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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOSH KIRK DAVIS — APPELLANT

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Court of Appeals

VS. — NO. 2006-CA-0719-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE OF MISSISSIPPI **APPELLEE**

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STATEMENT OF THE CASE

Josh Kirk Davis prosecutes an appeal from the denial of post-conviction relief following an evidentiary hearing conducted on April 4, 2006 in the Circuit Court of Yazoo County, Jannie M. Lewis, Circuit Judge, presiding.

Young Davis's conviction of murder less than capital in Yazoo County was appealed to the Supreme Court of Mississippi and affirmed by this Court on July 17, 2003, in an opinion penned by Justice Waller. *See* **Davis v. State,** 849 So.2d 1252 (Miss. 2003); appellee's exhibit A, attached.

On October 6, 2004, Davis filed in the Supreme Court an "Application for Leave to File Motion for Post-Conviction Relief." This Court did not request a response from the State, therefore, no response was filed. Davis's application was granted in an order entered by presiding justice Cobb on November 3, 2004.

Davis filed his "Motion For Post Conviction Relief and Supporting Authorities" in the Circuit Court of Yazoo County on December 3, 2004. (C.P. at 2)

Attached to Davis's motion was the affidavit of William D. Owen, a licensed physician, who

suggested that Josh Davis could not have fired from the doorway the shot that killed Bubba Arnold because the location of blood splatters and spent cartridges led Owen to believe to a reasonable degree of medical certainty the fatal shot was fired from the left at very close range. According to Dr. Owen, a family practitioner who had never testified in court as an expert in the field of forensic pathology, Davis fired into a dead body. (R. 20; C.P. at 25-26) On April 4, 2006, an evidentiary hearing was conducted in the Circuit Court of Yazoo County, Jannie M. Lewis, Circuit Judge, again presiding. Davis invited the lower court to enter an order setting aside his conviction and sentence and granting him a new trial.

Five (5) witnesses testified in support of Davis's post-conviction claims, including Dr. William Owen, a family practitioner who ". . . practiced for 13 years as a physician and surgeon in Smith County and for about a year served as coroner of Smith County." (R. 16)

Wesley T. Evans, who was appointed to assist Michael Rushing in the trial of the case, testified during the evidentiary hearing in support of Davis's post-conviction claim Davis was denied the effective assistance of counsel at trial.

At the conclusion of the evidentiary hearing, Judge Lewis found as a fact and concluded as a matter of law that Davis " . . . has failed to prove by a preponderance of the evidence that the affidavit of Dr. Owen or the testimony of Dr. Owen produces reasonably satisfactory evidence to support the factual allegations in the motion for his request for relief." (R. 88)

In denying post-conviction relief, Judge Lewis also found as a fact and concluded as a matter of law that "[a]s far as the ineffective assistance of counsel [claim], based on the testimony of Attorney Evans as well as the incorporation of the trial transcript, the Court finds that it would not have changed the outcome of the trial." (R. 89)

Judge Lewis took into consideration " . . . the evidence from the transcript that was

incorporated into this hearing, the testimony from the prior statements of the defendant that was also presented at this hearing, as well as the statement that Dr. Owen states that the defendant advised him that he only shot one time into the house, this Court finds that the statement by the defendant that he only shot one time into the house is substantially contradicted by the evidence of the transcript of the trial, as well as the testimony of Dr. Owen, as well as the prior written statements of Josh Davis." (Tr. at 88)

In his appeal to this Court from the denial of post-conviction relief, Davis presents three (3) issues for appellate review:

I. Trial counsel was ineffective in failing to investigate and discover a defense to the offense of murder less than capital.

II. Davis was denied due process and a fundamentally fair trial in violation of his 6th and 14th Amendment rights because the jury was improperly instructed on the concept of aiding and abetting.

III. Davis was denied due process and a fundamentally fair trial in violation of his 6th and 14th Amendment rights because his trial lawyer(s) failed to object to jury instructions that " . . . *may* have resulted in a conviction without the requisite intent finding . . ." (Brief of Appellant at 13) [emphasis supplied].

Michael Rushing and Wesley T. Evans, practicing attorneys in Madison and Canton, respectively, represented young Davis at trial.

Cynthia A. Stewart and Julie Epps represented Davis during the evidentiary hearing. Ms. Stewart has filed in this Court the Brief of Appellant on Davis's behalf.

For reasons more fully developed in the response that follows, we respectfully submit that Judge Lewis's findings of evidentiary fact and conclusions of law were neither clearly erroneous nor manifestly wrong. Accordingly, she did not err in denying post-conviction relief on the ground

Davis failed to demonstrate by a preponderance of the evidence he was entitled to the requested relief.

The truth of the matter is that Davis seeks to use post-conviction relief as a substitute for another direct appeal. Davis has already had his direct appeal which was decided adversely to him, including his claim he was denied the effective assistance of counsel.

FACTS IN REVIEW

[1]

During the early morning hours of July 30, 2000, William "Bubba" Arnold was asleep on a sofa inside a camp house located in a rural area of Yazoo County when he was killed instantly by two, perhaps three, blasts from a 12 gauge shotgun fired by fifteen (15) year old Josh Kirk Davis. The gunshots tore through Arnold's face, disfiguring him grotesquely and killing him instantly.

[2]

Davis, who neither testified nor produced evidence in this cause, freely admitted in his third statement to law enforcement authorities he fired three shots through an open window in the front door of the camp house. (R. 229-30; Exhibit S-9 at pages 5-7) Davis claimed he did so only after Clifton Campbell, the father of Nicki Campbell, pointed the shotgun at Davis's head and issued the following order: "You do it or you die." (Exhibit S-9, page 7)

[3]

Clifton Campbell then handed the shotgun to young Davis. Regrettably, Davis did it. While Campbell parted the blinds, Davis stuck the barrel of the shotgun through the open window in the front door and pointed the gun in the direction of "Bubba" Arnold" who was either asleep or passed out on the sofa. Although Davis did not see Arnold before he fired into the dark room, Davis said in his third statement to law enforcement authorities " . . . [he] knew where [Arnold] was, where he

laid down from the time when we left the cabin earlier that night." (Exhibit S-9)

[4]

Megan Smith and Michelle Campbell both testified that during the early morning hours prior to the shooting, Arnold had made passes at Nicki Campbell, Clifton Campbell's teenage daughter, while down at the lake with Davis, Megan, Michelle, Nicki, and Blake McNeer. (R. 211, 215, 368, 424-25) After taking a shower in the camp house around 2:00 a.m., Michelle, who had been dating Josh Davis (R. 425), observed Bubba Arnold lying on the couch as she walked out of the camp house to the car. (R. 368)

> Q. Now, when you walked out of the cabin, did y'all leave immediately, or did something else happen?
>
> A. Yes, sir, all of us were in the car. I think Josh was putting stuff in the trunk, and Blake [McNeer], we had told Blake what had happened with - - Nicki had told me that Bubba had tried to touch her and we told Blake, and he went inside, and I don't know what took place in there. Bubba came outside with the gun and asked us, or told us to leave. (R. 424-25)

The group returned to the home of Mike Campbell where Michelle told Mike Campbell, her father and the brother of Clifton Campbell, what had happened. "I told him that Bubba had tried to put moves on Nicki." (R. 426-27)

[5]

Michelle and Mike Campbell went inside the house while Clifton Campbell sat in his car conversing with Davis. Michelle, who was watching from a window, saw Josh Davis, who "seemed somewhat angry" talking to Clifton Campbell, Nicki's father. (R. 427-28)

Megan and Michelle then got into Megan's car and left for 15 or 20 minutes. When they returned to the house, Cliff and Josh were gone. (R. 428) The girls decided to drive out to the camp house where they saw David and Clifton Campbell running from the cabin. "Cliff had a gun in his

hand." (R. 428-29)

[6]

Megan and Michelle went to Jay's Truck Stop. A short time later they drove back to Michelle's house where Michelle asked Josh Davis what had happened.

> Q. What did you say to them [Davis and Clifton Campbell] when they got out of the car?
>
> A. I asked what had happened, what had taken place at the cabin, and Josh told me that he had shot three times.
>
> Q. Is that exactly what he said?
>
> A. No, sir. Do I have to say exactly what he said?
>
> (ADDRESSES THE COURT)
>
> THE COURT: You have to.
>
> A. He said, "I shot him. I shot that mother fucker three God damn times." (R. 429-30)

[7]

Michelle testified she told Megan she had to know what happened and that Michelle, Megan, and Josh Davis " . . . rode back out to the cabin." (R. 430)

> Q. Tell the jury what you did and what you observed.
>
> A. I got out of the car and I went up to the porch and pushed the blinds back, and I looked to see if Bubba was asleep, and Josh was behind me and he kind of moved in, and he said, "He's asleep, he's just asleep." And so I said, "Well, I have to know." So I opened the door and I walked into the end, it was a couch perpendicular to the one Bubba was lying on, and I walked at the end of the couch, and I looked and it looked like he was asleep, and there was a light on in the bathroom, and I saw blood on the wall.
>
> Q. When you first looked into the blinds, what did you see?
>
> A. I saw Bubba just lying.

Q. And how were you able to see?

A. I didn't see him really, I just saw the image of his body.

Q. What was Josh Davis doing while this was going on?

A. He was standing at the door.

Q. And what was . . . Megan doing?

A. She was standing beside him, crying.

Q. When you opened, what did you do when you opened the door?

A. I used my T-shirt to open it.

Q. Why did you do that?

A. Because Josh told he had shot, and I didn't want my fingerprints on the door.

Q. Now, after you and Mr. Davis and Megan Smith went into the cabin, where did you go after that?

A. We went back to my house.

Q. And what car were you riding in?

A. Megan's.

Q. What if anything did Mr. Davis say to you the rest of the night?

A. He kept telling me he didn't do it, he didn't do it, he promised me he didn't do it.

Q. Have you given statements in regard to this case before.

A. Yes, sir.

Q. I want to direct your attention to July 30th and ask if you gave a statement on that date?

A. Yes, sir.

Q. Could you tell this jury whether or not you told the truth when you gave that statement?

A. No, I did not.

Q. Tell the jury why you didn't.

A. Because I was scared, and Josh had asked me before, he said, "Tell them I was with y'all, tell them I was with y'all."

Q. I want to direct your attention to August 2nd, 2000, and ask did you have an occasion to give a statement at that time?

A. Yes, sir.

Q. And could you tell this jury whether or not it was truthful?

A. Yes, sir, it was. (R. 431-33)

[8]

Nine (9) different witnesses testified for the State of Mississippi during its case-in-chief, including Megan Smith and Michelle Campbell, both of whom testified that Davis admitted to them he shot in Arnold's direction three (3) times. (Megan: R. 336-37; Michelle: 429-30, 432)

[9]

At the close of the State's case-in-chief, the defendant moved for a directed verdict of acquittal of capital murder on the ground that " . . . the State has failed to make [out] a *prima facie* case [as to the charge of capital murder because] [t]hey have to prove beyond a reasonable doubt the underlying felony of burglary." (R. 453)

Following a response by the district attorney (R. 454-55), Judge Lewis ruled " . . . the State has put on a *prima facie* case, and the motion for directed verdict is denied." (R. 455)

[10]

After being personally advised of his right to testify or not, the defendant, Josh Davis elected

not to testify in this cause. (R. 456, 473) Following closing arguments (R. 474-531), the jury retired to deliberate at a time not reflected by the record. (R. 531) Subsequently, again at a time not reflected by the record, the jury returned a verdict of: "We, the jury, find the defendant, Josh Kirk Davis, guilty of murder." (R. 532-33; C.P. at 105)

A poll of the jury reflected the verdict was unanimous. (R. 533-34)

Judge Lewis thereafter sentenced Davis to serve a term of life in the custody of the Mississippi Department of Corrections. (R. 534-35)

SUMMARY OF THE ARGUMENT

I. Davis's ineffective assistance of counsel claim, made here in a post-conviction environment, is procedurally barred.

It is barred by the doctrine of *res judicata* as well.

But even if not, the findings of fact and conclusions of law made by Judge Lewis in the wake of a full blown evidentiary hearing were neither clearly erroneous nor manifestly. It cannot be said there is a reasonable probability that but for counsels' alleged omissions the outcome of trial would have been any different.

II. The granting of jury instruction No. 6 (D-5) did not deny Davis due process of law and deprive him of a fundamentally fair trial because this instruction is identical to a pattern jury instruction approved by this Court in **Milano v. State,** 790 So.2d 179, 185 (Miss. 2001).

III. The failure to make a specific objection to jury instruction No. 6 (S-5) and to adjudicate its integrity on direct appeal bars review in a post-conviction context.

ARGUMENT

I.

DAVIS'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, MADE HERE IN A POST-CONVICTION ENVIRONMENT, IS PROCEDURALLY BARRED AND BARRED ALSO BY THE DOCTRINE OF *RES JUDICATA*.

BUT EVEN IF NOT, THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY JUDGE LEWIS IN THE WAKE OF AN EVIDENTIARY HEARING WERE NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG.

This Court has stated time and again the standard for appellate review of post-conviction cases.

"When reviewing a trial court's decision to deny a petition for post-conviction relief, [an appellate court] will not disturb the trial court's factual findings unless they are found to be clearly erroneous. [citation omitted] However, where questions of law are raised, the applicable standard of review is *de novo*." **Twillie v. State,** 892 So.2d 187, 189 (Miss. 2004). *See also* **Buckhalter v. State,** 912 So.2d 159, 160 (Ct.App.Miss. 2005), reh denied.

"A trial judge's finding will not be reversed unless manifestly wrong." **Hersick v. State,** 904 So.2d 116, 125 (Miss. 2004).

"[The Supreme Court] reviews a trial court's findings on ineffective assistance of counsel on a clearly erroneous standard." **Davis v. State,** 897 So.2d 960, 967 (Miss. 2004), reh denied.

Davis, in a post-conviction environment, assails the effectiveness of trial counsel on two fronts.

First, he argues that "[t]rial counsel was ineffective under Mississippi and United States Constitutions in failing to investigate and discover a defense to the offense." (Brief of Appellant at 3)

Second, he argues that counsel was ineffective in the constitutional sense because he failed ". . . to see that the jury was properly instructed on the essential elements of the offense . . ." Specifically, " . . . [defense counsel's] failure to object to the [jury] instructions *may* have resulted in a conviction without the requisite intent finding. . ." (Brief of Appellant at 13) [emphasis ours]

Davis contends that Judge Lewis's findings to the contrary were wrong. Davis's arguments are devoid of merit for several reasons.

First, his claims are barred from appellate review because they were either decided adversely to Davis on direct appeal or, if not, they could, and should, have been presented for review on direct appeal.

Second, Judge Lewis found as a fact and concluded as a matter of law there was no reasonable probability that but for counsel's alleged failure to hire an expert and investigate another defense or to object to certain jury instructions, the outcome of trial would have been any different. (Tr. at 89) Given the strength of the prosecution's case, these findings were neither clearly erroneous nor manifestly wrong.

Third, jury instruction No. 6 (S-5), the aiding and abetting instruction criticized by Davis both in his points II. and III., is identical to the pattern instruction approved by this Court in **Milano v. State,** 790 So.2d 179, 185 (Miss. 2001), where the Court stated, *inter alia*, that "[t]he use of this instruction should cure future problems regarding this issue."

A. Procedural and *Res Judicata* Bars.

"The burden of proving that no procedural bar exists falls squarely on the petitioner." **Crawford v. State,** 867 So.2d 196, 202 (Miss. 2003).

With respect to Davis's ineffective assistance of counsel claim, that burden has not been met in this case. We invoke a procedural bar as well as a bar under the principle of *res judicata.* "The

doctrine of *res judicata* shall apply to all issues, both factual and legal, decided at trial and on direct appeal." Miss.Code Ann. §99-39-21(3).

Davis correctly observes in his brief that "[t]his Court is familiar with the two-part test for claims of ineffective assistance of counsel." (Brief of Appellant at 6) Interestingly enough, the Supreme Court applied that very standard in Davis's own case after Davis raised the issue of ineffective trial counsel.

An effective assistance of counsel claim levied by Wesley Evans, trial co-counsel, against Michael Rushing, Evans's co-counsel, was decided adversely to Davis's position. In addressing a claim targeting for criticism the content of Rushing's closing argument, this Court found "[t]here was no deficiency and no concomitant prejudice" to Davis. This issue has already been decided adversely to Davis on direct appeal.

In **Durant v. State,** 914 So.2d 295, 296 (Ct.App.Miss. 2005), we find the following language applicable to Davis's motion for post-conviction relief:

> Post-conviction collateral relief is 'to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions issues, or errors which in practical reality could not have been or should not have been raised at trial or on direct appeal.' Miss.Code Ann. §99-39-3(2) (Rev.2000). Post-conviction relief is not the same or a substitute for a direct appeal.

Section 99-39-21 Mississippi Code 1972 Annotated (2000), states, *inter alia*, that "[d]irect appeal shall be the principal means of reviewing all criminal convictions and sentences . . . "

"[P]ost-conviction relief does not lie for facts and issues which were litigated at trial or on appeal." **Smith v. State,** 434 So.2d 212, 215, note 2., (Miss. 1983).

The case of **Crawford v. State,** 867 So.2d 196, 202 (Miss. 2003), sums up our position quite nicely:

> Claims and theories that could have been but were not presented to the trial court or to this Court on direct appeal are procedurally barred from being reviewed by this court on post-conviction review. [citation omitted] Likewise, all issues, both factual and legal, that were decided at trial and/or on direct appeal are barred from review as *res judicata*. Miss.Code Ann. §99-39-21(3)(Supp.2003.

Section 99-39-21 reads, in its entirety, as follows:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.
>
> (2) **The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this chapter upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.**
>
> (3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.
>
> (4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.
>
> (5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.
>
> (6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section. [emphasis supplied]

Two (2) of the three (3) issues presented to the trial court in a post-conviction context deal

with the effective assistance of trial counsel. *See* claims I and III. Davis raised this issue on direct appeal in his appellate brief, and it was decided adversely to him by the Supreme Court.

As noted previously, this Court concurred with the State that Davis failed to identify a deficiency in counsels' *overall performance* sufficient to undermine the integrity of Davis's trial and conviction. We quote:

> The State argues that Davis has failed to demonstrate a deficiency in his counsels' overall performance sufficient to undermine the integrity of his trial and conviction. We agree. There was testimony that Davis admitted shooting into the camp cabin and a confession stating likewise. Rushing's statements during closing presented an alternative defense theory, namely, that Clifton put the shotgun to Davis's head and ordered him to fire. **There was no deficiency and no concomitant prejudice.** This assignment of error is without merit. [emphasis ours]

With respect to his claim of ineffective trial counsel, that issue has already been litigated on direct appeal. Stated differently, Davis has already been there and done that. While the precise grounds or specific legal theories for counsels' alleged ineffectiveness may be somewhat different, Davis is barred, nevertheless, from revitalizing and re-litigating that issue now. **Crawford v. State,** *supra*, 867 So.2d at 202.

Moreover, Davis's new and different grounds or theories for an ineffective assistance of counsel claim "could and should" have been raised "then and there" on direct appeal. It is too late to raise them "here and now" on post-conviction. By failing to raise these legal theories on direct appeal, their consideration and review is precluded on post-conviction review. **Crawford v. State,** *supra*, 867 So.2d 196 (Miss. 2003).

B. The Merits.

In a motion for post-conviction relief, the burden is on the prisoner to prove by a preponderance of the evidence he is entitled to relief. Miss.Code Ann. §99-39-23(7).

The **Davis** decision itself, 849 So.2d at 1256-57, quoting from **Holly v. State,** 716 So.2d 979, 989 (Miss. 1998), states that "[o]nly where it is reasonably probable that but for the attorney's errors, the outcome of the trial would have been different, will we find that counsel's performance was deficient." **Holly v. State** citing **Dickey v. State,** 662 So.2d 1106, 1109 (Miss. 1995); **Read v. State,** 536 So.2d 1336, 1339 (Miss. 1988).

Judge Lewis found as a fact and concluded as a matter of law that

> " . . . Josh Davis has failed to prove by a preponderance of the evidence that the affidavit of Dr. Owen or the testimony of Dr. Owen produces reasonably satisfactory evidence to support the factual allegations in the motion for his request for relief." (Tr. at 88)
>
> * * * * * *
>
> "As far as the ineffective assistance of counsel, based on the testimony of Attorney Evans as well as the incorporation of the trial transcript, the Court finds that it would not have changed the outcome of the trial." (Tr. at 89)

After hearing the testimony of Dr. Owen, a general practitioner, Judge Lewis " . . . disallowed the evidence on the blood splatter patterns and the position of the cartridges, finding that Dr. Owen was not qualified to testify in those areas." (Tr. 87)

This finding was neither clearly erroneous nor manifestly wrong. *See* **Edmunds v. State,** Supreme Court Cause No. 2004-CT-02081-SCT decided January 4, 2007, (¶ ¶ 6-8), slip opinion at pp 4 -6 [Not Yet Reported], where this Court held that testimony pertaining to a two-shooter theory should not have been admitted because, *inter alia*, such testimony was beyond Dr. Hayne's area of expertise.]

In **Davis v. State,** 897 So.2d 960, 967 (Miss. 2004), a post-conviction case similar in many respects to the case at bar, we find the following language penned by this Court:

> Davis's attorneys were presented with a difficult case to

> defend. * * * Under the totality of the circumstances and after reviewing the entire trial transcript, we find that Davis has not shown that his trial and appellate attorneys were ineffective.

The attorneys in Josh Davis's case, much like the attorneys in Kenneth Davis's case, had a difficult case to defend. Davis had confessed the shooting to the police as well as to his girlfriend, Michelle Campbell. The alternative defense that trial counsel allegedly failed to investigate fails to make a great deal of sense and would not have altered the outcome of the trial. Why would Josh Davis fire one or perhaps two shots from the doorway after Clifton Campbell had already entered the camp house and fired at close range the first and fatal shot that blew away half of Arnold's face and skull? Such a defense would have been inconsistent with Davis's confession to the police that he shot the gun *three times* and his confession to Michelle Campbell and Megan Smith, both private persons, that he " . . . shot that mother fucker *three* God damn *times.*" (R. 229-30; State's exhibit 9: R. 429-30)

A defense that Davis fired from the doorway into a corpse after Clifton Campbell fired the first and fatal shot from very close range would have been met head on by Davis's confessions to the police and to a private person.

How would trial counsel have explained this discrepancy to the jury?

And while Davis disparages a defense of duress, the jury could have still exonerated him on this basis even in the absence of a jury instruction authorizing it to do so.

It is elementary that " . . . counsel is given wide latitude in its choice and employment of strategies and defenses." **Crawford v. State,** *supra*, 867 So.2d 196, 210 (Miss. 2003), citing **Hiter v. State,** 660 So.2d 961, 965 (Miss. 1995). The selection of a defense falls within the amorphous zone of trial and litigation strategy. "[T]here is a presumption that decisions made are strategic." **Leatherwood v. State,** 473 So.2d 964, 969 (Miss. 1985).

The following language articulated by the Court of Appeals in **Reynolds v. State,** 736 So.2d 500, 511, (¶ 41) (Ct.App.Miss. 1999), is *apropos* to the issue before the Court:

> "[T]here is no 'single, particular way to defend a client or to provide effective assistance.' " *Handley*, 574 So.2d at 684 (quoting *Cabello*, 524 So.2d at 317). Defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss. 1985). "There is no constitutional right then to errorless counsel . . . " *See Handley*, 574 So.2d at 683 (quoting *Cabello*, 524 So.2d at 315). * * * "

Also relevant here are the following observations made by Justice Cobb in **Jackson v. State,** 815 So.2d 1196, 1200 (Miss. 2002), para. 8:

> Our standard of review for a claim of ineffective assistance of counsel is a two part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State*, 660 So.2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id.* at 965. **With respect to the overall performance of the attorney, 'counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy' and cannot give rise to an ineffective assistance of counsel claim.** *Cole v. State*, 666 So.2d 767, 777 (Miss. 1995). [emphasis ours]

See also **Harris v. State,** 822 So.2d 1129 (Ct.App.Miss. 2002).

At the close of the State's case-in-chief, defense counsel moved for a directed verdict of acquittal of capital murder on the ground the State had failed to prove beyond a reasonable doubt the underlying felony of burglary. Not surprisingly, the jury returned a verdict of murder less than capital.

Defense counsel also sought to reduce the crime to manslaughter by requesting a manslaughter instruction. Although the request was denied, seeking mitigation to a lesser included offense was a reasonable trial strategy.

Judge Lewis found as a fact the affidavit and testimony of Dr. Owen did not pass muster and that based upon the testimony of lawyer Evans as well as the testimony found in the trial transcript, any failure to investigate an alternative defense or object to certain jury instructions would not have changed the outcome of trial.

II.

THE GRANTING OF JURY INSTRUCTION NO. 6 (D-5) DID NOT DENY DAVIS DUE PROCESS OF LAW BECAUSE IT IS IDENTICAL TO A PATTERN JURY INSTRUCTION APPROVED BY THIS COURT.

Jury instruction No. 6 (S-5), the aiding and abetting instruction criticized by Davis both in his points II. and III., is identical to the pattern instruction approved by this Court in **Milano v. State,** 790 So.2d 179, 185 (Miss. 2001), where the Court stated, *inter alia*, that "[t]he use of this instruction should cure future problems regarding this issue."

III.

THE FAILURE TO MAKE A SPECIFIC OBJECTION TO JURY INSTRUCTION NO. 6 (S-5) AND TO ADJUDICATE ITS INTEGRITY ON DIRECT APPEAL BARS REVIEW IN A POST-CONVICTION CONTEXT.

Davis assails for the first time the correctness of jury instruction number 6 (S-5). This instruction was not objected to at trial, and the issue was not presented on direct appeal.

Counsels' failure to object did not amount to a deficiency in their performance because the same instruction, as noted previously, was approved by this Court in **Milano v. State,** 790 So.2d 179, 185 (Miss. 2001).

The passage from **Crawford v. State,** *supra*, 867 So.2d 196, 202 (Miss. 2003), previously quoted and relied upon also bears repeating here:

> Post-conviction review is a limited proceeding whereby this

> Court will only review "those objections, defenses, claims, questions, issues or errors which in practical reality could not or should not have been raised at trial or on direct appeal." *Cabello v. State*, 524 So.2d 313, 323 (Miss. 1988) (quoting Miss.Code Ann. §99-39-3(2) (Supp.2003).
>
> Claims and theories that could have been but were not presented to the trial court or to this Court on direct appeal are procedurally barred from being reviewed by this court on post-conviction review. [citation omitted] Likewise, all issues, both factual and legal, that were decided at trial and/or on direct appeal are barred from review as *res judicata*. Miss.Code Ann. §99-39-21(3)(Supp.2003.

In ruling on this matter, Judge Lewis was eminently correct when she observed that " . . . as to the aiding and abetting instruction, that issue was not allowed and that it was not sufficiently before this Court for post-conviction relief because that was not an issue that this Court could reasonably rely on to grant relief." (Tr. 89)

Finally, Davis's claim that his lawyers' failure to object *may* have resulted in a conviction without the requisite finding of intent is simply not good enough.

CONCLUSION

In **Smith v. State**, *supra*, 434 So.2d 212, 220 (Miss. 1983), we find the following language applicable to the present state of affairs:

> * * * * * * the fair and orderly administration of justice dictates that a person accused of a crime be afforded the opportunity to present his claims before a fair and impartial tribunal. **It does not require that he be given multiple opportunities to "take a bite at the apple."** Likewise, the orderly administration of justice does not require this Court to "lead a defendant by the hand" through the criminal justice system. It is this Court's responsibility to provide a meaningful opportunity for defendant to raise his claims and have them adjudicated. [emphasis supplied]

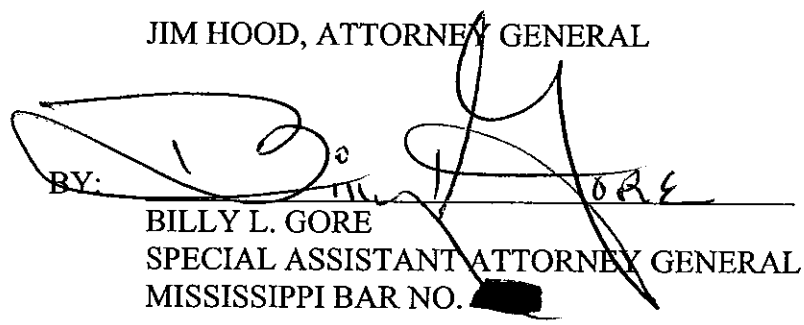
Appellee respectfully submits the Judge Lewis's findings of fact and conclusions of law were neither clearly erroneous nor manifestly wrong. Rather, they were supported by both

substantial and credible evidence.

Davis was not denied the effective assistance of counsel because it cannot be said that but for counsels' mistakes the outcome of trial would have been different. Accordingly, the circuit judge did not err in finding that Davis had failed to prove by a preponderance of the evidence he was entitled to post-conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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Josh Kirk DAVIS

v.

STATE of Mississippi.

No. 2002-KA-00747-SCT.

Supreme Court of Mississippi.

July 17, 2003.

Fifteen-year-old defendant was convicted in the Circuit Court, Yazoo County, Jannie M. Lewis, J., of murder and was sentenced to life imprisonment. Defendant appealed. The Supreme Court, Waller, J., held that: (1) defendant was not entitled to a manslaughter jury instruction; (2) admission of photographs of the crimes scene and two photographs from the victim's autopsy was not error; and (3) evidence was sufficient to support murder conviction.

Affirmed.

1. **Criminal Law ⇐814(20)**

Defendant was not entitled to a manslaughter jury instruction, in prosecution for murder; there was no factual basis for a manslaughter instruction since more than 45 to 65 minutes had passed since the victim had allegedly made unwanted sexual advances at a companion of defendant, defendant did not confront the victim at the time his companion disclosed that the victim had made the advances, and the victim was killed in his sleep.

2. **Criminal Law ⇐770(2), 814(3), 829(1)**

A defendant is entitled to have jury instructions given presenting his theory of the case, but a proposed instruction can be refused if it incorrectly states the law, is fairly covered elsewhere in other instructions, or is without foundation in the evidence.

3. **Criminal Law ⇐438(4, 5.1)**

Admission of photographs of the crime scene and two photographs from the victim's autopsy was not error, in prosecution for murder; the crime scene photographs depicted the angles and trajectories of the gunshots about which forensic pathologist testified, and the photographs were not admitted to inflame the jury.

4. **Criminal Law ⇐1153(1)**

The Supreme Court will not reverse a trial court's decision to admit photographs of a murder victim's body unless the court abused its discretion.

5. **Criminal Law ⇐438(6)**

Photographs of a victim have evidentiary value where they (1) aid in describing the circumstances of the killing and the corpus delicti; (2) where they describe the location of the body and cause of death; and (3) where they supplement or clarify witness testimony.

6. **Homicide ⇐1186**

Evidence was sufficient to support murder conviction, and thus defendant was not entitled to directed verdict; defendant admitted in his third statement to police officers that he fired three shots into the cabin where the victim was sleeping, two witnesses saw defendant running from the cabin with another man, and both witnesses testified that defendant told them that he fired three shots.

7. **Criminal Law ⇐753.2(3.1)**

Motions for directed verdict challenge the sufficiency of the evidence supporting the verdict.

8. **Criminal Law ⇐753.2(5, 8)**

When passing upon a motion for a directed verdict, all of the State's evidence is accepted as true with inferences that can be drawn therefrom, and if the evidence is sufficient to support the verdict of

guilty, the motion for directed verdict must be denied.

9. Criminal Law ⇐641.13(2.1)

Co-counsel's closing argument statements, which encouraged the jury to read all of defendant's statements, "especially the third one where [defendant] incriminates himself," did not prejudice defendant, and thus could not amount to ineffective assistance; there was testimony that defendant admitted to shooting into the cabin where the victim was, and defendant provided a confession to police officers. U.S.C.A. Const.Amend. 6.

Wesley Thomas Evans, Ridgeland, attorney for appellant.

Office of the Attorney General by Billy L. Gore, attorney for appellee.

BEFORE McRAE, P.J., WALLER and COBB, JJ.

WALLER, Justice, for the Court.

¶ 1. Josh Kirk Davis was indicted and convicted of murder in the Yazoo County Circuit Court for the shooting death of William "Bubba" Arnold. Finding no reversible error, we affirm the conviction and sentence of life imprisonment.

FACTS AND PROCEDURAL HISTORY

¶ 2. During the night of July 29, 2000, and the early hours of July 30, 2000, William Arnold, 15 year old Josh Kirk Davis, Blake McNeer, Megan Smith, Michelle Campbell, and Nicki Campbell were at a deer camp in rural Yazoo County, Mississippi, fishing and swimming in a nearby lake. While Davis, McNeer, Smith, and Michelle Campbell were swimming in the lake, the 46–year–old Arnold allegedly made unwelcome sexual advances toward 17–year–old Nicki Campbell.

¶ 3. Upon learning of Arnold's advances toward Nicki Campbell, McNeer confronted Arnold, and Arnold brandished a shotgun and demanded the group leave the property. The group then went to Michelle Campbell's house where, a little later, Mike Campbell, who is Michelle's father, and Clifton Campbell, who is Mike's brother and Nicki's father, returned from a night out. Shortly thereafter, Michelle and Davis informed Clifton of what had occurred earlier between Arnold and his daughter, Nicki. Clifton became enraged and left Mike Campbell's house with Davis. In the meantime, Megan and Michelle had left the house and returned to find Clifton and Davis gone.

¶ 4. Clifton and Davis traveled to the camp where, according to Davis, Clifton pointed a shotgun at him and ordered him to fire into the camp cabin where Arnold was sleeping. Davis took the shotgun and, with Clifton pulling aside the blinds in the door as the door's glass was missing, fired three shots. Davis admitted to firing into the camp cabin in his third statement to police. The shotgun blasts struck Arnold in the face, producing massive injuries and killing him instantly.

¶ 5. After Megan and Michelle returned to find that Clifton and Davis had already left Mike Campbell's house, they drove out to the camp where they found Clifton and Davis running from the camp with Clifton holding a shotgun. The two girls then left and returned a short time later to Mike Campbell's house. Michelle testified that when she questioned Davis about what happened, he said, "I shot him. I shot that mother * * * *er three God damn times."

¶ 6. Megan, Michelle and Davis returned to the camp cabin where they found Arnold lying on the couch. The three re-

turned to Mike Campbell's house, and Davis repeatedly professed his innocence.

¶ 7. Both Davis and Clifton were charged with capital murder with the underlying felony being burglary. After severance, Davis was tried alone and convicted of murder less than capital in a three-day trial. He was subsequently sentenced to life imprisonment. Davis appeals, arguing the trial court erred in refusing to grant a manslaughter instruction, erred in admitting into evidence the gruesome photographs of Arnold's body, erred in refusing to grant a directed verdict, and that co-counsel rendered ineffective assistance of counsel.

DISCUSSION

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GRANT A MANSLAUGHTER INSTRUCTION BASED UPON THE EVIDENCE.

[1] ¶ 8. Davis argues that the trial court erred in denying a manslaughter instruction because the killing occurred in the heat of passion in that Arnold's sexual advances toward Nicki supposedly enraged both Davis and Clifton. The requested manslaughter instruction, D–8, provided, in pertinent part:

> If you find from the evidence in this case beyond a reasonable doubt that JOSH DAVIS and no other person on or about July 30, 2001 [actually 2000] in YAZOO County acting in the heat of passion or with culpable negligence effect the death of William Arnold, then you shall find the defendant guilty of manslaughter.

(emphasis in original).

[2] ¶ 9. A defendant is entitled to have jury instructions given presenting his theory of the case, but a proposed instruction can be refused if it incorrectly states the law, is fairly covered elsewhere in other instructions, or is without foundation in the evidence. *Poole v. State*, 826 So.2d 1222, 1230 (Miss.2002); *Jones v. State*, 797 So.2d 922, 927 (Miss.2001); *Adams v. State*, 772 So.2d 1010, 1016 (Miss.2000); *Higgins v. State*, 725 So.2d 220, 223 (Miss.1998).

¶ 10. In the instant case, there was no factual basis for a manslaughter instruction. The State is correct that any initial passions had cooled and that deliberation and malice had set in. After the youths had returned from the camp, Nicki and McNeer, the person who confronted Arnold about his advances toward Nicki, each went to sleep. Mike and Clifton did not arrive at the house until approximately 30 to 45 minutes later, and the drive back to the camp took about an additional 15 to 20 minutes. Furthermore, Arnold was killed while he was asleep. Davis was also not related by blood to Nicki and Clifton. Given the amount of time that transpired, any heat of passion, assuming such was even present to begin with, cooled into deliberation and malice. This assignment of error is without merit.

II. WHETHER THE TRIAL COURT ERRED BY ADMITTING CERTAIN PHOTOGRAPHS OF THE CRIME SCENE.

[3] ¶ 11. Davis next argues that photographs of Arnold were unduly gruesome and served only to prejudice and inflame the jury. Four of the disputed photographs depicted the interior of the camp cabin and the location and relation of Arnold's body to the interior and blood splatters on the wall and floor. Two other photographs were taken during the autopsy each of which depict the injuries to each side of Arnold's face and head. The State counters that the trial court correctly admitted the photographs because they showed the nature and extent of the injuries Arnold sustained and the circumstances surrounding the incident.

[4, 5] ¶ 12. We will not reverse a trial court's decision to admit photographs of a murder victim's body unless the court abused its discretion. *Simmons v. State*, 805 So.2d 452, 485 (Miss.2001) (citing *Gray v. State*, 728 So.2d 36, 57 (Miss.1998)). We have likewise held that a trial judge's discretion to admit such photographs is nearly limitless regardless of the gruesomeness and repetitiveness. *Woodward v. State*, 726 So.2d 524, 535 (Miss.1997). Photographs of a victim have evidentiary value where they "1) aid in describing the circumstances of the killing and the corpus delicti; 2) where they describe the location of the body and cause of death; and 3) where they supplement or clarify witness testimony." *Westbrook v. State*, 658 So.2d 847, 849 (Miss.1995) (citations omitted). *See also Neal v. State*, 805 So.2d 520, 524 (Miss.2002); *Jones v. State*, 776 So.2d 643, 652 (Miss.2000).

¶ 13. Here, there is no indication that the prejudicial value of the photographs outweighed their probative value. They served the legitimate evidentiary purpose of depicting the angles and trajectories of the gunshots about which Dr. Steven Hayne, the forensic pathologist who performed the autopsy, testified, and they did not to inflame the jury. *See, e.g., McDowell v. State*, 813 So.2d 694, 699 (Miss. 2002); *Stevens v. State*, 808 So.2d 908, 926 (Miss.2002); *Drake v. State*, 800 So.2d 508, 515–16 (Miss.2001); *Milano v. State*, 790 So.2d 179, 191 (Miss.2001). This assignment of error is without merit.

III. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT.

[6] ¶ 14. Davis argues the State never proved he was involved in the murder of Arnold. He further argues that there was no physical evidence placing him at the crime scene.

[7, 8] ¶ 15. Motions for directed verdict challenge the sufficiency of the evidence supporting the verdict. *Bridges v. State*, 807 So.2d 1228, 1231 (Miss.2002); *Smith v. State*, 802 So.2d 82, 86 (Miss. 2001); *Holmes v. State*, 798 So.2d 533, 537 (Miss.2001); *Mallard v. State*, 798 So.2d 539, 542 (Miss.2001). When passing upon such a motion, all of the State's evidence is accepted as true with inferences that can be drawn therefrom, and if the evidence is sufficient to support the verdict of guilty, the motion for directed verdict must be denied. *Hill v. State*, 774 So.2d 441, 447 (Miss.2000); *Fleming v. State*, 732 So.2d 172, 182 (Miss.1999); *Stevenson v. State*, 733 So.2d 177, 183 (Miss.1998); *Mamon v. State*, 724 So.2d 878, 881 (Miss.1998); *Wall v. State*, 718 So.2d 1107, 1111 (Miss.1998).

¶ 16. Here, there was sufficient evidence to support the verdict. Davis admitted to law enforcement in his third statement on August 1, 2000, that he fired three shots into the camp cabin where Arnold was sleeping while Clifton held the blinds aside.[1] Both Megan Smith and Michelle Campbell saw Davis running from the camp with Clifton, and both testified he told them he fired the three shots. Michelle also testified that Josh stated, "I shot him. I shot the mother f* *ker three God damn times." This assignment of error is without merit.

IV. WHETHER CO-COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL DURING CLOSING BY REVEALING STATEMENTS IN VIOLATION OF THE ATTORNEY–CLIENT PRIVILEGE.

[9] ¶ 17. Davis's appellate and trial counsel, Wesley Evans, argues that state-

1. As stated before, the window in the door to the camp was missing its glass.

ments made by trial co-counsel Michael Rushing violated Davis's attorney-client privilege and totally contradicted Davis's trial strategy that Clifton fired the fatal gunshots. The pertinent statements are as follows:

> Now we've got Josh's three statements, and y'all can read them for yourself. Y'all are intelligent folks, and I want you to do that, especially the third one where Josh incriminates himself at least to the extent of saying he fired the three shots, but, at the same time, he provides his defense, which the State cannot counter. They have no testimony or evidence to counter the defense that the gun was put to his head and he was threatened with his life. but I've got a statement here that's not into evidence, but it's my work product, and I'm going to read it to you. It's very brief....
>
> THE COURT: Five minutes.
>
> MR. RUSHING: Okay. It's from August 29th, 2000. Interview: "Josh Davis at Holmes County jail." These are my notes on my initial full interview with Josh.
>
> [DA] POWELL: Your honor, we're going to object to Mr. Rushing reading his notes from an interview. There's nothing in evidence about that.
>
> THE COURT: Sustained.
>
> MR. RUSHING: I can read my statement, my closing statement.
>
> THE COURT: Let's approach the bench.
>
> (AT BENCH OUT OF HEARING OF JURORS)
>
> THE COURT: You can't read anything that is not a part of the evidence that the defense—
>
> MR. RUSHING: I can't talk about it?
>
> THE COURT: Not unless it came out as evidence in this trial.
>
> MR. RUSHING: It's exactly the same as his third statement.
>
> THE COURT: If it is the same, then you can testify, but you can't testify if this is something that came out of an interview that you had with him, because it's not in evidence.
>
> MR. RUSHING: Okay. I understand.
>
> (END OF BENCH CONFERENCE)
>
> MR. RUSHING: Well, I'm not going to read you the statement, but suffice it to say that I have been representing Josh since less than a month after this unfortunate occurrence, and, at no time, has he given me varying versions of what happened. And at no time has he wavered from the contention that Clifton Campbell put that shotgun to his head and said, "Boy, if you don't shoot up in there, I'm going to blow your head off." And he was drunk and he was mean, and he meant it, at least to Josh.

¶ 18. We outlined the standards to be applied when addressing issues of the ineffective assistance of counsel in *Holly v. State*, 716 So.2d 979, 989 (Miss.1998):

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove that his attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687–96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Wilcher v. State*, 479 So.2d 710, 713 (Miss. 1985); *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984). This Court looks at the totality of the circumstances to determine whether counsel's efforts were both deficient and prejudicial. *Carney v. State*, 525 So.2d 776, 780 (Miss.1988); *Read v. State*, 430 So.2d 832 (Miss.1983). "Judicial scrutiny of counsel's performance [is] highly deferential." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. There is a strong but rebuttable pre-

sumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Carney*, 525 So.2d at 780; *Gilliard v. State*, 462 So.2d 710, 714 (Miss.1985). Only where it is reasonably probable that but for the attorney's errors, the outcome of the trial would have been different, will we find that counsel's performance was deficient. *Dickey v. State*, 662 So.2d 1106, 1109 (Miss.1995); *Reed v. State*, 536 So.2d 1336, 1339 (Miss.1988).

¶ 19. The State argues that Davis has failed to demonstrate a deficiency in his counsels' overall performance sufficient to undermine the integrity of his trial and conviction. We agree. There was testimony that Davis admitted shooting into the camp cabin and a confession stating likewise. Rushing's statements during closing presented an alternative defense theory, namely, that Clifton put the shotgun to Davis's head and ordered him to fire. There was no deficiency and no concomitant prejudice. This assignment of error is without merit.

CONCLUSION

¶ 20. Finding no reversible error, we affirm the judgment of the Yazoo County Circuit Court.

¶ 21. **CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED.**

PITTMAN, C.J., McRAE AND SMITH, P.JJ., COBB, DIAZ, EASLEY, CARLSON AND GRAVES, JJ., CONCUR.

Robert Lester COX

v.

STATE of Mississippi.

No. 2001-KA-01427-SCT.

Supreme Court of Mississippi.

July 17, 2003.

Defendant was convicted in the Circuit Court, Tallahatchie County, George C. Carlson, Jr., J., of murder. Defendant appealed and State cross-appealed. On denial of rehearing, the Supreme Court, Waller, J., held that: (1) jury could reasonably conclude that defense of suicide did not constitute a reasonable hypothesis of innocence; (2) law enforcement officers did not act in bad faith in allegedly destroying physical evidence at murder scene, and thus defendant's constitutional right to due process and fundamental right to a fair trial were not violated; (3) hearsay testimony was admissible as a present sense impression and as an excited utterance exception to the hearsay rule; (4) prejudicial impact of witness's testimony did not outweigh the probative value, and thus evidence was relevant in murder trial; and (5) State's comments during closing argument on murder defendant's failure to explain the fact that his shotgun killed victim were not improper comments on defendant's failure to testify.

Affirmed.

1. Criminal Law ⇐552(3)

Direct evidence is unnecessary to support a conviction so long as sufficient circumstantial evidence exists to establish guilt beyond a reasonable doubt.

CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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