IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2006-KA-02058 COA

MIKIMIE TENILLE BROWN
a/ka/ Mikime Brown a/k/a Mikimie Kim Brown — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200
Counsel for Mikimie Tenille Brown

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CASES:

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ISSUE NO. 2: (Improper Opinion Evidence About Mental Health)

All of the cases cited by the state under this issue were decided before *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). As pointed out by appellant in the initial brief, after *Daubert*, the proper tests here address whether the area of testimony is one where a jury would need assistance and whether the witness is duly qualified. The state is asking the court to apply the wrong outdated standards.

ISSUE. NO. 3: (Evidence of Diminished Capacity Excluded At Trial)

The state misses the point of the appellant's argument here. Diminished capacity is not asserted here as a "defense". The appellant's position is that, on the question of intent, diminished capacity would be relevant, particularly the post event activity under the authority of *Garrison v. State*, 726 So. 2d 1144, 1151 (Miss. 1998), which the state did not address.

ISSUE NO. 4: (Confusion About Culpable Negligence) The state does not explain why "tantamount to willfulness" in the questioned instruction does not confuse and imply deliberate design.

Contrarily, the state cites the inapplicable case of *Chandler v. State,* 946 So. 2d 355 (Miss. 2006). The *Chandler* decision stated that an instruction similar to the one given here *did not apply* in that case. On the other hand, the *Chandler* decision restated a different definition for culpable negligence:

> culpable negligence is defined as 'the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk thereof.

According to the current *Merriam-Webster Dictionary* definition, the word "tantamount" means "equivalent in value, significance, or effect". (http://www.m-w.com) Telling a jury that a negligent act is the equivalent of a willful act is confusing.

ISSUE NO. 6 (Improper Closing Argument)

The state did not respond to any of the appellant's arguments under this issue. According to the controlling authority, the state has, therefore, waived all opposition to the claimed error. *Sumrall v. State,* 758 So.2d 1091, 1094 (Miss. App.2000) and *Magee v. State*, 542 So.2d 228, 234 (Miss.1989). Under the authority cited initially, a reversal would be required.

CONCLUSION

Kim Brown is entitled to have the murder and arson convictions reversed and remanded back to the Circuit Court for a new trial, or at a minimum, to have the court render a conviction of manslaughter under count one of the indictment and remand for resentencing.

Respectfully submitted,

MIKIMIE TENILLE BROWN

BY: George T. Holmes

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 3d day of August, 2007, mailed a true and correct copy of the above and foregoing Reply Brief Of Appellant to Hon. Michael R. Eubanks, Circuit Judge, P. O. Box 488, Columbia MS 39475, and to Hon. Doug Miller, Dist. Atty , 500 Courthouse Sq., Ste. 3, Columbia MS 39429, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200 Counsel for Mikimie Tenille Brown