case]. The indictment was not before the jury, and the ‘time and place testified about’ was far from definite.” Therefore, this obvious omission is fatal and requires a reversal. The **main take-away** is this: when an instruction fails to apprise the jury of an essential element, the omission is grounds for reversal. Rogers v. State, 95 So.3d 623,631-32 (Miss. 2012).

[STATE’S INSTRUCTION- OMISSION OF VENUE ELEMENT IMPROPER – NO. 1]

VERDICT OF JURY

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

FORM OF THE VERDICT

Form of the verdict should be separate from the instruction on the substantive offense.

Doby v. State, 557 So.2d 533, 540 (Miss. 1990)

[FORM OF THE VERDICT – NO. 1]

MS Court
Of Appeals
2005

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that a gun used as a blunt instrument to hit someone is not inherently a deadly weapon. Rather it is for you the Jury to decide if a gun used as a blunt instrument to hit someone was used as a deadly weapon.

(B) A deadly weapon may be defined as any object, article or means which, when used as a weapon under the existing circumstances is reasonably capable of producing or likely to produce serious bodily harm to a human being upon whom the object, article or means is used.

COMMENT:

The language in instruction (A) solely addresses the capabilities of the weapon in issue and those capabilities the jury must find the weapon to possess in order to deem the weapon a "deadly weapon." Furthermore, the language of instruction (B) uses the language "serious bodily harm" in reference to the weapon's capability. Miss. Code Ann. §97-3-7(2)(b). When read as a whole, both instructions clearly state the law applicable to adequately instruct the jury on aggravated assault. Jenkins v. State, 913 So. 2d 1044 (Miss. App. 2005).

[DEFENDANT'S INSTRUCTION - AGGRAVATED ASSAULT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the Jury to determine the reasonableness of the grounds upon which the defendant acts.

COMMENT:
The instruction contains language identical to the self-defense instruction approved by the Mississippi Supreme Court in Montana v. State, 822 So.2d 954 (Miss. 2002). Miller v. State, 919 So. 2d 1137 (Miss. App. 2005).

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that the law in Mississippi declares that an aggressor is not entitled to assert the defense of self-defense. This means that if you find from the evidence in this case beyond a reasonable doubt that John Doe was the initial aggressor in this series of events, then John Doe may not claim that he acted in self-defense.

(B) The Court instructs the jury that to make an assault justifiable on the grounds of self-defense, the danger to the Defendant must be either actual, present and urgent, or the Defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the Defendant acts.

COMMENT:

The court granted the State's instruction (A) as well as the defendant's instruction (B), because it is disputed who the initial aggressor was. Hampton v. State, 910 So. 2d 651 (Miss. App. 2005).

[INSTRUCTIONS - INITIAL AGGRESSOR DEFENSE (A) STATE'S INSTRUCTION- GRANTED ; (B) DEFENDANT'S INSTRUCTION GRANTED]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that slight penetration to the vulva or labia is sufficient to constitute the offense of sexual battery.

COMMENT:

The Mississippi Supreme Court has held that an identical instruction was approved for the offense of rape and that sexual battery is no different. See Johnson v. State, 626 So.2d 631 (Miss. 1993). Morris v. State, 913 So. 2d 432, 435 (Miss. App. 2005).

[STATE'S INSTRUCTION - APPROVED - SEXUAL BATTERY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the term "sexual conduct" means and applies to all forms of sexual intercourse actual or simulated.

COMMENT:

The instruction misinformed the jury on the elements on sexually exploited conduct. Furthermore, sexual conduct is not an element of child exploitation. Blackwell v. State, 915 So. 2d 453 (Miss. App. 2005).

[DEFENDANT'S INSTRUCTION - CHILD EXPLOITATION]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury that the guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through the [188] direction of another person as his or her agent, by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

COMMENT:

The jury instruction was adopted by the Supreme Court in Milano v. State, 790 So.2d 179 (Miss. 2001). Sims v. State, 908 So. 2d 186 (Miss. App. 2005).

MS Court
Of Appeals
2006

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury that, should you find from the evidence in this case, beyond a reasonable doubt that:

1. On or about the 8th day of January, 2003 in Lauderdale County, Mississippi;
2. The Defendant, John Doe, did wilfully and unlawfully take, steal **or** cut or did authorize his employees to unlawfully take, steal **or** cut the timber of Melwyn Shirley and the value of that timber was over \$ 250.00;

then it is your sworn duty to find the Defendant guilty of Timber Theft over \$ 250.00.

COMMENT:

The careless use of the word "or" (emphasized above) instead of "and" in the instruction resulted in an erroneous statement of the law that deprived the defendant of his fundamental rights. Such a showing, alone would obviously be insufficient to sustain a conviction of larceny, namely, that the timber be taken "knowingly, willfully and feloniously," and that the timber be carried away. Instances where the jury is given incorrect or incomplete instructions regarding the elements of a crime, reversal is generally required. Pollard v. State, 932 So. 2d 82 (Miss. App. 2006).

[COURT'S INSTRUCTION - LARCENY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that where a convicted felon, reacting out of reasonable fear for his life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a deadly weapon for the purpose or in the course of defending himself, he is not guilty of being a convicted felon in possession of a deadly weapon. However, the possession of a deadly weapon by the convicted felon either before the danger or for any significant period after it, remains a violation.

COMMENT:

This language is identical to language that this Court has previously approved as a proper statement of law in Lenard v. State, 828 So.2d 232 (Miss. App. 2002). Hatten v. State, 938 So. 2d 365 (Miss. App. 2006).

[DEFENDANT'S INSTRUCTION - SELF DEFENSE/ FELON WITH POSSESSION
OF A FIREARM]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury, that under the law, the Defendant is a competent witness in her own behalf, and that the Jury has no right to disbelieve her merely because she is a Defendant, and her testimony is entitled to such weight, faith, and credit as the Jury may think proper to give it.

COMMENT:

Current case law establishes that the rule that a defendant is not entitled to a jury instruction regarding his competence remains good law. The court did not err in refusing the proposed instruction. Graham v. State, 935 So. 2d 1119 (Miss. App. 2006).

[DEFENDANT'S INSTRUCTION - COMPETENCY WITNESS ON OWN BEHALF]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

If you find from the evidence in this case the State FAILED to prove in this case BEYOND A REASONABLE DOUBT that:

1. John Doe, on or about December 6, 2002 in Clay County;
2. Unlawfully, willfully, purposely and knowingly cause or attempt to cause bodily injury to Bob Smith;
3. By repeatedly grabbing Bob Smith with his hands and wrestling with him;
4. Bob Smith was a law enforcement officer;
5. Bob Smith was acting within the scope of his duty as a law enforcement officer, and further;
6. John Doe was not acting in self defense;

then you shall find the defendant NOT GUILTY of the Charge of Simple Assault on a Law Enforcement Officer.

COMMENT:

The court held that this instruction was repetitive to an instruction previously granted. Since both instructions are similar, then there is to say that this one would be as well. However, the court refused to grant this instruction because the jury is to not be instructed twice on the same matter, to eliminate confusion. Dobbs v. State, 936 So. 2d 322 (Miss. App. 2006).

[DEFENDANT'S INSTRUCTION - SIMPLE ASSAULT ON LAW ENFORCEMENT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury to view B.D.'s testimony in light of the child's age and understanding.

COMMENT:

The court did not err in denying the instruction because Mississippi law does not require the court to instruct the jury to view a child's testimony in light of the child's age and understanding. Higdon v. State, 938 So. 2d 340 (Miss. App. 2006).

[DEFENDANT'S INSTRUCTION - EYEWITNESS TESTIMONY/
CHILD]

MS Court
Of Appeals
2007

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT
INSTRUCTION NO. _____

The Court has allowed certain written statements of the defendants to be placed in evidence during this trial. Certain material was inappropriate for the jury's consideration and had to be redacted (deleted) from some or all of these documents.

You are instructed that you may not draw any inferences from the redacted material and that you shall not speculate or guess as to the contents thereof. You should wholly ignore such material, as it has no evidentiary value in this trial.

COMMENT:

The instruction was inadequate because it did not instruct the jury to consider the statement against the defendant who made it. See Gray v. Maryland, 523 U.S. 185 (1968). In *Gray*, the U.S. Supreme Court outlined when the admission of a co-defendant's confession will not violate the Confrontation Clause. Although we find the limiting instruction to the jury was not sufficient under *Gray*, we find no prejudice or manifest injustice resulted as to any of the defendants. Anderson v. State, 5 So. 3d 1088, 1095 (Miss. App. 2007).

[DEFENDANT'S INSTRUCTION - LIMITING
INSTRUCTION/REDACTION]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury (sua sponte) that "Culpable Negligence" is conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the defendant's act under the surrounding circumstances as to render his conduct tantamount to willfulness.

COMMENT:

Above instruction has previously been approved by the Mississippi Supreme Court and offers a correct statement of law. See Shumpert v. State, 935 So. 2d 962 (Miss. 2006).
Brown v. State, 981 So. 2d 1007 (Miss. App. 2007).

[COURT'S INSTRUCTION - CULPABLE NEGLIGENCE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is not necessary that the State either recover or produce at trial the weapon alleged to have been used by the Defendant in this case.

COMMENT:

The language of Mickel v. State, 735 So. 2d 1031 (Miss. 1999), has made it clear that the instruction at issue has been deemed an impermissible comment on the evidence. Here, the jury was presented with direct, uncontradicted testimony from the bank teller, that the robber had a gun during the robbery. This instruction was not error because as the evidence against the defendant was such that no fair minded juror could have arrived at any verdict other than guilty. Hancock v. State, 964 So. 2d 1167 (Miss. App. 2007).

[COURT'S INSTRUCTION - ARMED ROBBERY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is the duty of each and every member of the jury in this case to decide the issues presented for yourself, and if, after a careful consideration of all the evidence in the case and the instructions of the Court on the law and free consultation with your fellow jurors, there is any single juror who has reasonable doubt of John Doe's guilt, it is your solemn duty as a juror under oath to stand by your belief, you must never yield your belief simply because every other single member of the jury may disagree with you.

COMMENT:

This is a standard two-theory circumstantial evidence instruction. The Mississippi Supreme Court has established that two-theory instructions should only be given in cases based entirely on circumstantial evidence. See State v. Rogers, 847 So.2d 858 (Miss. 2003). Here, there was eyewitness testimony, so the instruction was denied. Ousley v. State, 984 So. 2d 996 (Miss. App. 2007).

[DEFENDANT'S INSTRUCTION - TWO-THEORY CIRCUMSTANTIAL EVIDENCE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that Constructive possession may be shown by establishing that the Defendant was aware of the presence and character of the substance; that the substance was subject to Defendant's intentional and conscious dominion and control and was in close proximity to the Defendant and further that the Defendant was aware of the presence and character of the cocaine and was intentionally and consciously in possession of the cocaine.

It need not be actual physical possession. A presumption of constructive possession arises against the person(s) who exercises exclusive dominion and control over the vehicle within which contraband or [sic] controlled substance is found.

COMMENT:

A presumption of constructive possession arises against the owner of premises upon which contraband is found. However, the presumption is rebuttable and "when contraband is found on premises which are not owned by a defendant, mere physical proximity to the contraband does not, in itself, show constructive possession." Fultz v. State, 573 So.2d 689 (Miss. 1990). As such, the State is required to show additional incriminating circumstances to justify a finding of constructive possession. Moreover, when

reading the instructions as a whole, language to the effect that the defendant had "intentional and conscious" control over the illegal substance was present. Bates v. State, 952 So. 2d 320 (Miss. App. 2007).

[DEFENDANT'S INSTRUCTION - CONSTRUCTIVE POSSESSION]

MS Court
Of Appeals
2008

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The court instructs the jury for the defendant, that under the law, the term "reasonable doubt," as used by the court in instructions to juries, as the law in the trial of cases, is a sacred and substantial right of this defendant charged with this crime, given and guaranteed unto her by the law of the land, and that such reasonable doubt may rise from the testimony or any part of the testimony, or the lack of testimony, and that under the law, it is the sworn duty of the Jury, and each member thereof, that if there is a reasonable doubt in the mind of any member of this Jury as to the guilt of the defendant, it is your sworn duty to return a verdict of "Not Guilty."

COMMENT:

The court trial court did not err in excluding the instruction. It is a long-standing rule that defining "reasonable doubt" for the jury is improper; instead, reasonable doubt defines itself. Martin v. State, 854 So. 2d 1004 (Miss. 2003).
Colburn v. State, 990 So. 2d 206, 217 (Miss. App. 2008)

[DEFENDANT'S INSTRUCTION - REASONABLE DOUBT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The verdict of the jury must represent the considered judgment of each juror. In order to return a verdict, it will be necessary that each juror agree. In other words, all twelve jurors must agree before returning a verdict in this case. It is your sworn duty as jurors to consult with one another and to deliberate in view of reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

If there is any juror who is not convinced beyond a reasonable doubt of the defendant's guilt, it is his or her duty to vote "Not Guilty."

COMMENT:

The trial court redacted the language, "even though it may cause a mistrial in this case" from the final

sentence of the instruction, but otherwise left the instruction as Williams proposed it. The language that was redacted was unnecessary. Williams v. State, 5 So. 3d 496 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - ONE JUROR]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The court instructs the jury that "direct evidence" is direct proof of a fact, such as testimony by a witness about what that witness personally saw, heard, or did. "Direct evidence" is the testimony of someone who claims to have actual knowledge of a fact or who claims to have personal knowledge of the commission of the crime which has been charged. "Direct evidence" is simply evidence which, if you believe it, directly proves a fact. An example is if a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

The court instructs you that "circumstantial evidence" is proof of a fact or facts from which you could conclude, by your reason and common sense, that another fact exists, even [though] it has not been proven directly. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. "Circumstantial evidence" is simply a chain of circumstances that indirectly proves a fact. An example is if someone walked into the courtroom wearing a raincoat covered

with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

The law makes no distinction between the weight to be given either direct or circumstantial evidence. You, as the jury, should decide how much weight to give any evidence.

COMMENT:

It was not error to give a jury instruction with examples of direct and circumstantial evidence. Even though the defendant complained about the instruction, the jury decided the issue of the circumstantial evidence in the defendant's favor. The instruction was not an abstract instruction that misled the jury. Jenkins v. State, 997 So. 2d 207 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION- CIRCUMSTANTIAL AND DIRECT EVIDENCE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it could convict John Doe of capital murder if it found that John Doe shot and killed Bob Smith while committing house burglary . . . "not in necessary self-defense."

COMMENT:

While the portion of the capital murder jury instruction reading "not in necessary self-defense," was in appropriate, the defendant was not entitled as a matter of law. Since John Doe entered the premises with a gun without being aware of any danger, the initial aggressor, he is denied any right to claim self-defense. Beale v. State, 2 So. 3d 693 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - SELF DEFENSE/ CAPITAL MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury that every killing of a human being without authority of law is either murder or manslaughter; murder when done with deliberate design to affect the death of the person killed, and manslaughter when done without malice, or in the heat of passion.

COMMENT:

Whether a defendant has committed murder or manslaughter is ordinarily a question to be resolved by the jury." Brown v. State, 999 So. 2d 853 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - MURDER LESSER-INCLUDED OFFENSE/
MANSLAUGHTER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence, beyond a reasonable doubt, that John Doe freely and voluntarily abandoned his intent to commit the crime of burglary of an automobile before the defendant performed any overt act toward the commission of that crime, and if you further believe there was not an outside cause prompting the abandonment, then you shall find the defendant not guilty.

COMMENT:

In order for an abandonment instruction to be warranted a defendant must show that he voluntarily abandoned his intent and did "not have his intent frustrated by the resistance of the victim or the intervention of a third party." *Pruitt v. State*, 528 So. 2d 828, 831 (Miss. 1988). Furthermore, it is not abandonment if he attempted the crime and it would have been completed if he were not interrupted by a person, object, scenery, etc. *Hawkins v. State*, 11 So. 3d 123 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - ABANDONMENT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

Murder is the killing of a human being, with malice aforethought, not in necessary self defense, and without the authority of law, by any means or by any manner, when done with premeditated and deliberate design to effect the death of the person killed or when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without premeditated design to effect the death of any particular individual.

COMMENT:

The jury does not have to be instructed that it is required to unanimously agree on either deliberate design murder or depraved heart murder. The Mississippi Supreme Court has rejected the argument that the two instructions are mutually exclusive, explaining that depraved heart murder section has been coalesced with the deliberate design murder section. See Catchings v. State, 684 So. 2d 60 (Miss. 1996). Therefore, the trial court did not err in granting an instruction that combined the two instructions. Readus v. State, 997 So. 2d 941 (Miss. App. 2008).

[STATE'S INSTRUCTION - APPROVED - DELIBERATE DESIGN
MURDER/DEPRAVED HEART MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

(A) The court instructs the jury that in order to sustain a conviction for the crime of Sexual Battery some penetration must be proven beyond a reasonable doubt. However, it need not be full penetration. Even the slightest penetration is sufficient to prove the crime of Sexual Battery

(B) Further informed the jury that "a child under the age of fourteen (14) years cannot legally consent to the act of sexual penetration, however slight."

COMMENT:

(A) The court has approved an identical instruction in McKnight v. State, 738 So. 2d 312 (Miss. App. 1999), finding it a proper statement of law.

(B) The instruction was granted because the jury might get the idea that the child consented to the touching by her participation in tickling and touching and so forth. Wilson v. State, 990 So. 2d 798 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - SEXUAL BATTERY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the killing of any human being by the act, procurement, or omission of another shall be excusable when committed by accident and misfortune, in the heat of passion, upon a sudden and sufficient provocation.

COMMENT:

When faced with the charge of capital murder, a defendant is not entitled to raise the defense of accident as to that charge. It is no legal defense to claim accident, or that it was done without malice. Nelson v. State, 995 So. 2d 799 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - SELF DEFENSE/MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

"Alibi" means elsewhere or in another place. In this case, John Doe is asserting the defense of alibi by saying that he was at his home, at the time of the alleged offense.

"Alibi" is a legal and proper defense in law. John Doe is not required to establish the truth of the alibi to your satisfaction, but if the lack of evidence in this case raises in the minds of the jury a reasonable doubt as to whether the defendant was present and committed the crime, then you must give the defendant the benefit of any reasonable doubt and find the defendant not guilty.

COMMENT:

When a defendant asserts the defense of alibi, the defendant is entitled to a jury instruction focusing upon such a theory if there is supporting evidence. *Cochran v. State*, 913 So. 2d 371, 375 (P14) (Miss. Ct. App. 2005). Where proof does not support an alibi defense, the instruction should not be granted. Here, the trial court did not err when it denied the alibi instruction, because there was no evidence presented to support the defense. *Roper v. State*, 981 So. 2d 1021 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - ALIBI]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The court instructs the jury that the uncorroborated testimony of a victim should be examined closely and be scrutinized with caution.

COMMENT:

In this case, the witness's testimony was that of a child. The Court has held that a child's testimony should not be viewed with a jaundiced eye as to whether or not the child is truthful—a child may be presumed to be as truthful as any other witness. If the jury is to be instructed at all with respect to the testimony of a child, it should be told to view the testimony in light of the child's age and understanding, not his veracity. Morgan v. State, 995 So. 2d 812 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - CHILD'S TESTIMONY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that in order to justify an Aggravated Assault on the plea of self-defense in this case, there must be something shown in the conduct of Bob Smith, the victim, at or about the time of her assault, indicating a present intention to kill Mary Smith or her unborn child or to do her some great personal injury, and imminent danger of such intention being accomplished. Mere fears or beliefs of Bob Smith are insufficient. The danger to Bob Smith from Mary Smith must have been such as to lead a reasonable person under similar circumstances to reasonably believe that some infliction of serious bodily harm was necessary to prevent Bob Smith from then and there killing Mary Smith or doing her some great bodily harm.

COMMENT:

The jury instructions sufficiently defined self-defense, but they did not inform the jury as to what it should do if it found self-defense. The instruction did not suggest that the jury should acquit John Doe if it found he acted in self-defense. Without such an instruction, the verdict requires reversal. Woods v. State, 996 So. 2d 100 (Miss. App. 2008).

[DEFENDANT'S INSTRUCTION - SELF DEFENSE/ AGGRAVATED ASSAULT]

MS Court
Of Appeals
2009

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you, the jury find from the evidence in this case beyond a reasonable doubt that:

1. John Doe, on or about the March 22, 2007, in Copiah County, Mississippi;
2. Did knowingly or recklessly, by force or violence
3. Take actual possession of a [Honda] Passport from Bob Smith, the actual owner thereof

COMMENT:

The language in john Doe's indictment "from Bob Smith" is equivalent to the statutory language "from another person's immediate actual possession." Perryman v. State, 16 So. 3d 41, 44 (Miss. App. 2009).

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that on or about July 27, 2004, the Defendant, John Doe, did, unlawfully, willfully, and feloniously,

- kill Bob Smith, a human being,
- without authority of law and not in necessary self-defense,
- while engaged in the commission of an act imminently dangerous to others and evincing a depraved heart, disregarding the value of human life,
- whether or not he had any intention of actually killing any person, then you shall find the Defendant guilty as charged of Murder.

If you unanimously find that the State has failed to prove any of the above elements of the crime of Murder, you may proceed in your deliberations to consider the lesser charge of Manslaughter.

COMMENT:

The instruction tracks the statutory language found in Miss. Code Ann. Section 97-3-19; therefore, the Court cannot find the lack of further definition of depraved-heart murder to be error in this case. Furthermore, there is no duty of the trial court to give, sua sponte, further definition of depraved-heart murder to the jury. Nichols v. State, 27 So. 3d 433, 440 (Miss. App. 2009).

[COURT'S INSTRUCTION - APPROVED - DEPRAVED HEART MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is a question of fact whether the gun claimed to have been used by John Doe was a deadly weapon ***in the manner claimed to have been used.***

A deadly weapon may be defined as any object, article or means which, ***when used as a weapon under the existing circumstances*** is reasonably capable of producing or likely to produce death or serious bodily harm to a human being upon whom the object, article or means is used. (Emphasis added)

COMMENT:

The State objected to the language "in the manner claimed to have been used," and the language was removed from the instruction. The court found no reversible error because the language "when used as a weapon under the existing circumstances," adequately conveys the same point as the removed language. Thomas v. State, 14 So. 3d 812 (Miss. App. 2009).

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT
Instruction No. _____

The Court instructs the jury that the defendant, John Doe, has been charged in Count I/II of the indictment with the crime of Capital Murder. If you find from the evidence in this case beyond a reasonable doubt that: (1) On or about November 27, 2005, in Stone County, Mississippi, (2) the defendant, John Doe, did wilfully, unlawfully, feloniously and without authority of law kill and murder Bob Smith, a human being, (3) **with deliberate design to effect the death** of John Doe. . .

(Emphasis added)

COMMENT:

By definition, capital murder incorporates the word "murder" which, pursuant to Miss. Code Ann. Section 97-3-19(1)(a), states the additional requirement of "deliberate design to effect the death of the person killed, or of any human being." The supreme court has explained the connection between the capital murder and murder statutes by stating that the word "murder" within [the capital murder] statute takes its meaning from the general murder statute. Furthermore, the deliberate-design language merely raises the State's burden of proof and is essentially harmless error. Husband v. State, 23 So. 3d 550 (Miss. App. 2009).

[COURT'S INSTRUCTION - CAPITAL MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT
Instruction No. _____

The Court instructs the jury that the testimony of a witness or witnesses may be discredited or impeached by showing that on a prior occasion they have made a statement which is now inconsistent with or contradictory to their testimony in this case. In order to have this effect, the inconsistent or contradictory prior statement must involve matter which is material to the issues in this case.

The prior statement of the witness or witnesses can be considered by you only for the purpose of determining the weight or believability that you give to the testimony of the witness or witnesses that made them. You may not consider the prior statement as proving the guilt or innocence of the defendant.

COMMENT:

This proposed instruction is almost identical to those instructions not given in Ferrill and McGee that were held to be necessary, warranting reversal and a new trial See Ferrill v. State, 643 So.2d 501 (Miss. 1994); McGee v. State, 608 So. 2d 1129 (Miss. 1992). Because other jury instructions discussed the matters of weight and credibility of the evidence, all impeached witnesses were questioned about the inconsistencies, and both closing arguments addressed the inconsistencies, the court could not say that the refusal of the proposed jury instruction was

reversible error when taken in context with all other jury instructions. Bolden v. State, 23 So. 3d 491, 501 (Miss. App. 2009).

[DEFENDANT'S INSTRUCTION - PRIOR INCONSISTENT STATEMENT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court further instructs the jury that if you find from the evidence that the Defendant, John Doe, did not break and enter a certain building called and being Bob's Meat [Processing] Company, . . . , but that John Doe, as a member of the general public, had the express or implied consent of Bob Smith to enter the said property, then you shall find him not guilty of burglary.

COMMENT:

A conviction for burglary of a business can be obtained where there is a constructive breaking in which the defendant had permission to enter a business, but the defendant possessed the intent to commit an unlawful act inside. Thus, the court found the jury instruction is an incorrect statement of the law. Fulgham v. State, 12 So. 3d 558, (Miss. App. 2009).

[DEFENDANT'S INSTRUCTION - BUSINESS BURGLARY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that they are the sole judges of the facts in this case. You may consider the alleged confession in light of the manner in which it was obtained and give it such weight and credibility as you think it is entitled. Unless you believe from the evidence beyond a reasonable doubt that the alleged confession was made by the Defendant both truthfully and of his own free will, and was not the result of any hope of regard or leniency, then you must disregard the alleged confession to the extent that these facts tend to discredit it.

COMMENT:

The instruction was denied because the voluntariness and admissibility of the confession are questions for the court to decide, not the jury. Although the defendant is entitled to an instruction on his theory of the case, he is not entitled to an instruction that singles out particular pieces of evidence. See Manuel v. State, 667 So. 2d 590 (Miss. 1995). Here, the instruction improperly singled out one witness's testimony. Grayson v. State, 17 So. 3d 624, 627 (Miss. App. 2009).

[DEFENDANT'S INSTRUCTION - WITNESS CREDIBILITY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs you that it is just as much your duty under the law and upon your oaths as jurors to free an innocent person by your verdict of not guilty as it is for you to convict a guilty person.

COMMENT:

The defendant argues that the instruction shifted the burden of proof from the State to him. The court disagreed, because in combination with other instructions the defendant's presumption of innocence and the State's burden of proof was accurately announced and did not pose and potential confusion for juror. Johnson v. State, 19 So. 3d 145 (Miss. App. 2009).

[COURT'S INSTRUCTION - APPROVED - PRESUMPTION OF INNOCENCE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that before you are warranted in convicting the Defendant on the evidence in this case you must exclude every reasonable hypothesis consistent with his innocence; and that if there is a reasonable hypothesis consistent with his innocence then it is your sworn duty to find the Defendant not guilty.

COMMENT:

Franklin was not entitled to a circumstantial evidence instruction because the State presented the testimony of Bob and Sandy who testified that John Doe confessed to them that he had killed Mason and Brock. Circumstantial evidence instruction should be given when there is no direct evidence—without a confession and without eyewitnesses. Franklin v. State, 23 So. 3d 507 (Miss. App. 2009).

[DEFENDANT'S INSTRUCTION - CIRCUMSTANTIAL EVIDENCE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the case before you is one of circumstantial evidence. You are free to find John Doe guilty of Exploitation of Children, you must first find him guilty not only beyond a reasonable doubt, but also to the exclusion of every reasonable hypotheses consistent with innocence.

COMMENT:

A circumstantial-evidence instruction is only necessary when the prosecution's case is based **entirely** on circumstantial evidence. John Doe was not entitled to a circumstantial evidence instruction because there was direct evidence that he possessed child pornography. Argo v. State, 13 So. 3d 849 (Miss. App. 2009).

[DEFENDANT'S INSTRUCTION - CIRCUMSTANTIAL EVIDENCE]

MS Court
Of Appeals
2010

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that during the course of this trial you have heard offers of proof that the Defendant allegedly committed other bad acts at times before the allegations charged in this case. You cannot, in any way, consider offers of proof of allegations of previous bad acts by the defendant as any evidence that he acted the same way on August 10, 2001.

COMMENT:

Rule 404(b) of the Mississippi Rules of Evidence states that evidence of other crimes, wrongs, or acts is allowed to show intent of a party. The instruction is a misstatement of this rule because it instructs the jury that it cannot consider allegations of the defendant's prior bad acts "in any way." It is not a limiting instruction warning the jury that such evidence may be used merely for the issue of intent. Peterson v. State, 37 So. 3d 669, 674 (Miss. App. 2010).

[DEFENDANT'S INSTRUCTION - LIMITING INSTRUCTION]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt, that:

- (1) On or about and between the 1st day of August, 2006, and the 27th day of May, 2008, in Copiah County, Mississippi;
- (2) the defendant, John Doe, a person;
- (3) did wilfully, unlawfully and feloniously have sexual intercourse with [A.B.];
- (4) a person under 14 years of age and 24 or more months younger than John Doe;
- (5) and is not John Doe's spouse;

then you should find the said John Doe guilty of Statutory Rape. If you find that the State has failed to prove any one or more of these essential elements of the crime of Statutory Rape, beyond a reasonable doubt, then you must find the defendant not guilty.

COMMENT:

The supreme court has addressed and rejected the same issue in Booze v. State, 942 So.2d 272 (Miss. App. 2006) (holding that a jury instruction stating that sexual intercourse is a required element of rape is sufficient to instruct the jury on penetration). Powell v. State, 49 So. 3d 166, 171 (Miss. App. 2010).

[STATE'S INSTRUCTION - APPROVED - STATUTORY RAPE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the uncorroborated testimony of an accomplice that is unreasonable, self-contradictory or substantially impeached at trial is not enough to convict an accused of an offense. If you find that Bob Smith's testimony was either unreasonable, self-contradictory, or substantially impeached, his testimony alone may not be used to convict John Doe of capital murder.

COMMENT:

The instruction went to the sufficiency of the evidence, which was a question of law for the court to determine. The jury was not required to make such a conclusion of law, so the instruction was denied. Turner v. State, 70 So. 3d 1123, 1131 (Miss. App. 2010).

[DEFENDANT'S INSTRUCTION - ACCOMPLICE TESTIMONY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the Defendant is a competent witness in his own behalf and his testimony should not be disregarded simply because he is the Defendant. The Defendant is clothed with the same mantel of credibility as all other witnesses that have testified before you and in considering your verdict, you are to give his testimony the same weight and credibility you would any other witness in the light of the evidence.

The Mississippi Supreme Court has held that defendants are not entitled to an instruction which informs the jury that the defendant is a competent witness in his own behalf. See Baker v. State, 391 So. 2d 1010 (Miss. 1980). This instruction is improper because it singles out the testimony of a particular witness. Field v. State, 28 So. 3d 697, 701-02 (Miss. App. 2010).

[DEFENDANT'S INSTRUCTION - COMPETENCY OF WITNESS]

MS Court
Of Appeals
2011

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury to consider whether the defendant did possess a deadly weapon, but it did not include the word gun.

COMMENT:

It is not a crime for a felon to possess any deadly weapon, only the specific weapons listed by statute. This instruction was held to mis-describe the element regarding what the defendant had to possess to incur criminal liability. At most, the Court found was harmless error and reasoned that the omission of the possession of a firearm element did not contribute to the verdict. Johnson v. State, 94 So. 3d 1209 (Miss. App. 2011).

[COURT'S INSTRUCTION - FELON WITH POSSESSION OF A FIREARM]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that:

(1) on or about May 20, 2006, Bob Smith, was a living human being, and

(2) the Defendant, John Doe, did unlawfully, willfully and feloniously act in a manner eminently [sic] dangerous to others and with a depraved heart, regardless of human life, kill and murder said Bob Smith by shooting him, and

(3) said act resulted in the death of Bob Smith, whether or not the Defendant had any particular premeditated design to effect the death of Bob Smith

then you shall find the Defendant, John Doe, guilty of murder.

If the State has failed to prove any one or more of the above elements beyond a reasonable doubt then you shall find the Defendant not guilty.

COMMENT:

The supreme court has held that it is not error to give an instruction that omits the words "not in necessary self-defense" when charging depraved-heart murder when the Court also instructs the jury in a separate instruction that the killing would be justified if committed by the defendant in the lawful defense of his own person. Franklin v. State, 72 So. 3d 1129, 1140-41 (Miss. App. 2011)

[STATE'S INSTRUCTION - SELF DEFENSE/DEPRAVED HEART MURDER

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury, in relevant part, that:
If you believe from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that:

(1) On or about March 22, 2007, the defendants, John Doe and Bob Smith . . . , individually, or while aiding and abetting and/or acting in concert with each other, did purposely, knowingly or recklessly, under circumstances manifesting extreme indifference to the value of human life, cause serious bodily injury to Jane Roe, and

(2) said injury was caused by shooting into the street or traffic thereby hitting Jane Roe causing injury to the right side of her head and/or her right ear,

then you shall find the defendants John Doe and Bob Smith, guilty of aggravated assault

Couple the aggravated-assault jury instruction with the fact that right before instructing the jury, the trial judge explained to it: "[w]e've got three charges. [John and Smith] are charged with aggravated assault, and that will be either *guilty or not guilty for two defendants*, and then you've got an individual charge of possession of a firearm." (Emphasis added).

COMMENT:

The possibility of prejudicial impact is present; therefore, the Court concluded that the trial judge's comments coupled with the jury instructions were not harmless error. The improper jury instructions coupled with the trial judge's confusing comments on the applicable law warrant a new trial. Jones v. State, 95 So. 3d 672, 683 (Miss. App. 2011)

[COURT'S INSTRUCTION - CONDEMNED - AGGRAVATED ASSAULT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

To constitute possession of a firearm, controlled substance and/or drugs in any amount, there must be sufficient facts to warrant a finding beyond a reasonable doubt that the Defendant was aware of the presence and character of the particular firearm, controlled substance and/or drugs in any amount, and was intentionally and consciously in possession of it. It need not be actual physical possession; constructive possession may be shown by establishing that the firearm, controlled substance and/or drugs in any amount, was subject to the defendant's dominion or control.

COMMENT:

Proximity is usually an essential element, but by itself is not adequate of other incriminating circumstances. See Curry v. State, 249 So.2d 414 (Miss. 1971). This court has previously found this language is not required when instructing a jury on constructive possession. Furthermore, the circuit court did not err in failing to instruct the jury on what evidence to look for if the presumption does not arise. Mosley v. State, 89 So. 3d 41, 48 (Miss. App. 2011)

[COURT'S INSTRUCTION - APPROVED - CONSTRUCTIVE DISCHARGE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence that at the time the alleged crime was committed, the Defendant had substantially reduced mental capacity, whether caused by, intoxication, substance abuse or any other cause, you must consider what effect, if any this diminished capacity had on the Defendant's ability to form any of the specific mental states that are essential elements of murder.

Thus, if you find that the Defendant's mental capacity for whatever reason was diminished to the extent that you have a reasonable doubt whether he did, maturely and meaningfully, premeditate, deliberate, and reflect upon the gravity of his contemplated act, or form an intent to kill, you can not [sic] find him guilty of a willful, deliberate and premeditated murder.

Also, if you find that his mental capacity was diminished to the extent that you have a reasonable doubt whether he premeditated design, you can not [sic] find him guilty of murder.

Further, if you find that his mental capacity was diminished to the extent of premeditated design, nor had an intent to kill at the time of the alleged crime was committed, [sic] then you shall find the Defendant, John Doe NOT GUILTY

COMMENT:

The proposed jury instruction does not conform with Mississippi law, because it gives the impression that the defendant's intoxication, regardless of the reason for it, is a defense. Because this is not the law, the Court found that no abuse of discretion in the denial of the instruction. Adams v. State, 62 So. 3d 432, 440 (Miss. App. 2011).

[DEFENDANT'S INSTRUCTION- SELF DEFENSE/ INTOXICATION- MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, willfully, and feloniously, doing **any act which is an element of the crime** or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense; and if you believe from the evidence beyond a reasonable doubt that the defendant, John Doe, did willfully, unlawfully and feloniously do any act which is an element of the crime with which he is charged or immediately connected with it or leading to its commission, then and in that event, you should find the defendant guilty of that crime as the case may be. (Emphasis added).

(B) The jury was instructed on the elements of capital murder in jury instruction two. The last paragraph of jury instruction two states: "If the prosecution has failed to prove any one or more of the above listed elements beyond a

reasonable doubt, then you shall find John Doe not guilty
of Capital Murder."

COMMENT:

While instruction (A) could have misled the jury, the
Court find that any confusion caused was cured by
reading the instructions (both (A) and (B) together)
as a whole. Thus, any error was harmless.

Kee Brown v. State, 75 So. 3d 573, 577 (Miss. App.
2011).

[STATE'S INSTRUCTION - AIDING AND ABETTING]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the defendant, John Doe is claiming that the killing of Bob Smith was done in self-defense and thus under the law was a justifiable homicide. To make a killing justifiable on the grounds of self-defense, the danger to the defendant must not have been created, initiated or caused by him; the danger must be either actual, present, and urgent or the defendant must have reasonable grounds to apprehend a design on the part of the victim to kill, or do some great bodily harm to him, and in addition to this, that there was apparent imminent danger of such design being accomplished. *Hence, the mere fear, apprehension or belief, however sincerely entertained by one person that another designs to take his life or to do him some great bodily harm, will not justify the accused taking the life of the deceased. A party may have an apprehension that his life is in danger and believe the grounds of his apprehension just and reasonable, and yet he acts at his peril. He is not the final judge; the jury may*

determine the reasonableness of the grounds upon which he acted. (Emphasis added).

COMMENT:

The supreme court in Flowers v. State, 473 So.2d 164 (Miss. 1985) condemned almost identical language in a jury instruction. Here, the court held that the defendant's instruction prejudiced his due-process rights to a properly instructed jury. The instruction constituted a deficient performance of trial counsel and caused prejudice to the defendant, so the court found that the defendant met his burden of showing that he received ineffective assistance of counsel at trial. Blunt v. State, 55 So. 3d 207, 210-11 (Miss. App. 2011).

[DEFENDANT'S INSTRUCTION - CONDEMNED - SELF DEFENSE/
JUSTIFIABLE HOMICIDE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT
INSTRUCTION NO. _____

If you believe from the evidence that the deceased was a much larger and stronger person than the Defendant, and was capable of inflicting great and serious bodily harm upon the Defendant with his hands and that the Defendant had reason to believe and did believe as a man of ordinary reason that he was then and there in danger of such harm at the hands of the deceased and used a knife, with which he fatally stabbed the deceased, to protect himself from such harm, then the Defendant was justified, and your verdict shall be "not guilty" even though the deceased may not have been armed.

COMMENT:

The Mississippi Supreme Court has held that where an attacker is much larger than the one attacked, the nature of the assault, though only with fists, might be such as to show that the one being attacked is in danger of great bodily harm and, therefore, justified in the use of a deadly weapon to defend himself. See Manuel v. State, 667 So. 2d 590, 592 (Miss. 1995). In this case, there was no evidence presented to suggest that the defendant was fearful of being harmed by the victim because of his size.

This Court held where there is testimony as to the difference in size between the defendant and the deceased, but no testimony that the defendant feared for his safety as a result of that size difference, the granting of a self-defense jury instruction which focuses upon that size difference would have be an improper comment upon the evidence by the trial court. Showers v. State, 70 So. 3d 241, 244-45 (Miss. App. 2011).

[DEFENDANT'S INSTRUCTION - SELF DEFENSE/ SIZE DIFFERENCE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury find the defendant guilty of simple assault, and not fondling, if it found "beyond a reasonable doubt that . . . John Doe did attempt by physical menace to put [his daughter] in fear of imminent or serious bodily harm."

COMMENT:

Simple assault is not a lesser-included offense of fondling. To be a lesser-included offense, all the elements of simple assault must be included in the elements of fondling. It must be impossible to commit the greater offense without at the same time committing the lesser included offense. It is possible to commit fondling without committing an assault, because fondling involves offensive touching which denotes sexual gratification that does not necessarily cause bodily injury. The trial judge had a right to deny the assault instruction because the defendant failed to provide evidence supporting his actions were designed to instill imminent fear of serious bodily injury. Sheffield v. State, 64 So. 3d 529, 532 (Miss. App. 2011)

[DEFENDANT'S INSTRUCTION - LESSER OFFENSE, SIMPLE ASSAULT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The defendant's proffered instruction instructs the jury that if you find from the evidence . . . John Doe did shoot and kill Bob Smith. . . while the said John Doe was resisting an attempt by Bob Smith and others to unlawfully kill John Doe, to rob him, or to commit any other felony upon him or that John Doe had reasonable grounds to apprehend a design on the part of Bob Smith and others acting in concert with him to commit a felony upon John Doe or to inflict some great bodily harm or personal injury upon the person of John Doe or any other human being and there existed an imminent danger of such design on the part of Bob Smith and or others acting in concert with him being accomplished, then the shooting and killing of Bob Smith by John Doe was justifiable and you shall find John Doe not guilty.

COMMENT:

If a defendant proffers an instruction that correctly states the law, has a foundation in the evidence, and is not covered elsewhere in the instructions, it is error to deny that instruction. Hager v. State, 996 So. 2d 94 (Miss. App. 2008). Here, the defendant's instruction satisfied the requirements so the court reversed the judgment of conviction and remanded the case for a new trial. Ford v. State, 52 So. 3d 1245, 1248 (Miss. App. 2011)

[DEFENDANT'S INSTRUCTION - JUSTIFIABLE HOMICIDE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the defendant's theory of the case is that he would not have been stopped and charged with these offenses if [the CI] had not put the marijuana in his car and called the police and if you so find you must find John Doe not guilty.

COMMENT:

This instruction was denied because the defendant's theory of the case did not include any type of defense, only a theory of fact; thus, the theory of his case is not relevant. The trial court did not err in denying this jury instruction. Moore v. State, 64 So. 3d 542, 545 (Miss. App. 2011)

[DEFENDANT'S INSTRUCTION - THEORY OF THE CASE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that while the danger which will justify the taking of another's life must be imminent, impending and present, such danger need not be unavoidable except by killing in self-defense. The Defendant, John Doe, need not have avoided the danger to her person presented by the victim by flight. So long as the Defendant was in a place where she had the right to be and was neither the immediate provoker nor aggressor, she may stand her ground without losing the right of self-defense.

COMMENT:

Without being informed of the rights John Doe possessed under the Castle Doctrine, either through the jury instruction or another informative instruction, the jury was improperly allowed to consider John Doe's failure to retreat as evidence that her use of force was unnecessary, excessive, or unreasonable. The trial judge's refusal to grant a jury instruction regarding the Castle Doctrine constituted reversible error. Sanders v. State, 77 So. 3d 497, 503 (Miss. App. 2011)

[DEFENDANT'S INSTRUCTION - SELF DEFENSE/ CASTLE DOCTRINE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a reasonable doubt may arise from the whole of the evidence, the conflict of the evidence, the lack of evidence, or the insufficiency of the evidence; but, however it arises, it is your sworn duty to find John Doe "not guilty."

COMMENT:

Current Mississippi Law does not allow a jury instruction to define "reasonable doubt." See Lett v. State, 902 So.2d 630 (Miss. App. 2005). Following precedent and the instructions read as a whole, the jury instructions adequately covered the State's burden of proof; therefore, it did not need the instruction on reasonable doubt. Rivera-Guadiana v. State, 71 So. 3d 1221, 1224 (Miss. App. 2011).

[DEFENDANT'S INSTRUCTION - REASONABLE DOUBT]

MS Court
Of Appeals
2012

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt, that the defendant, John Doe:

1. Passed a stopped school bus, and
2. That he knew, or should have known by the exercise of ordinary care that the school bus was letting off children to go to their homes, and
3. That his passing said school bus was a decision chosen/or made by the defendant and not caused by circumstances beyond his control, and
4. That at the time the defendant passed said bus, he knew that his braking system was not functioning properly, and
5. That as a **direct and proximate result** of the above actions of the defendant, Jane Doe was killed, and
6. That the above actions of the defendant was such that under the circumstances then and there existing evidences a wanton and reckless and willful disregard for human life, and the conscious and wanton and reckless disregard of the probabilities of fatal consequences to others as a direct result of the willful creation of an unreasonable risk thereof;

then the defendant, John Doe, is guilty of Manslaughter by Culpable Negligence, and it is your sworn duty to so find.

COMMENT:

The jury was properly instructed. The statutory elements of culpable-negligence manslaughter are an unlawful killing by the culpable negligence of another. See Miss. Code Ann. § 97-3-47. The causation element is present in this definition—the unlawful killing must be a result of the defendant's culpable negligence. A direct and proximate result of the above actions of the defendant properly describes the causation element of result. Gebben v. State, 108 So. 3d 956, 966-67 (Miss. App. 2012)

[STATE'S INSTRUCTION - MANSLAUGHTER/CULPABLE
NEGLIGENCE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it. You have heard the evidence regarding the identification of the defendant as the person who committed the crime. In this connection, you should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstances surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification. You have heard evidence that prior to this trial, the witness, Patricia Gordon, identified the defendant, John Doe, by viewing a photographic spread which contained his photograph.

The identification of the defendant by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant.

It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

COMMENT:

The instruction given was not given in error, because it instructed the jury that the State is required to prove identity beyond a reasonable doubt and contained a list of factors for assessing whether the State has done so. Smith v. State, 90 So. 3d 122, 133-34 (Miss. App. 2012). The Supreme Court has held that a proper identification need not include a detailed list of factors. See Davis v. State, 568 So.2d 277, 280 (Miss. 1990).

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a defendant is not required to testify in a case and the fact that the defendant did not testify shall not give rise to an inference of guilt in your minds nor are you to speculate as to what his testimony might have been.

COMMENT:
Fullilove v. State, 101 So. 3d 669, 678 (Miss. App. 2012)

[DEFENDANT'S INSTRUCTION - RIGHT OF DEFENDANT NOT TO TESTIFY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that on or about September 5, 2007:

- 1) John Doe was over 21 years of age, date of birth being April 5, 1977[,]
- 2) did unlawfully, willfully, and feloniously[,]
- 3) have sexual intercourse[,]
- 4) with Jane who was under 16 years of age, date of birth being October 17, 1991, then you shall find the defendant guilty as charged.

If the State fails to prove any one or more of the above elements beyond a reasonable doubt, then you should find the defendant not guilty.

COMMENT:

Although the element "is not the person's spouse" was missing from the instruction, the Court did not find that the trial court committed error in allowing this instruction. Omitting the language did not create an injustice to the defendant and tracked the language of the indictment. Baker v. State, 95 So. 3d 692, (Miss. App. 2012).

[DEFENDANT'S INSTRUCTION - STATUTORY RAPE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you unanimously find from the evidence in this case, beyond a reasonable doubt, that the defendant, John Doe, on or about July 3, 2008, in Warren County, Mississippi, did:

1. willfully, unlawfully, feloniously, and without authority;
2. take possession of or take away a certain motor vehicle;
3. described as a 2008 Chevrolet Tahoe;
4. the property of Patrick Vinzant.

then and in that event, the defendant, John Doe, is guilty of motor[-] vehicle theft[,] and it is your sworn duty to so find.

COMMENT:

The defendant argued that the instruction failed to include language that the defendant intended to permanently deprive the victim of his automobile, which is a requisite element. In Richmond v. State, 751 So.2d 1038 (Miss. 1999), the court held that the use of the term "feloniously" in the instruction was the linguistic equivalent of done with criminal intent; thus the jury had been properly instructed on the elements of motor-vehicle theft. Vinzant v. State, 99 So. 3d 767, 772 (Miss. App. 2012)

[STATE'S INSTRUCTION- APPROVED- LARCENY OF A MOTOR VEHICLE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that you are not to judge the actions of John Doe in ***the cool, calm light of after-developed facts***, but instead you are to judge his actions in the light of the circumstances confronting John Doe, at the time of the altercation with the victim, as you believe from the evidence that those circumstances reasonably appeared to him on that occasion; and if you believe under those circumstances it reasonably appeared to Bob Smith, that he then and there had reasonable grounds to apprehend great bodily harm from the actions of Bob Smith, and there reasonably appeared to John Doe to be imminent danger of such harm being accomplished; then John Doe was justified in acting in self-defense and you must find John Doe not guilty.

COMMENT:

The trial judge rejected the instruction, after the State objected to the "cool, calm, light of after developed facts" language. The Court affirmed the trial court's holding and used the *Robinson* Instruction, which has carried the supreme court's approval for twenty-five years. Crook v. State, 105 So. 3d 353, 358 (Miss. App. 2012)

[DEFENDANT'S INSTRUCTION - REJECTED- SELF DEFENSE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is immaterial whether the child molestation charge was accomplished by force or violence or against the will of the victim, or whether the victim resisted, because the victim was under the age of consent.

COMMENT:

Even though the court found that the jury instruction merely added an additional element, as force and violence are not required to prove fondling, it also found that the instructions fairly and adequately state the law. Perilloux v. State, 113 So. 3d 603, 609 (Miss. App. 2012).

[COURT'S INSTRUCTION - APPROVED- CHILD MOLESTATION]

MS Court
Of Appeals
2013

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and [their] absence in manslaughter. Under the law of the State of Mississippi, every killing of a human being without authority of law is either murder or manslaughter; murder when done with malice aforethought and a deliberate design to effect the death of the person killed, and manslaughter when done in the heat of passion without malice and without premeditation.

COMMENT:

Since the first sentence of the instruction is a correct statement of law, the Court found no error by the trial court in overruling Barron's objection. *Barron v. State*, 130 So. 3d 531, 540 (Miss. App. 2013)

[STATE'S INSTRUCTION - DISTINCTION BETWEEN MURDER &
MANSLAUGHTER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that John Doe has stipulated to the fact that he has a felony conviction that occurred on a date prior to April 24, 2010. The Court instructs the jury that John Doe's prior conviction . . . may not be considered as evidence that he committed the offense with which he is currently charged in Count 2 of the indictment. It may, however, be used for the limited and sole purpose of proving the prior conviction element of the crime of unlawfully possessing a firearm after having previously been convicted of a felony.

(Emphasis added)

COMMENT:

Essentially, the jury instruction is a combination of a factual stipulation, a peremptory instruction, and a limiting instruction. In State v. Flippen, 344 N.C. 689, 477 S.E.2d 158, 164 (N.C. 1996), the North Carolina Supreme Court addressed circumstances in which the prosecution and a defendant who was facing the death penalty had stipulated that the defendant had no significant history of prior criminal activity. The Flippen court noted that "in those cases where the evidence is truly uncontradicted, the defendant is . . . entitled to a peremptory instruction when he requests it." Rogers v. State, 130 So. 3d 544 (Miss. App. 2013).

[DEFENDANT'S INSTRUCTION - FACTUAL STIPULATION]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the theory of "imperfect self-defense" provides that an intentional killing may be considered manslaughter if done without malice under a bona fide but unfounded belief that it was necessary to prevent great bodily harm.

COMMENT:

Held instruction to be an accurate statement of the law and fitting for the case. Branch v. State, 118 So. 3d 646 (Miss. App. 2013).

[COURT'S INSTRUCTION - IMPERFECT SELF DEFENSE]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that an inference of the intent to steal may arise from the proof of the breaking and entering.

COMMENT:

The instruction stated nearly identical language from the finding in Crawford v. State, 839 So.2d 594 (Miss. App. 2003), and is, therefore, a correct statement of law. Blythe v. State, 141 So. 3d 407 (Miss. App. 2013).

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

(A) The Court instructs the jury that possession of a controlled substance cannot be established when the only evidence connecting the accused to the substance is the momentary holding of the substance.

If you find from the evidence that . . . John Doe momentarily held the substances in question at the request of Don . . . and without knowledge of what the substances were[,] then you shall find . . . John Doe not guilty of possession of a controlled substance.

(B) The court also instructed the jury that if you believe that the substance was subject to John Doe's dominion and control, it is your duty as jurors to find him guilty as charged.

COMMENT:
Possession requires actual or constructive control, not a mere passing control which occurs from a momentary handling. The second instruction did not shift the burden of proof to the defendant. Fay v. State, 133 So. 3d 841 (Miss. App. 2013).

[DEFENDANT'S INSTRUCTION - POSSESSION OF A CONTROLLED SUBSTANCE]
(A) Possession consists of momentarily handling - condemned.
(B) In defendant's dominion and control - approved.

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that the Defendant, John Doe, did on or about June 12, 2010, unlawfully, willfully, and feloniously engage in sexual penetration with D.G., a child under the age of eighteen (18), by licking her private parts and inserting his fingers, while he, John Doe, was in a position of trust or authority over D.G., John Doe, being her grandfather, then you shall find the Defendant guilty of Sexual Battery as charged. If the State has failed to prove any of these elements beyond a reasonable doubt, then you shall find the Defendant not guilty.

COMMENT:

The instruction followed the statutory language of the crime of sexual battery, under Miss. Code Ann. Section 97-3-95(2). Gill v. State, 126 So. 3d 128, 132 (Miss. App. 2013)

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

In the present case, One and Two described in vivid detail the sexual abuses the defendant committed to them. After both One and Two testified, the circuit judge gave the jury the following limiting instruction: "The acts testified to by One and Two are related to charges about which the defendant is not presently on trial, and **they are to be considered by you only for the limited purposes of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident.**" (Emphasis added).

COMMENT:

The circuit court followed Mississippi precedent found in *Derouen* and *Gore* by admitting evidence of prior sexual acts for a limited purpose under Rule 404(b) after a Rule 403 determination that the probative value was not substantially outweighed by the danger of unfair prejudice to Westbrook and by providing appropriate limiting instructions to the jury about the limited purpose for which it could use the prior-sexual-acts testimony. See *Derouen v. State*, 994 So.2d 478 (Miss 2008); *Gore v. State*, 37 So. 3d 1178, Miss. 2010).
Westbrook v. State, 109 So. 3d 609, 616 (Miss. App. 2013)

[COURT'S INSTRUCTION - APPROVED - LIMITING USE OF PRIOR SEXUAL
ACT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs you that words alone and disagreements among people are not enough to invoke the passion required for the defense of Heat of Passion Manslaughter. Mere words, no matter how provocative, are insufficient to reduce an intentional and unjustifiable homicide from murder to manslaughter.

COMMENT:

Words alone and disagreements among people are not enough to invoke the passion required for the defense of Heat of Passion Manslaughter. *Bradshaw v. State*, 138 So. 3d 199, 204 (Miss. App. 2013)

MS Court
Of Appeals
2014

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that the John Doe is an accomplice in this case, and the testimony of an accomplice is to be considered and weighed **with great care and caution**. You may give it such weight and credit as he deem it is entitled.

(Emphasis added)

COMMENT:

When determining whether a defendant is entitled to such a cautionary instruction, the trial judge considers whether the witness was in fact an accomplice and whether the witness's testimony was corroborated. Although giving a cautionary instruction regarding the testimony of an accomplice is within the trial judge's discretion, such an instruction is **required** when the accomplice's testimony is the sole basis for the conviction, and the defendant's guilt is not clearly proven. James v. State, 146 So. 3d 985 (Miss. App. 2014).

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose You are required and expected to use your good common sense and sound, honest judgment in considering and weighing the testimony of each witness who has testified in this case.

COMMENT:

The jury was fairly, fully, and accurately instructed regarding its duty to consider and weigh the credibility of witness testimony. James v. State, 146 So. 3d 985 (Miss. App. 2014).

[COURT'S INSTRUCTION- CREDIBILITY OF WITNESS]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt that at the time and place charged in the indictment and testified about, . . . the defendant, did willfully, unlawfully, and feloniously **cause bodily injury** to the victim, a human being, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life with a deadly weapon, to-wit: a rifle, by shooting . . . the victim with the rifle, . . . being a means likely to produce death or serious bodily harm, then it is your duty to find the defendant guilty as charged.

COMMENT:

The defendant was specifically accused of aggravated assault under Mississippi Code Annotated section 97-3-7(2) (a), which requires that "a person is guilty of aggravated assault if he . . . attempts to cause serious bodily injury to another." The defendant was only found guilty of causing bodily injury and not serious bodily injury. The blending of the subsections of section 97-3-7(2) (a) and (b) is not necessarily a defect and does not warrant reversal, if the defendant is charged under both subsections. Johnson v. State, 910 So.2d 1174, 1180 (Miss. App. 2005). However, the defendant in this case could only be charged with a lesser offense because the greater was not proved, such as simple assault. Snowden v. State, 131 So. 3d 1251 (Miss. App. 2014).

[COURT'S INSTRUCTION - CONDEMNED - AGGRAVATED ASSAULT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury to find the defendant guilty if the State proved beyond a reasonable doubt that the defendant did (reproduced as it appeared in the instruction, in relevant part only):

1. attempt to cause serious bodily injury to another;
2. by discharging a firearm while in or on a vehicle;
3. without acting in lawful self-defense.

COMMENT:

Essentially the same issue was present in Morris v. State, 748 So. 2d 143 (Miss. 1999). There, the Mississippi Supreme Court examined the aggravated assault statute, which has substantially the same relevant language as the drive-by-shooting statute. An objection to that argument was erroneously overruled. The terms attempt and purposely or knowingly can be used interchangeably with the concept of attempt and actually committing the crime. Wallace v. State, 2014 Miss. App. LEXIS 385, *5 (Miss. App. July 15, 2014).

[STATE'S INSTRUCTION - DRIVE BY SHOOTING]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a person has actual possession when he or she knowingly has direct, immediate, and exclusive physical control over the thing or object. A person has constructive possession when he or she lacks actual possession of the thing or object but knowingly has both the power and the intention, at a given time, to exercise control or dominion over the thing or object, either directly or through another person.

COMMENT:

Whether a defendant was "aware of the presence and character" of the drug is an element of constructive possession, but the "knowledge" and "intent" language is essentially the same as the "aware of the presence and character" language most commonly cited in jury instructions. See Mosley v. State, 89 So. 3d 41 (Miss. App. 2011) (noting jury instruction with "aware of character and presence" language has been approved numerous times over the years). This instruction is identical to model jury instructions. Floyd v. State, 155 So. 3d 883 (Miss. App. 2014).

[STATE'S INSTRUCTION - CONSTRUCTIVE POSSESSION]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Defendant offered the jury instruction, which was a cautionary instruction that "[Mr. Snitch's] testimony should be taken with suspicion and distrust, as he was a 'snitch' who admitted that he received favorable treatment for his testimony."

COMMENT:

The Supreme Court has held that a cautionary instruction pertaining to the testimony of a confidential informant is not required where the details of the informant's pay arrangement with law enforcement are disclosed to the jury, and where the informant is subject to cross-examination. Webber v. State, 108 So. 3d 930 (Miss. 2013). While Mr. Snitch was not paid for his testimony, the jury was made aware of his cooperation with authorities in exchange for "assistance from the D.A. on his charge." Miller v. State, 144 So. 3d 199 (Miss. App. 2014).

[DEFENDANT'S INSTRUCTION - INFORMANT]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if the jury found from the evidence beyond a reasonable doubt that "[John Doe], either by himself or acting in concert with another or others," murdered Moe Doe, John must be found guilty of murder.

COMMENT:

The addition of the language "either by himself" did not change the elements that must be proven for the jury to find John guilty of murder. Luster v. State, 143 So. 3d 636 (Miss. App. 2014).

[STATE'S INSTRUCTION - MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that if you find that the State has failed to prove any one or more of the essential elements of the crime charged in Count I of the Indictment [aggravated assault], you must find the defendant not guilty of the charge. You will then proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all of the elements of the lesser crime of Simple Assault. If you find from all of the evidence in this case beyond a reasonable doubt that:

1. Bob Smith, on or about January 1, 2013[,] in Rankin County, Mississippi;
2. Did purposely and/or knowingly and unlawfully cause bodily injury to Jane Smith;
3. By striking her with hands and closed fists;

then you shall find the Defendant guilty of Simple Assault.

If the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Bob Smith not guilty.

COMMENT"

The court refused the instruction on the grounds that the lesser-included offense of simple assault should be in the same instruction as aggravated assault, and that if the lesser-included offense of simple assault was given in a separate instruction, it may confuse the jury. White v. State, 149 So. 3d 556 (Miss. App. 2014).

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that under a capital murder charge, they must find that John Doe acted "alone or in conjunction with another" in causing the sheriff's death.

COMMENT:

Regardless of whether the jury found John Doe acted "in conjunction with" another or was "directing" another, either would support a finding of capital murder. A person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense, is equally guilty as the principal offender. See Miss. Code. Ann. § 97-1-3. Baxter v. State, 2014 Miss. App. LEXIS 413, 43-44 (Miss. App. July 29, 2014).

[STATE'S INSTRUCTION - CAPITAL MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

NO. _____

JOHN DOE

DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that it is not necessary that an unlawful act of the Defendant be the sole cause of death. Responsibility attaches if the act of the Defendant contributed to the death. If you believe the Defendant committed an unlawful act or aided and abetted another in committing an unlawful act that contributed to the death of Garry, then the Defendant is not relieved of responsibility by the fact that other causes may have also contributed to his death.

COMMENT:

The instruction improperly shifted the burden to the defense to prove. The Supreme Court has reversed convictions where jury instructions have shifted the burden of proof to the defendant. See *Quinn v. State*, 64 So. 738 (1914).

Williams v. State, 2014 Miss. App. LEXIS 694, 17 (Miss. Ct. App. Dec. 2, 2014)

[DEFENDANT'S INSTRUCTION - AIDING AND ABETTING]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that a person may not use more force than reasonably appears necessary to save his life or protect himself from great bodily harm. Where a person repels an assault with a deadly weapon, **he acts at his own peril** and the question of whether he was justified in using the weapon is for determination by the jury.

COMMENT:

Some cases make it clear that the "at peril" phrase is incorrect. See Flowers v. State, 473 So.2d 164 (Miss 1985); see also Blunt v. State, 55 So.3d 207 (Miss App. 2011; Johnson v. State, 908 So.2d 758 (Miss. 2005). However, no Supreme Court decision holds that use of the "he acts at his own peril" language in a self-defense jury instruction is "per se" reversible error. For over 120 years in the jurisprudential history of this state, the "acts at his own peril" language in a self-defense jury instruction was considered appropriate.

Rodgers v. State, 2014 Miss. App. LEXIS 656, 5 (Miss. Ct. App. Nov. 18, 2014)

[DEFENDANT'S INSTRUCTION - SELF DEFENSE MURDER]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT

INSTRUCTION NO. _____

The Court instructs the jury that three witnesses called by the State are accomplices to the commission of the same crimes with which John Doe is charged in this case However, since the three witnesses are accomplices, any testimony of either of them, which you find to be uncorroborated by other evidence, should be viewed with great caution and suspicion **if you find such uncorroborated testimony to be unreasonable, self-contradictory, or substantially impeached.** (Emphasis added).

COMMENT:

The instruction mirrors the language provided in *Williams's special concurrence regarding accomplice testimony jury instructions*. Williams v. State, 32 So. 3d 486 (Miss. 2010). Although the record contained corroborating testimony to connect the defendant to the armed robbery and burglary. The circuit court judge gave the instruction out of an abundance of caution. Lathan v. State, 2014 Miss. App. LEXIS 569, *20 (Miss. Ct. App. Oct. 7, 2014).

[DEFENDANT'S INSTRUCTION - ACCOMPLICE TESTIMONY]

IN THE CIRCUIT COURT OF _____, MISSISSIPPI
STATE OF MISSISSIPPI PLAINTIFF
VS. NO. _____
JOHN DOE DEFENDANT
INSTRUCTION NO. _____

The Court instructs the jury, in pertinent part, deliberate design may be presumed from the unlawful and deliberate use of a deadly weapon.

COMMENT:

"As a presumption is accepted as true without proof to the contrary," we held that the instruction ("[a] person is presumed to intend") impermissibly shifted "the burden to the defendant to provide proof" that she lacked intent. Williams v. State, 111 So. 3d 620, 623 (Miss. 2013). The instruction was harmless error. Deliberate design may not be presumed, and this Court overrules prior cases to the extent that they conflict with this principle. Reith v. State, 135 So. 3d 862, 865 (Miss. 2014)

[STATE'S INSTRUCTION - CONDEMNED - PRESUMPTIVE INSTRUCTION]