IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COLT ALLEN CHRISTIAN — APPELLANT

VS. — NO. 2007-KA-0758

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

COLT ALLEN CHRISTIAN **APPELLANT**

vs. **CAUSE No. 2007-KA-00758-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Jackson County, Mississippi in which the Appellant was convicted and sentenced for his felony of **AGGRAVATED ASSAULT**.

STATEMENT OF FACTS

On 19 June 2005, Jackson County Sheriff's Deputy Robert Zwick was dispatched to a location around the Forks Lake fire department to investigate what at the time was believed to be a hit and run accident. An Ellis Roberts was reported to be following a jacked up, purple truck. Zwick happened to know the Appellant and that the Appellant drove such a vehicle.

There was then a report of a fight occurring at the location; then afterwards a report of an accident with injuries. When Zwick arrived, he found Roberts' truck backed into a ditch. Roberts was inside, bleeding profusely. Zwick saw no damage to Roberts' truck, other than that

the driver's window had been knocked out. This was puzzling to Zwick, given the report of an accident. But he finally got the matter straight when paramedics informed him that Roberts' had suffered a gunshot wound.

While Zwick was at the scene, the Appellant drove up, though in another vehicle. The Appellant appeared to be nervous and upset. The Appellant claimed that his brother Caleb was driving the purple truck. (R. Vol. 2, pp. 132 - 150).

Mrs. Doris Moorman testified that she and her husband notice a smaller truck and a big truck, the small truck in front and the big one behind it. At some point, the big truck struck the rear of the small truck. The driver of the small truck pulled over, but the big truck kept driving on. So the driver of the small truck followed the big truck. The trucks came to a stop sign located not far from Forts Lake Road. Both stopped. As the big truck started to cross the intersection, the small truck passed it. The trucks were driving very close together. (R. Vol. 3, pp. 191 - 198).

Lieutenant Ken McClenic of the Jackson County Sheriff's Department was sent to investigate the shooting. The Appellant's residence was not far from the scene of the shooting. He went there and found the Appellant outside of a garage, leaning against a vehicle, holding his hand. As McClenic got out of his vehicle, the Appellant told him, "I did it. Let's go. Take me to jail. I am ready to go." McClenic tried to calm the Appellant down and then read him his rights. The Appellant told him where the purple truck was and where the gun was located. The Appellant verbally consented to a search of the house. The gun was found there. The gun had no live bullets, but it did have a spent casing.

The Appellant told McClenic that his girlfriend and he were driving in the purple truck. A person pulled out in front of him, which annoyed the Appellant. So the Appellant "bumped"

that individual's vehicle. The Appellant then continued on toward his home. He stopped, though, to confront the person he had bumped. At that point, thinking that Roberts was "going for something," the Appellant shot Roberts. The Appellant claimed he shot Roberts in self - defense. The Appellant was then taken to hospital for treatment of an injury to his hand. (R. Vol. 3, pp. 226 - 239).

The victim testified. He stated that he had no recollection of the shooting or the events before or after the shooting. An audio recording of a 911 call he made was played, and he identified his voice. He then recalled making the call, which he had done after the Appellant "bumped" his vehicle, and following the Appellant's vehicle. He then described the various disabilities he suffered from in consequence of having been shot.

The victim denied having had a weapon in his truck at the time he was shot, denied having gotten out of his truck before he was shot. (R. Vol. 3, pp. 269 - 281).

A crime scene technician testified as to what she collected from and around the victim's truck. No gun was found, but she did find drops of blood that came from the Appellant. She also found a cell phone. She also found shards of glass. She found the outside casing of a bullet. (R. Vol. 3, pp. 206 - 234).

Roberts was treated for a gunshot wound to his head. He suffered the loss of his right eye as a result. He required extensive medical treatment. (R. Vol. 3, pp. 159 - 175). He continued to suffer handicaps in consequence of the shooting. (R. Vol. 3, pp. 180 - 188).

The transcript of the victim's 911 call (State's Exhibit 22) demonstrated that the victim was calling for help after the Appellant bumped the victim's truck. The recording caught the Appellant telling the victim, "Get out of your g___ d_____ truck bitch," to which the victim replied, "Whoa, easy buddy." The last statement was by the victim reporting that the Appellant

had a gun and that the Appellant was hitting the victim's truck.

The defense then produced a case - in - chief. The Appellant's father testified. He said that he went to his son's home the day after his son shot Roberts to look at a jet ski. The jet ski had been damaged and it appeared to have been struck from behind. (R. Vol. 4, pp. 300 - 302).

The Appellant then testified. He stated that, earlier on the day he shot Roberts, his girlfriend and he had been entertaining themselves with a jet ski. The couple were driving back to the Appellant's home when they encountered "Mr. Gene," this being between the Oaks and Catfish Cabin. Roberts was said to have pulled up on the right side of the Appellant vehicle; Roberts began cursing the Appellant.

The Appellant said he sped up and tried to get away from Roberts. However, Roberts passed him. The Appellant turned onto Franklin Creek Road and got back in front of Roberts. At this point both drivers were driving fairly fast. At one point Roberts slowed a bit, and the Appellant bumped Roberts' truck.

Roberts pulled to the side of the road. The Appellant said he did not stop because he did not know what was going on, did not know why Roberts was upset. Anyhow, the Appellant did stop at a stop sign. He said he was bumped in turn by Roberts. The Appellant made a turn onto the road in which he lived, but he stopped on the side of the road so that Roberts would not see where he lived. Roberts followed and stopped.

The Appellant said he got out of his truck to find out why Roberts was upset with him. According to the Appellant, it appeared that Roberts was about to get out of his truck, a thing the Appellant did not want him to do. So the Appellant pushed Robert's door. As he did so, the Appellant gun fired. At that point, Roberts put his truck in reverse and went into Franklin Creek Road.

The Appellant testified that he did not know that Roberts had been shot. The Appellant returned to his vehicle and went to his home. He stated that he did not intend to shoot Roberts. He said he thought that the slide on his pistol was what caused the injury to his hand.

The Appellant admitted having told McClenic that he had shot Roberts, and he admitted that he did consent to a search of his home.

On cross-examination, the Appellant admitted that Roberts and he were driving fast and that at one point he, the Appellant, was just several feet from Robert's bumper. He admitted that if he had been afraid of someone in that situation he would have backed off, rather than driving closely behind.

He also admitted that he did not tell McClenic about how the chase began. He denied having told an emergency room physician that he had accidentally bumped another vehicle; that the driver of that vehicle became irate and began following him; that when the Appellant pulled over to the side of the road and exited his vehicle, the Appellant thought he was reaching for an unknown object, he discharged his weapon. He also denied having told the doctor that he had punched the back window and driver's window out of Roberts' truck.

The Appellant admitted having gotten out of his truck, armed with a gun. He stated that he was not afraid of the victim at that point. He did not recall Roberts telling him to go easy. He could not give a straight answer as to whether he ordered the victim out of the truck or whether he was trying to keep the victim from getting out of the truck. He denied having shot Roberts in self defense; he claimed that the shooting was accidental. (R. Vol. 4, pp. 303 - 321).

An expert witness for the defense testified that the gun used by the Appellant was an older weapon. If the slide of the gun were blocked by the Appellant's hand, then the gun would fail to eject a fired shell. The gun was in working order. If the Appellant had been out of

shooting position, the gun cold still be fired. If so, it was possible that the Appellant was out of shooting position and that his hand blocked the slide. (R. Vol. 4, pp. 325 - 346; 361 - 366)

On cross- examination, however, the witness admitted that the gun had three or four safety mechanisms, any one of which, if engaged, would have prevented the gun from firing. The hammer had to be pulled back in order to fire the gun. The gun would not fire unless the trigger was pulled with the safeties off. (R. Vol. 4, pp. 367 - 375).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN SUSTAINING THE STATE'S OBJECTION TO THE DEFENSE EXPERT WITNESS QUALIFICATION AS A SHOOTING RECONSTRUCTIONIST?

2. WAS THE VERDICT SUPPORTED BY THE EVIDENCE?

3. WERE THERE CUMULATIVE ERRORS COMMITTED WHICH ACTED SO AS TO DEPRIVE THE APPELLANT OF A FAIR TRIAL?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN SUSTAINING THE STATE'S OBJECTION TO THE DEFENSE EXPERT WITNESS' QUALIFICATION AS A SHOOTING RECONSTRUCTIONIST

2. THAT THE VERDICT IS SUPPORTED BY THE EVIDENCE

3. THAT THERE WERE NO CUMULATIVE ERRORS RESULTING IN A DENIAL OF A FAIR TRIAL FOR THE APPELLANT

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN SUSTAINING THE STATE'S OBJECTION TO THE DEFENSE EXPERT WITNESS' QUALIFICATION AS A SHOOTING RECONSTRUCTIONIST

The defense called one James O'Dell Bowman to the stand and attempted to qualify him in the field of firearms and something called shooting reconstruction.

In the presence of the jury, the witness stated that he had been a navy SEAL during the

Vietnam war and that he worked for two years as a law enforcement office in California. He worked for the Pascagoula police department for twenty - one years. He was familiar with firearms and was a "master shooter" and a police sniper. He was in charge of criminal investigations at the time he retired from the Pascagoula police department.

He claimed that he attended an Institute of Police Technology and Management in Jacksonville, Florida, where, he said, he learned firearm reconstruction.

The witness then went on to describe how the gun that the Appellant used to shoot Roberts operated. He described the result of his testing of that gun. He concluded that the reason why the gun had a spent shell lying in its chamber was that something had blocked the slide. (R. Vol. 4, pp. 325 - 333).

The defense then asked Bowman of his opinion as to whether it was the Appellant's hand that blocked the slide. To this the State objected, asserting that the witness had not been shown to be an expert in the field of toolmark identification or firearm injuries. This objection was sustained. The defense then tendered the witness as an expert in firearms. (R. Vol. 4, pg. 333)

The State the requested and was granted *voir dire* of the witness. However, under the belief that the defense was seeking to qualify the witness as an expert in firearms only, it withdrew its objection. When the defense attempted to have the witness testify that it was his opinion that it was the Appellant's hand that interfered with the movement of the slide, the State objected. That objection was sustained. (R. Vol. 4, pg. 334).

The witness then testified that the Appellant's gun never malfunctioned when he tested it. Bowman then shot the weapon incorrectly. The result was that the slide struck his hand. The fired shell remained in the chamber.

The witness then testified that he spoke with the Appellant prior to trial about the

shooting. Based on what the Appellant told him, Bowman concluded that the weapon struck the window or door of the victim's truck. When asked what he thought happened when the victim's truck was struck with the weapon, the State again objected, asserting that the witness had not been qualified to be an expert in the putative field of firearm shooting reconstruction. This objection was sustained. (R. Vol. 4, pp. 334 - 336).

The defense then, still in the presence of the jury, attempted to qualify Bowman as an expert in that alleged field. Bowman testified that had investigated between two and five hundred crime scenes. They had on occasion tried to ascertain the angle at which a weapon was fired and the location of the shooter when the weapon was fired. He testified that he had been to school to learn how to do these things. Upon this, the defense tendered Bowman as an expert in the field of shooting reconstruction; the State was granted *voir dire*. (R. Vol. 4, pp. 336 - 337).

In the course of this examination, Bowman stated that he was an accident reconstructionist and that he had attended sixty - two courses in accident reconstruction. He had attended one course in shooting reconstruction. He said he had course in unresolved death investigations and other criminal investigations that dealt with shootings in particular.

One course Bowman claimed to have taken was one he described as "crime scene reconstruction of shooting incidents." However, the school's website listed no such course. There was a course called "crime scene reconstruction." Still, Bowman maintained he attended a course called "gunshot reconstruction" though he had no certificate for it.

Bowman was not a member of any group known as "the Association for Crime Scene Reconstruction." He admitted that that group did shooting reconstruction.

Bowman thought he was a member of the International Association of Bloodstain Pattern Analysts, but it turned out that he was not. He thought that was because he had failed to pay his

dues.

The trial court was still unconvinced that Bowman had been shown to be an expert in the field of shooting reconstruction expert or that it had been established that there was such a field. So, the defense soldiered on, yet again trying to establish these things.

Bowman claimed to have reconstructed shootings some twenty or thirty times during his career as a policeman. He also claimed that the same "technology," to use defense counsel's work, for shooting reconstruction was the same as accident reconstruction. It all came down to the effects of gravity and road or air friction. At that point, the trial court sent the jury out of the courtroom (R. Vol. 4, pp. 337 - 346).

The court explained its role as the "gatekeeper" under M.R.E 702. It then informed the witness that it had thusfar not heard anything in particular as to the qualifications of the witness. It had heard nothing in particular of what the associations mentioned did insofar as training, education or experience. There was nothing to show what experience the witness had in testifying or rendering opinions in his purported fields of expertise.

The witness then testified that shooting reconstruction involves the attempt to determine where a bullet came from in the course of examining a crime scene. In one case, this determination allowed a conclusion as to the height of the shooter. That crime scene was "fresh," however.

In the case at bar, Bowman visited the scene about a month and a half before trial. There was no evidence apparent at the scene when he visited it. Bowman did talk to the Appellant, and he examined the gun the Appellant used. He examined photographs of the vehicles involved.

The witness then testified that he had concluded that the gun was fired while it was being jarred, that the shooter's hand was out of position, and that this was why the fired shell remained

in the chamber. He thought the gun was fired while the Appellant was pushing on the driver's window of the victim's truck.

The State objected to the admission of this conclusion on the ground that it was based upon speculation. There was no evidence that the gun fired while the Appellant was pushing on the window. The State asserted that the conclusion was not reliable and thus not relevant, and that Bowman was not demonstrated to have the qualifications necessary to offer such an opinion. The trial court sustained the objection on those grounds. (R. Vol. 4, 346 - 355).

But the defense still was not finished! The witness then demonstrated how he thought the gun was fired. While it is difficult to tell from the record what was exhibited, the essence of the demonstration was that the hammer of the gun was cocked, the Appellant's finger was on the trigger, and that in some way or another the gun was hit from the front. Thus the shooting, according to the witness, was accidental.

At long last there was a final ruling on the question. The witness was found to qualify as an expert in firearms, but not in the alleged field of shooting reconstruction. However, the court did determine that the witness could testify that the gun might have fired if jarred. The expert could not testify that a jarring of the gun caused the injuries to the Appellant's hand. (R. Vol. 4, pp.356 - 360).

The witness testified before the jury that the gun could have fired if the shooter's hand was jarred out of position. (R. Vol. 4, pp. 364 - 366).

The Appellant claims that the trial court erred in its ruling. We bear in mind that it is a matter left to the discretion of a trial court whether to find that a proposed expert may testify as such. This Court will not find an abuse of that discretion unless the decision is shown to be arbitrary or clearly erroneous. *White v. State*, 964 So.2d 1181 (Miss. Ct. App. 2005).

The Appellant has urged nothing here to show that the decision was arbitrary or clearly erroneous. What he has done is complain that the decision to refuse to permit Bowan to testify as to his opinion that the gun somehow accidentally fired compromised the defense. It did not: the Appellant could and did offer evidence of this.

The Appellant has not demonstrated that there is a field of expertise known as "shooting reconstruction." No books, treatises, studies or materials such as those were offered to the trial court to demonstrate the existence of and reliability of the field. Similarly, though given much time to do so, the Appellant failed to demonstrate that the witness possessed sufficient training or experience in the putative field so as to be qualified as an expert in it. We have found no decision in this State's decisions recognizing the field.

Under M.R.E. 702, it was the Appellant's burden to establish that: (1) that the alleged field of shooting reconstructionist was specialized knowledge that would assist the trier of fact; (2) that Bowan was qualified by knowledge, skill, experience, training or education to testify as such an expert; (3) and that the testimony was based upon sufficient facts or data, that it is based upon reliable principles and methods, and that Bowan reliably applied those principles and methods in the case at bar. Here, all that Bowan said he did was to fire the gun the Appellant said he used. He confirmed that the gun was in working order and that by blocking the action of the slide one would cause a fired shell to remain in the chamber. But in no way did Bowan explain by what principles and methods he divined that the Appellant's gun fired "accidentally."

Beyond this, we submit that the proposed testimony – that the gun "accidentally" fired while striking the victim's vehicle – was at best speculative. There were a number of assumptions made about correct and incorrect firing positions. These in turn assumed that the Appellant would have known how to fire the gun correctly. These in turn assumed the location

of the Appellant's hand on the gun.

The Appellant was permitted, though Bowan, to introduce evidence as to how the gun worked. Likewise, it was in evidence that the gun was in working order and that the only way to account for the presence of the fired shell in the chamber was that the slide was blocked. The injuries to the Appellant's hand were proven. It was not necessary that the expert testify to this. The Appellant himself testified to this. (R. Vol. 4, pg. 310).

In the event that this Court should find that it was error to refuse to permit the expert to testify as a shooting reconstructionist, any error should be held to be harmless. The theory that the gun went off accidentally was established before the jury. Bowan testified that the gun could be knocked out of position in the hand and that the gun could still be fired. The Appellant testified that the gun went off accidentally. The defense of accident was fully established.

The Appellant mentions something about a discovery issue. There was an imbroglio about whether the Appellant disclosed what he was required to disclose, but this played no part when it came to determining whether the witness' testimony qua shooting reconstructionist would be admitted. It is unnecessary to consider that part of the case.

The First Assignment of Error is without merit.

2. THAT THE VERDICT IS SUPPORTED BY THE EVIDENCE

In considering the Appellant's Second Assignment of Error, we bear in mind the standard of review applicable to it. *May v. State*, 460 So.2d 778 (Miss. 1984).

The evidence in support of the verdict, taken as true, together with all reasonable inferences therefrom, is that the Appellant, annoyed by the driving behavior of the victim, bumped the victim's bumper. When the victim pulled over, apparently assuming that the Appellant would stop, the Appellant drove on. The victim followed the Appellant, called 911.

At some point, the Appellant and the victim stopped their vehicles. The Appellant was out of his truck, armed, even though there was no reason for him to be armed, holding his testimony aside for the moment. The 911 call transcript clearly shows that the Appellant ordered the victim out of his truck, using abusive language in doing so. The victim's words as shown in that transcript clearly indicate that he was offering no threats of any kind to the Appellant. The Appellant broke the driver's side window. The victim was then shot by the Appellant. This was a completely clear case of aggravated assault.

In the course of the investigation, the Appellant admitted that he had shot Roberts. He claimed, though, contrary to his trial testimony, that he fired in self - defense. He claimed that he thought Roberts was reaching for something.

By the time of trial, the Appellant decided that his act of shooting Roberts was an accident. He claimed that he was trying to keep Roberts inside his truck when the gun went off. Moreover, he testified that Roberts instigated the difficulty by pulling up beside him in an angry and threatening way, though he, the Appellant, did not know why.

The Appellant's testimony was contradicted and impeached in several ways. First, as we have said, he first claimed that he shot in self - defense, and then claimed accident. Secondly, in his account of what happened in the initial investigation, he did not claim that the chase between himself and Roberts began far before the point where they were observed by a witness. Thirdly, the tone of the voices on the audio tape clearly show who was the aggressor, and it was the Appellant. Fourthly, the gun had four safeties and could not be fired unless all were disengaged, the hammer cocked, and the trigger pulled. Then there was the fact that as Deputy Zwick was present as medical personnel were tending to Roberts, the Appellant drove by in another vehicle and told Zwick the lie that someone else was driving the purple truck.

And these were the major inconsistencies. Consequently, the Appellant's claim that his testimony was uncontradicted is flatly untrue. The Appellant's story of accident was rebutted.

It is difficult to see how accident was involved in this shooting. Clearly, the Appellant instigated the difficulty and then introduced deadly force into it. Since self - defense was expressly abandoned by the Appellant, it simply made no sense why the Appellant had a loaded, cocked gun on his person when he accosted the victim at the victim's truck unless it was the Appellant's intent to shoot the victim. Had this shooting been an accident, it is difficult to understand why the Appellant drove by the shooting scene in someone else's car, acting nervous. The evidence was wholly sufficient to permit a reasonable jury to find guilt.

The fact that the Appellant's blood was at the scene means nothing. He injured himself.

That there was some slight damage to the jet ski might or might not have indicated that the victim bumped the Appellant's truck. Clearly, though, the Appellant bumped the victim's truck.

The Appellant's claim, perhaps, boils down to a suggestion that, while he did instigate the difficulty, and did engage in an assault on the victim, his gun somehow went off accidentally. The absurdity of this, if this is what the Appellant means, ought to be manifest: One simply cannot expect to engage in the acts the Appellant committed, yet somehow not be responsible for the foreseeable consequences of them.

The Second Assignment of Error is without merit.

3. THAT THERE WERE NO CUMULATIVE ERRORS RESULTING IN A DENIAL OF A FAIR TRIAL FOR THE APPELLANT[1]

The Appellant asserts that there was a "concerted plan to eliminate his defense of an accidental shooting." While not clear, in support of this notion, he re-asserts the issue concerning the witness Bowman. To that extent, we incorporate here our response to that issue.

He also alleges that the State indicted the Appellant's girlfriend as an accessory after the fact for the sole and specific reason of eliminating her as a witness for the defense. She was indeed so indicted on 2 August 2006. (Defendant's Exhibit 2). She was indicted on the same day and year as the Appellant. (R. Vol. 1, pg. 5). She did indeed elect to invoke her privilege not to testify. (R. Vol. 4, pp. 295 - 298).

There is nothing in this record to support the claim that the State indicted her for no other purpose than to prevent her from testifying. We do not find that the record supports the claim that the indictment was served only two days before the Appellant's trial, as claimed by the Appellant. On the other hand, we find noted on the indictment against the girlfriend that she was "at large."

The Appellant did not raise this issue in the trial court. The only thing discussed in the trial court was how to permit the girlfriend to invoke her privilege. Consequently, any allegation that the State somehow improperly indicted the girlfriend is not before this Court. *Rogers v. State*, 928 So.2d 831 (Miss. 2006).

Beyond this, the record simply does not support any claim of prosecutorial vindictiveness. There is nothing is the record concerning the girlfriend's actions, such that she became an

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[1] The Appellant numbers this issue as his fourth issue. Yet, we find that only three assignments of error are presented in this appeal.

accessory after the fact. The Court knows nothing of the case against her, or even what occurred with respect to the indictment against her. It is impossible to say from this record that there was no genuine case against the girlfriend. It was the Appellant's duty to present a record sufficient to support his claims of error. *Smith v. State*, 572 So.2d 847 (Miss. 1990). In absence of anything to show that the indictment was obtained not because she was an accessory after the fact, but for some other reasons, there is no basis to consider "prosecutorial vindictiveness."

There is some obscure comment about the emergency room doctor and the 911 transcript. However, the Appellant does not appear to urge any error in this respect, and in any event no argument or citation to authority is provided. Those comments are to be disregarded. *Owens v. State*, 869 So.2d 1047 (Miss. Ct. App. 2004).

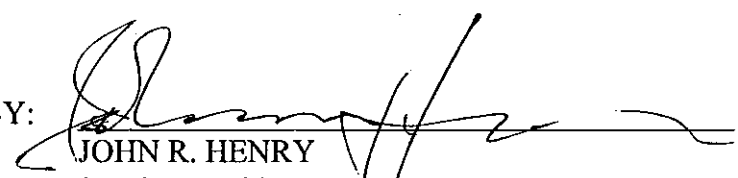
The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, 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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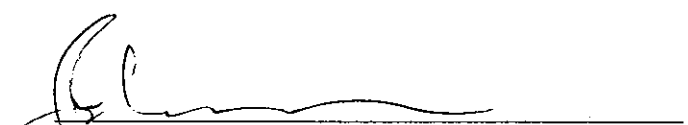
This the 24th day of March, 2008.



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