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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
NO. 2004-KA-01204-COA

DARYL HAWKINS

APPELLANT

**FILED**

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SUPREME COURT  
COURT OF APPEALS

V.

STATE OF MISSISSIPPI

APPELLEE

**APPELLANT'S REPLY BRIEF**

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
George T. Holmes, [REDACTED]  
301 N. Lamar St., Ste 210  
Jackson MS 39201  
601 576-4200

Counsel for Appellant

## TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
Issue 1	1
Issue 2	2
Issue 3	2
Issue 4	3
CERTIFICATE OF SERVICE	4

## TABLE OF AUTHORITIES

### CASES:

<i>Dobbins v. State</i> , 766 So. 2d 29 (Miss. App. 2000) .....	3
<i>Duke v. State</i> , 340 So. 2d 727 (Miss. 1976) .....	1
<i>Durr v. State</i> , 446 So.2d 1016 (Miss.1984) .....	3
<i>Ford v. State</i> , 218 So.2d 731 (Miss. 1969) .....	1
<i>Love v. State</i> , 441 So.2d 1353 (Miss.1983) .....	2
<i>Reddix v. State</i> , 731 So.2d 591 (Miss. 1999) .....	2
<i>Slater v. State</i> 731 So. 2d 1115 (Miss. 1999) .....	2

### STATUTES

none

### OTHER AUTHORITIES

none

## REPLY ARGUMENT

### *Issue No. 1: Not Pleading Overt Act in the Indictment*

The case *Duke v. State*, 340 So. 2d 727 (Miss. 1976) cited by the state does not present any counter authority to the appellant's position. *Duke* does not speak specifically to the adequacies *vel non* of indictment pleading nor does the case otherwise pertain to the issue of defective indictments except in slight reference at the end of the opinion which is not helpful to the Court here. *Duke* address substantively only the elements of the offense of attempt, it does not take away one iota from appellant's arguments under this issue.

The state cites *Ford v. State*, 218 So.2d 731, 732 (Miss. 1969), which is an outstanding authority for the appellant's position. The appellants begs the court to compare the indictment in the present case to the indictment quoted in *Ford* and the specific reference to the overt act in that case that the defendant "...did then and there do and commit certain overt acts, to-wit ...". The inadequacies of Hawkin's indictment is thus revealed.

Finally, regarding Issue number 1, the reference to breaking a window in the indictment is, at best, ambiguous as to whether or not it describes an overt act. The accusation is not labeled as an overt act as in *Ford, supra*. The breaking of an automobile window could just as easily be of vandalism and no more.

*Issue No. 2: Denial of the Abandonment Jury Instruction*

A distinction can clearly be drawn between *Slater v. State* 731 So. 2d 1115, 1118-19 (Miss. 1999), cited by the appellee, and the facts of the present case. In *Slater* there was no factual basis for an abandonment instruction. In *Slater* an individual was killed as a result of two people shooting, Slater and his co-defendant. There was evidence that Slater stopped shooting first, but there was no evidence as to which shooter's volley killed the victim. More importantly, Slater testified that he shot in self defense, what the Supreme Court called a "pure defense", so that Slater could not present alternative theories, it would be one or the other, and since he testified to self defense, all other bets were off.

In the present case, there is no conflicting "pure defense" and nothing prevented Hawkins from having alternative defenses. See *Reddix v. State*, 731 So.2d 591, 593 (Miss.,1999)("A criminal defendant has a right to assert alternative theories of defense, even inconsistent alternative theories. *Love v. State*, 441 So.2d 1353, 1356 (Miss.1983)). The evidence exists in the record here to support the requested instruction as pointed out in the initial brief.

*Issue No. 3: Sufficiency of the evidence vis-a-vis the indictment*

The state argues that if Hawkins failed to object to the defective indictment at trial, he cannot complain on appeal that due to a defective indictment, the state

did not did not prove the elements of the crime actually charged. However, as pointed out in the initial brief, the law is abundantly clear that failure to object or demur to a defective indictment is no bar to the issue being raised on appeal.

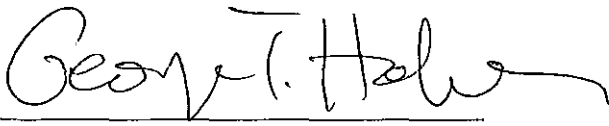
*Durr v. State*, 446 So.2d 1016, 1017 (Miss.1984).

*Issue No. 4. Break a car window, die in prison, proportionality*

The state argues that Hawkins did not make a threshold showing of disproportionality. This is so because Hawkins requested the opportunity, but the trial court denied the request and went directly to pronouncing the sentence. [T. 100-01]. Otherwise, the threshold showing is presented in the appellant's brief and since the issue is one of Constitutional import, can be treated as plain error. *Dobbins v. State*, 766 So. 2d 29, 31 (Miss. App. 2000).

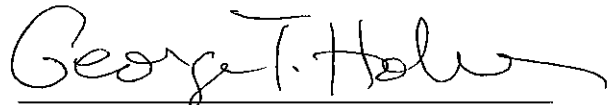
Respectfully submitted,

DARYL HAWKINS

BY:   
GEORGE T. HOLMES,  
Mississippi Office of Indigent Appeals

**CERTIFICATE**

I, George T. Holmes, do hereby certify that I have this the 12<sup>th</sup> day of March, 2008 mailed a true and correct copy of the above and foregoing Reply Brief to Brief Of Appellant to Hon. Albert B. Smith, III, Circuit Judge, P. O. 478, Cleveland MS 38732, and to Hon. Brenda F. Mitchell, Off. Of D. A. , P. O. Box 848, Cleveland MS 38732, and to Hon. Laura H. Tedder, Spec. Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid. all by U. S. Mail, first class postage prepaid.



George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS  
George T. Holmes, [REDACTED]  
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601 576-4200