IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANNY ALLEN WESTBROOK — APPELLANT

VS. — NO. 2008-KA-0436

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**

**DANNY ALLEN WESTBROOK** **APPELLANT**

**vs.** **CAUSE No. 2008-KA-00436-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 Harrison County, First Judicial District, in which the Appellant was convicted and sentenced for his felony of **MURDER**.

## STATEMENT OF FACTS

Daniel Wilson testified that he was involved with one Nicole Ross on 22 August 2006. On the evening of that day, he met Ross at a place known to the record as Buddy's Inn between nine and half past ten. Ross brought along a friend, a person by name of Sabrina.

While socializing with Ross, Wilson saw a man walk through the door and head to the bar. This man, whom he identified as the Appellant, got a bat from behind the bar and went back outside the bar. Wilson stated that the Appellant was "in a hurry," that "[h]e had a purpose to

what he was doing." Wilson did not know whether the Appellant was in trouble, but, thinking that the Appellant might need help, he followed him outside the bar. Several other people also went outside the bar.

Once outside the bar, Wilson saw the Appellant strike a man with the baseball bat several times. There was some talking or hollering between the victim and the Appellant. Other people in the parking lot were hollering as well. The victim had no weapon so far as Wilson could see. The Appellant struck the victim on the shoulder. The Appellant struck him at least two more times in the head. No one else was involved in the fight. The Appellant swung the bat with considerable force. ( R. Vol. 2, 10 - 28).

Sabrina Dellamonica, an employee of a bowling alley, testified that she and her friend Nicole went to Buddy's at about half past eleven. While at the bar, she observed an altercation between a female and someone named George. The female had taken money from George, or so George thought. The result of this altercation was that the Appellant put George out of the bar. Naturally, there was a verbal confrontation between the Appellant and George; George was loud and a little mad.

George left the bar and went to his pick'em up truck. Dellamonica then saw the Appellant take a baseball bat from behind the bar. The Appellant then left the bar with the baseball bat. Dellamonica and her friend heard some yelling from without the bar. They went to the door to see what the commotion was about. What she saw was the Appellant pulling George out of his truck and then striking George with the bat. George fell to the ground, and the Appellant then hit him in the head with the bat. She thought that the Appellant hit George some three or four times. At that point, Dellamonica went back into the bar and ordered another beer because she, as she put it, "[was] not stupid," "especially in a place like Buddy's."

The Appellant came back into the bar and gave the bat to the bartender, who put the back into a back room. A few minutes later, the bartender called law enforcement. Dellamonica said that she was then told by the Appellant and the bartender that she had not seen anything and that she did not know anything. The police arrived, but Dellamonica did as she was told. She did not give a statement at that time. As she put it, "I [was not] going to raise my hand and be like, yes, I saw it all while I [was] still in a place like that." She took a taxi home and later did give a statement to the police. ( R. Vol. 2, pp. 28 - 40).

Nicole Ross then testified. She said that she too was employed at the bowling alley at which Dellamonica was employed. She stated that Dellamonica and she left the bowling alley at about half past one on the morning of 22 August 2006. They wanted a beer and ended up at Buddy's Inn after finding that other places were already closed. Daniel Wilson met them there.

When they arrived, there were only three or four patrons present. After about twenty minutes of their arrival, a man and a woman got into a dispute about twenty dollars, it being the man's opinion that the woman had taken his twenty dollars. The Appellant was at the time sitting at the bar, having a drink. Ross took him to be the bar's "bouncer." When the dispute erupted, the Appellant intervened and the man and he argued for a few minutes. At some point in all of this, the Appellant told the man, "Not in my bar!", and told the man to leave the bar. The man did as he was told.

About twenty minutes later, two black men walked into the bar and announced that the man who had been told to leave had returned. The Appellant told the bartender, "I'm going to jail tonight." The Appellant got a little red baseball bat and went outside the bar. The man never re-entered the bar. No doubt curious, Ross and her party also went to the door to see what was about to happen.

Ross saw the Appellant strike the victim on the back of the neck with the bat. Then the Appellant hit the victim in the back of the head, splitting the victim's head open. The victim fell to the ground, and the Appellant struck him again with the bat. The Appellant then picked up the victim's head and dropped his head to the ground. This all occurred in the parking lot of the bar, the parking lot being made of concrete.

Ross further testified that she heard the victim say to the Appellant, just before the Appellant struck him that, "You do not want none of this, son." The victim was walking toward the Appellant, but the victim had nothing in his hands.

Having finished doing what it took to go to jail, the Appellant went back inside the bar and gave the bat to the bartender. The bartender washed the bat off while the Appellant paced and sipped from his drink. Ross and her friends screamed that the victim needed an ambulance. The Appellant went back outside the bar. Ross and her party left as law enforcement arrived. (R. Vol. 2, pp. 40 - 60).

The victim, George Sharpe, died in consequence of fracture of the skull, bruising of the brain, internal bleeding inside the head and massive brain swelling. A bat used with sufficient force would be expected to cause such injury. No defensive wounds were found. ( R. Vol. 2, pp. 61 - 75).

Matthew A. Newport was an officer with the Gulfport police department on 22 August 2006. He was dispatched at about a quarter of three on the morning of that day to Buddy's Lounge upon the report that an assault had been committed there. When he arrived, he found the victim lying face down next to a red Dodge truck, who had a massive head injury. Newport took statements from several people he found at Buddy's Lounge, including the Appellant's statement. The Appellant told Newport that he had had an altercation with the victim but that he simply told

the victim to leave the bar. The Appellant said he never saw the victim again until someone came into the bar and told him that the victim was outside the bar, bleeding. The Appellant denied having physically touched the victim.

Newport found a red baseball bat and several other bats and pool cue inside a storage area of the bar. After talking to other witnesses, Newport arrested the Appellant and took the Appellant and the red bat to the police station. ( R. Vol. 2, pp. 76 - 84). Once at the police station, officers noticed that the Appellant had dried blood on his hands. ( R. Vol. 2, pg. 93).

## STATEMENT OF ISSUES

**1. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT; WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?**

**2. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MANSLAUGHTER INSTRUCTION?**

**3. WERE THE INSTRUCTIONS GRANTED ON CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER CONFUSING?**

**4. DID THE TRIAL COURT ERR IN REFUSING A SELF - DEFENSE INSTRUCTION?**

**5. WAS THE APPELLANT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL?**

## SUMMARY OF ARGUMENT

**1. THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE**

**2. THAT THE TRIAL COURT DID NOT ERR IN NOT GIVING AN INSTRUCTION BASED UPON MISS. CODE ANN. SECTION 97-3-31**

**3. THAT THE TRIAL COURT DID NOT ERR IN GRANTING INSTRUCTIONS ON CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER**

**4. THAT THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT AN INSTRUCTION OF DEFENSE OF SELF**

**5. THAT THE RECORD IN THE CASE AT BAR IS INSUFFICIENT TO DETERMINE WHETHER THE APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL; THAT ALLEGED INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL DO NOT DEMONSTRATE A DEFICIENT PERFORMANCE OF COUNSEL OR PREJUDICE TO THE APPELLANT**

## ARGUMENT

**1. THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT; THAT THE VERDICT WAS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE**

In considering the Appellant's First Assignment of Error, we bear in mind the standards of review appurtenant to them. *May v. State*, 460 So.2d 778 (Miss. 1984).

SUFFICIENCY OF THE EVIDENCE

The Appellant asserts that the case never should have been given to the jury since, according to the Appellant, he was not guilty of murder. If the Appellant is to be believed, and he surely is not to be believed, he committed a justifiable homicide as defined either by Miss. Code Ann. Section 97-3-15(1)(e) or Section 97-3-15(3) (Rev. 2006). Section 97-3-15(1)(e) provides that the killing of another human being shall be justifiable when committed by a person in resisting an attempt by the other to unlawfully kill the person, or to commit any felony upon him at, *inter alia* any place of business or employment or premises thereof in which such person shall be. Section 97-3-15(3) creates a presumption that a person who used defensive force against another did so while having reasonably feared imminent death or great bodily harm or, among other things, the commission of a felony upon him or against his business or immediate premises thereof.

It is not clear, though, whether the Appellant actually intends to say that the evidence was insufficient to support the verdict, or whether his claim is that the trial court erred in failing to instruct the jury on these provisions in Section 97-3-15 *sua sponte*. The Appellant's argument

tends to drift from a claim that the jury should have been so instructed to a claim that the evidence was insufficient to support the verdict of murder because the facts showed that the homicide was justifiable under either of these provisions.

First of all, as adumbrated by appellate counsel for the Appellant, no instructions on these provisions of Section 97-3-15 were sought by the defense. This being so, no complaint about the lack of them may be raised now. *E.g. McDowell v. State*, 983 So.2d 1003 (Miss. Ct. App. 2007). The Appellant, though, while conceding that the trial court was under no duty to instruct the jury or suggest instructions to the jury, says that the trial court was under such a duty because these defenses were "readily apparent", citing *McGregory v. State*, 979 So.2d 12 (Miss. Ct. App. 2008). (Brief for the Appellant at 7).

*McGregory* does stand for the proposition that a trial court may initiate or give jury instructions. But what the Appellant has not pointed out is that this Court, in the very same breath, noted that a trial court is not required to do so. *McGreogry, supra*, at 18. *McGregory* in no way changed the rule that a trial court is under no duty to instruct a jury *sua sponte*. Because there is no such duty, contrary to the Appellant's assertion here, there can be no abuse of discretion by a trial court where it does not take it upon itself to craft or suggest instructions for a jury. The trial court committed no error in not instructing the jury under Section 97-3-15(1)(e), (3).

The Appellant then goes on to assert that the evidence showed that he was defending his place of employment or the premises thereof. Thus, he says, the evidence was insufficient to support the verdict of murder. This, even though that was not the theory of the defense at trial. Since that was not the theory of defense at trial, it may not be raised here. Nonetheless, assuming for argument that the theory is properly before the Court, there is no merit in it.

Briefly restated, the evidence showed that the Appellant ejected the victim from the bar. Sometime later, the victim returned to the parking lot of the bar. When the Appellant was informed of this, he got a baseball bat and remarked that he was going to jail. He went out into the parking lot. The victim was said to have told the Appellant that, "You do not want some of this son." The Appellant struck the victim with the baseball bat, disabling him. The Appellant then continued to strike the victim with considerable force. After the victim had been well beaten with the bat, the Appellant picked up the victim's head and then let it fall to the concrete.

The Appellant re-entered the bar, gave the bat to the bartender, who cleaned the bat, and told the patrons remaining at the bar that they had seen nothing. When interviewed by the police, the Appellant denied having touched the victim and denied having known that the victim was without the bar.

With respect to the victim, there was no evidence that he was armed. There was some testimony to the effect that there were words between the victim and the Appellant just before the blows were struck, but absolutely no evidence that the victim assaulted the Appellant, or even threatened to do so. There was no evidence of a forcible entry onto the premises.

These facts, which are not contradicted, hardly demonstrate a case in support of the "Castle Doctrine." While it may be that the victim might be characterized as a trespasser, by having come upon the property after having been told to leave it, the mere fact that he came onto the property hardly gave the Appellant a license to assault and kill him. *Atterberry v. State*, 261 So.2d 467 (Miss. 1972). While it may or may not be that the so - called "Castle Doctrine" expands somewhat the law of defense of self, another and habitation, it is certainly no authority that mere trespassers may be killed out of hand.

The facts do not support a theory under Section 97-3-15(3) because there was no evidence

that the victim "unlawfully and *forcibly*" entered the parking lot. Under Section 97-3-15(3), it is not enough to demonstrate that the entry was unlawful. Such entry must be accompanied with evidence that it was also done by force. There was no such evidence here.

And then there was clear evidence of the Appellant's state of mind just prior to and after he so brutally attacked the victim. Prior to the attack, the Appellant stated that he was going to jail; after the attack he instructed the witnesses that they had seen nothing, and he later lied to the police. These facts clearly show premeditation. As significantly, the Appellant simply did not make the claim that he was defending himself or his place of employment to the police. He simply denied knowledge of how the victim came to his end.

The facts simply did not demonstrate a case under the "Castle Doctrine." The Appellant would not have been entitled to an instruction under it had he requested one. That being so, it is unnecessary to consider whether it was "plain error" that the trial court did not grant one *sua sponte*. In any event, it is hardly plain that the trial court committed error by not granting an instruction based upon the "Castle Doctrine."

There was no evidence at all that the Appellant killed the victim in the course of resisting an attempt by the victim to kill him or commit some felony upon him. Since there was no evidence to support such an instruction, there would have been no error to refuse one had one been requested.

The Appellant then claims that the trial court should not have submitted the case to the jury with a murder instruction, claiming that the facts "support a killing under Miss. Code Ann. Section 97-3-31." (Brief for the Appellant at 9).

As we have said above, there was substantial proof of deliberate design murder or of depraved heart murder on the part of the Appellant: He indicated that he knew he would be going

to jail before he so viciously attacked the victim; he told the eyewitnesses that they had seen nothing; he lied to the police about his involvement. And then there is the fact that the force used by the Appellant was far in excess of what would have been necessary to send a trespasser on his way. The victim was disabled by the first blow – a blow that in itself was excessive. Yet the Appellant continued to beat the victim long after the victim had been overcome. These and other facts established by the State supported murder, and the trial court committed no error in permitting the jury to consider murder. *Cf. Lester v. State*, 862 So.2d 582 (Miss. Ct. App. 2004)(Facts that the accused accosted victim with a deadly weapon together with lack of evidence of a sudden provocation sufficient to reasonably suggest heat of passion and the fact that excessive force was used against unarmed victim supported verdict of murder).

The Appellant relies upon *Wells v. State*, 305 So.2d 333 (Miss. 1974), for the proposition that the facts in the case at bar showed no felony greater than manslaughter as defined by Section 97-4-31. In *Wells*, however, the evidence was that there was a sudden affray between the accused and the victim, and one precipitated by the victim while engaged in an unlawful act. The victim was said to have grabbed the accused's throat, and the accused took out his knife and held it against the victim's shoulder or neck. The defense was that the victim tripped or slipped, and cut himself on the knife held by the accused. The Court did find that the facts showed no homicide greater than manslaughter, but the Court also stressed the fact that there was no evidence of malice. In the case at bar, as we have just said, there was considerable evidence of malice. *Wells* is thus not on point.

The evidence presented by the State, taken as true, together with all reasonable inferences from it would certainly have permitted a reasonable juror to find the Appellant guilty of murder.

WEIGHT OF THE EVIDENCE

In his argument in support of the notion that the most he committed was manslaughter, the Appellant focuses on a number of what he describes as barroom or juke joint killings.

The first decision discussed is *Dedeaux v. State*, 630 So.2d 30 (Miss. 1993). The facts of the case, according to the Court, were confused and conflicting except the fact that the accused did kill the victim. Here, however, except for minor conflicts in the evidence, there is simply no question that the Appellant, without need or reason, took hold of a bat and went out to the parking lot to confront the victim. He used highly excessive force, and there was no indication that he had a reasonable belief that he was about to be attacked. The victim in *Dedeaux* was the aggressor and had been chasing the accused, and at one point he apparently threatened the accused. These are not the facts in the case at bar. Nor is it a fact in the case at bar, unlike in *Dedeaux*, that the prosecution and the trial judge thought the case to be one of manslaughter rather than murder.

In *Clemons v. State*, 473 So.2d 943 (Miss. 1985), the Court thought the evidence sufficiently confused and conflicting as to cast reasonable doubt on the verdict of murder. Again, here the evidence is not conflicting in any significant way. The testimony was that the Appellant savagely beat the victim, a fact borne out by the pathologist's testimony, and that the Appellant was the aggressor. The Appellant, though, would have the Court believe that the victim provoked the difficulty by returning to the bar. To the extent that was a provocation, and we do no concede that it was, that did not give the Appellant a license to do what he did. The Appellant says that his comment about going to jail was merely a boast that he was going to give the victim a good lesson. However, that characterization is not supported by the record, and thus to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983).

In *Tait v. State*, 669 So.2d 85 (Miss. 1996), the evidence was that two friends had been playing with a gun. At one point, one friend put the gun to the forehead of the other, and the gun went off. The one who pointed the gun at the other's forehead fell to the floor in tears. The discussion by the Court concerned whether the evidence showed depraved heart murder or culpable negligence manslaughter. If found that the evidence supported culpable negligence manslaughter only. Dispositive to this finding were the facts that the accused was disconsolate immediately after the shooting, together that there was no evidence that he knew the gun was loaded or even that he pulled the trigger.

In the case at bar, a culpable negligence manslaughter instruction was given. However, it is no surprise that that theory was rejected by the jury. In the case at bar, the Appellant grabbed a bat with hostile intent, and after having so brutally beaten the victim, he lied about his involvement and told the bar patrons that they had seen nothing. There is nothing here to demonstrate that the most proved by the State was manslaughter.

The Appellant would have this Court treat the case at bar as a routine juke joint shooting, almost as though there were such a crime known as that. However, again, the essential facts of what occurred in this case were clear and were not disputed except in small and insignificant details. To the extent that the Appellant believes there is a body of law specific to "juke joint shootings," or that there should be, one characterized by confused, booze - tinged recollections of what occurred, that is not the case here. Regardless of whether the Appellant's first "strike" with the bat struck the truck, all witnesses agree that the victim was quickly disabled and that the Appellant continued to beat him, without need or purpose. And the Appellant then, having critically injured the victim, picked his head up and let it drop on the concrete pavement. The Appellant's action can only be thought of as having been committed out of pure malice or with a

depraved heart.

The Appellant would have this Court believe that the victim entered the fray because of the victim's statement to the Appellant. Yet, there was no "fray" at that time. The Appellant simply attacked, without need or cause. While it is true that the victim approached the Appellant after seeing that the Appellant had armed himself for a fray, evidently with the purpose of defending himself, the victim never assaulted or attempted to assault the Appellant. The Appellant attacked and kept attacking. To the extent this could be called a fray, and it cannot, it was one begun and ended by the Appellant.

The cases cited by the Appellant involve either highly confused accounts of a homicide or an instance of tomfoolery that ended in tragedy. In the case at bar, the Appellant seized hold of a bat, mercilessly beat an unarmed man to death, and then tried to cover up his involvement in the matter, going so far at to lie to the police about it. If indeed this was a case of repelling an attack or an unlawful act, one would surely think that the Appellant would have said that, rather than lying about it all. The verdict in the case at bar does not constitute an unconscionable injustice. The trial court therefore did not abuse its discretion in refusing to grant a new trial.

The First Assignment of Error is without merit.

**2. THAT THE TRIAL COURT DID NOT ERR IN NOT GIVING AN INSTRUCTION BASED UPON MISS. CODE ANN. SECTION 97-3-31**

The Appellant filed a proposed instruction, D-19 ( R. Vol. 1, pg. 48), in which three forms of manslaughter were set out. One of those forms found its authority under Miss. Code Ann. Section 97-3-31 ( Rev. 2006). The other two were heat of passion manslaughter and culpable negligence manslaughter. While an instruction on culpable negligence manslaughter was ultimately given, this instruction, D-19, was not given by the trial court, and the Appellant

here asserts error.

During the conference on jury instructions, the trial court asked the prosecutor about his position on the giving of a manslaughter instruction as a lesser - included offense. The prosecutor initially stated that, in his opinion, there was no evidence in support of a manslaughter instruction. The trial court then indicated that it believed that the facts of the case tended to support culpable negligence manslaughter more than heat of passion manslaughter, but then stated that "that issue is not before me." The colloquy then drifted into a discussion about "depraved heart culpable negligence," at which point the trial court observed that, if the prosecution objected to a manslaughter instruction and if it did not grant a manslaughter instruction, that would leave the Appellant without a defense.

At this point the Appellant's attorney chimed in. He stated that he could provide a decision which discussed manslaughter in the absence of heat of passion. The trial court returned to its discussion culpable negligence manslaughter and depraved heart murder. At that point the prosecutor indicated that he would request a depraved heart murder instruction if the court were of a mind to give a manslaughter instruction. The discussion then turned to whether the indictment would have to be amended to permit a charge of depraved heart murder.

After further discussion, the trial court asked the attorney for the Appellant whether he wanted a manslaughter instruction, to which the attorney responded affirmatively. The trial court then asked the attorney which form of manslaughter he desired. The attorney stated that he wished to have a culpable negligence instruction. At that, the trial court instructed the prosecutor to prepare an instruction that included deliberate design murder, depraved heart murder, and culpable negligence manslaughter. It instructed the defense to prepare certain instructions, to "do a culpable negligence." ( R. Vol. 2, pp. 111 - 118). A culpable negligence manslaughter

instruction was given, D-50-A ( R. Vol. 1, pg. 30).

As we have said, the Appellant now claims that the trial court erred in failing to give D-19, asserting that there was evidence to support the versions of manslaughter set out in that instruction. It is said that the trial court "compelled" the defense to accept culpable negligence manslaughter. (Brief for the Appellant at 21).

The trial court did not "compel" the defense to accept culpable negligence manslaughter. The record is quite clear that the court asked the defense which form of manslaughter it desired, just as the record is very clear that the defense elected culpable negligence manslaughter. The defense did not, at that point, assert that it should be granted instructions under other forms of manslaughter; it clearly made the decision, all by itself, to select culpable negligence manslaughter as the defense theory. ( R. Vol. 2, pg. 115).

It is true that the trial court expressed the view that the facts of the case suggested, to it, culpable negligence manslaughter more than heat - of - passion manslaughter. But it never actually denied the heat - of - passion manslaughter instruction on the ground that there was no evidence in support of it. And the same is true for the form of manslaughter set out in Section 97-3-31: the court did not address it, and the defense, when given the opportunity to state which form or forms of manslaughter it wished to have, clearly elected culpable negligence manslaughter, to the exclusion of the other forms set out in D-19.

Had the defense wanted the other forms of manslaughter as well as culpable negligence, it should have made that point at the time the court asked what form or forms it wanted, if not earlier in the course of the discussion. The defense should have pressed for a definitive ruling with respect to those other forms. By not doing so and by affirmatively stating which form it wanted, it effectively withdrew D-19 to the extent of the those other forms. Where a party

withdraws its request for an instruction, it may not base a claim of error on the fact it was not given.[1] *Guilbeau v. State*, 502 So.2d 639 (Miss. 1987). Furthermore, because the defense did not press for definitive ruling concerning the other forms, it may not complain here about the lack of those instructions. *Baker v. State*, 930 So.2d 399 (Miss. Ct. App. 2005).

In view of this, it is unnecessary to consider whether there was sufficient evidence in the case to allow for an instruction under Section 97-3-31. The defense clearly and expressly made the decision to go forward with culpable negligence and eschewed the other forms of manslaughter set out in D-19.

The Appellant asserts that there was sufficient evidence to allow for an instruction under Miss. Code Ann. Section 97-3-33 (Rev. 2006). It does not appear that any instruction filed by the defense involved this form of manslaughter. No complaint about the matter may be made now. Besides this, it appears to us that that form of manslaughter would have been embraced by Section 97-3-31.

As for heat - heat - of - passion, had the defense pressed for that instruction, and had the trial court refused the instruction, there would have been no error in such a ruling. There was no evidence that the Appellant was in the state of mind required for the grant of such an instruction. *Givens v. State*, 967 So.2d 1, 11 (Miss. 2007). The Appellant had the presence of mind to know that he was going to go to jail, and after he finished beating the victim he returned to his drink, telling bar patrons that they had not seen anything.

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[1] It is true that D-19 is marked as "refused". However, it is clear, from the statements of the trial court and the defense attorney that it was so marked because the defense elected culpable negligence and was requested to draft and did draft another culpable negligence instruction. D-19 was shown as "refused" for this reason, not because the trial court stated that it would not give an instruction on the other forms of manslaughter.

Finally, we note that instruction D-19 was an abstract instruction. It would have been properly denied for that reason.

The Second Assignment of Error is without merit.

**3. THAT THE TRIAL COURT DID NOT ERR IN GRANTING INSTRUCTIONS ON CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER**

In the Third Assignment of Error, the Appellant contends that the instructions granted on murder, depraved heart murder and culpable negligence manslaughter did not properly and completely state the law. Specifically, the Appellant complains that none of the instructions given explained the difference between the three theories of liability. Consequently, says the Appellant, he was denied due process of law. However, the Appellant does not appear to get round to explaining, exactly, what the trial court should have instructed the jury about beyond those instructions it did grant. It appears, though one cannot be certain, that the Appellant thinks the trial court should have granted an instruction contrasting depraved heart murder with culpable negligence manslaughter.

First of all, we note that the defense did not request an instruction that would have attempted to distinguish these felonies. Since it did not request such an instruction, the Appellant may not complain of the matter here. *Anderson v. State*, 904 So.2d 973, 977 (Miss. 2004). Nor did he request an instruction defining culpable negligence or object to the lack of such an instruction. He may not complain of the lack of such instruction now. *McDowell v. State*, 984 So.2d 1003, 1013 (Miss. Ct. App. 2007). It is true that the Appellant submitted instruction D-50, in which he added language concerning recklessness to the statutory language, in an attempt to explain culpable negligence, but this was not an attempt to distinguish depraved heart murder from culpable negligence. The Appellant was apparently merely trying to explain the concept of

culpable negligence only. In any event, the phrase "reckless, negligent conduct" was not of itself of much use to distinguish this form of manslaughter from depraved heart murder, and, in fact, was not sufficient to do so. *Roberson v. State*, 2007-KA-01412-COA (Miss. Ct. App., Decided 24 February 2009, Not Yet Officially Reported)(Example of what the Court described as a proper definition of culpable negligence). Nonetheless, Instruction D-51 properly defined culpable negligence.[2]

The Appellant claims that this Court has recently described the difference between culpable negligence manslaughter and depraved heart murder in *Staten v. State*, 989 So.2d 938 (Miss. Ct. App. 2008). It is true that the Court described the difference between these felonies, relying upon *Windham v. State*, 602 So.2d 798 (Miss. 1992). However, nowhere in the opinion of this Court was it held that a trial court must give an instruction to distinguish these three felonies.

The trial court asked the attorneys to provide a definition of culpable negligence, and this was incorporated into D-51 ( R. Vol. 2, pp. 122 - 123; Vol. 1, pg. 54).

The instructions that were given on the felonies of murder and depraved heart murder, S-4 ( R. Vol. 1, pp. 23 - 24), when read together and along with D-51 ( R. Vol. 1, pg. 54) and S-2 (R. Vol. 1, pg. 22) were sufficient to guide the jury. Deliberate design was explained in S-2. In S-4, with respect to depraved heart murder, the language "while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, disregarding the value of human life" was sufficient to explain to the jury what that form of murder was. Instruction D-50-A informed the jury that the killing of a human being by the act, procurement or culpable

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[2] D-51 is not marked as given or refused. However, it was given. ( R. Vol. 2, pg. 123).

negligence of another was manslaughter. D-51 defined culpable negligence and included the "reckless disregard" language. The text of these instructions were sufficient to apprise the jury of the distinctions among the felonies. The sentence "negligence of a degree so gross as to be tantamount to a wanton disregard of or utter indifference to the safety of human life" in D-51 clearly distinguished itself from the depraved heart murder instruction. They are not in conflict with each other.

The Appellant complains that the trial court did not permit the defense to amend D-50. D-50-A was a much more thorough instruction on culpable negligence. It matters not at all that D-50 was not amended in view of D-50-A.

The Third Assignment of Error is without merit.

**4. THAT THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT AN INSTRUCTION OF DEFENSE OF SELF**

As pointed out by the Appellant in his brief, the defense in effect withdrew its proposed instructions on self defense by stating that it could not in good faith proceed on a theory of self defense. (Brief for the Appellant at 26). The Appellant may not now assert error on account of the fact that the trial court did not grant an instruction on self defense. *Guilbeau v. State*, 502 So.2d 639 (Miss. 1987).

There was no evidence to support in instruction on self defense. According to the testimony, when the Appellant heard that the victim was outside of the bar, he armed himself with a bat, said that he was going to jail that night, and went outside to confront the victim. It is true that the victim walked toward the Appellant, but it is also true that the testimony was that he unarmed. The victim did tell the Appellant that, "You do not want none of this, son," but this statement, given its context, cannot be seen as some indication that the victim intended to attack

the Appellant. When the victim made this statement, the Appellant was already in an aggressive stance. ( R. Vol. 2, pp. 48 - 52). While the Appellant here might characterize it as a defensive posture, that characterization is unreasonable given the fact that the Appellant armed himself, stated that he was going to jail, and then went out to the parking lot. Quite clearly, the Appellant was the aggressor. On the other hand, there is not the first word of testimony to show or indicate that the victim was attacking or was about to attack the Appellant. The Appellant did not tell police officers that he acted in self - defense; he lied to them and said he knew nothing about the matter until someone told him that the victim was outside, bleeding.

It is true, of course, that an accused has the right to have his jury instructed as to his theory or theories of the case, even where the evidence in support of it or them is meager. Here, though, the evidence in support of self defense was not meager; it was non - existent. The Appellant armed himself in advance, the victim was not armed and did nothing more than to walk toward the Appellant and tell him that he did not want to get into a confrontation. This was no self - defense case. *Chandler v. State*, 946 So.2d 355 (Miss. 2006).

The Fourth Assignment of Error is without merit.

**5. THAT THE RECORD IN THE CASE AT BAR IS INSUFFICIENT TO DETERMINE WHETHER THE APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL; THAT ALLEGED INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL DO NOT DEMONSTRATE A DEFICIENT PERFORMANCE OF COUNSEL OR PREJUDICE TO THE APPELLANT**

The Appellant *pro se* filed a "Motion for a New Trial or Motion for Reconsideration," in which he alleged that his trial attorney was ineffective in a number of ways. ( R. Vol. 1, pp. 67 - 69). The Appellant's attorney filed a "Motion for Judgement *Non Obstante Verdicto* or for New Trial in the Alternative" ( R. Vol. 1, pp. 63 - 64), relief upon which was denied by the trial court. ( R. Vol. 1, pg. 89). It does not appear that the trial court ruled upon the *pro se* motion. Because

the Appellant did not press for a ruling on his motion, that motion was abandoned. *Smith v. State*, 986 So.2d 290 (Miss. 2008). Nonetheless, appellate counsel has adopted the Appellant's complaints about his trial attorney here, and asserted them as instances of ineffective assistance of counsel.

Preliminarily, we do not agree with the Appellant that the record before the Court is adequate to determine that counsel was ineffective. As will be seen, many if not all of the instances alleged by the Appellant involve strategic choices made by the trial attorney. The record does not and cannot shed light on the reasons why the attorney did or did not do what he did or did not do. We further note that the question to be resolved by the Court is whether the trial court had a duty to declare a mistrial or order a new trial on account of counsel's performance. *Colenburg v. State*, 735 So.2d 1099 (Miss. Ct. App. 1999). Here there is nothing shown to indicate that the trial court should have declared a mistrial or granted a new trial on the basis of ineffective assistance of counsel.

The first complaint is that the attorney did not give an opening statement. The defense reserved opening statement. When it came time for the defense to produce its case - in -chief, no opening statement was presented. This is hardly surprising since there was practically no case - in -chief presented by the defense. ( R. Vol. 2, pg. 102). The purpose of an opening statement is to introduce the jury to the facts the party making the statement intends to prove. Where there is not going to be a case - in -chief, there seems to be little purpose in making a statement.

The decision to reserve or make an opening statement is a matter of trial strategy. *Richardson v. State*, 918 So.2d 760 (Miss. Ct. App. 2005). That being so, the fact that counsel did not give an opening statement is not a fact to support a finding of ineffective assistance of counsel. The fact that one was not made does not demonstrate or suggest a lack of strategy.

The next complaint is that counsel called only one witness. Here, however, the Appellant does not indicate what witnesses would have been available and of benefit to the defense case. It is impossible here to say that the failure to call witnesses was an instance of ineffective assistance of counsel in the absence of any indication that there were witnesses to call. It may be that the few questions asked of the one witness called by the defense went to an obscure purpose, but these questions did not prejudice the defense.

The Appellant then asserts that his attorney failed to inform the trial court that the Appellant did not have a criminal record. What is worse, according to the Appellant, is that the attorney filed a motion *in limine* to prohibit the State from proving any prior conviction had by the Appellant. The Appellant speculates that this misconception by the attorney might well have caused him to advise the Appellant not to testify under the mistaken belief that the Appellant could be impeached by his prior convictions.

First of all, there was no evidence produced concerning the Appellant's prior convictions, if any there were. Secondly, while it may be that the Appellant claimed that he had no prior convictions, there is nothing to substantiate that claim. Thirdly, and perhaps most importantly, whether the Appellant was advised not to testify under counsel's mistaken belief that the Appellant could be impeached by prior convictions is a claim – or a suggestion – that cannot be resolved here. The record simply does not support that suggestion.

The Appellant further claims that the trial court should have had a hearing on whether the Appellant's trial attorney was mistaken about the Appellant's prior criminal history. No authority is cited in support of that assertion, and we are not aware of the existence of any authority to such effect. Beyond this, the claim made by the prisoner in his filing in the trial court was: that the attorney "failed to properly inform the court that the defendant have (*sic*) no

past criminal history, counsel in fact filed a motion he would not have to speak about defendant (*sic*)." How this statement would have caused the trial court to understand what present counsel says that Appellant meant is difficult to see.

The next claim is that the trial attorney failed to explain the law of self - defense to the Appellant. According to the Appellant, that this is so is "obvious" since the attorney did not pursue self - defense as a defense.

This is not obvious. The facts established by the State demonstrated the unavailability of the defense. There is otherwise nothing at all in this record to show that the attorney did not explain the law of self - defense to the Appellant. That the defense did not attempt to establish a defense of self - defense might well have been on account of the fact that there was no testimony available for the purpose. This particular claim simply cannot be determined on direct appeal, the record being entirely insufficient to do so.

In a footnote, the appellate counsel notes that the Appellant claimed that the attorney failed adequately investigate or prepare for trial. (Brief for the Appellant, at 31, fn. 14). There is nothing in this record to substantiate this claim.

The Appellant then points to the defense attorney's summation, in which the attorney told the jury that the Appellant "killed the situation," and stated that he used the term deliberately. The Appellant has cited that part of the summation in which this comment was made. (Brief for the Appellant, at 32). It is said that the attorney effectively told the jury that it could not acquit the Appellant.

That the Appellant killed Sharpe was a fact that was not in dispute, just as how he killed him and how he came to kill him were not in dispute. This being so, it would not have behooved the attorney to be coy about what the proof indisputably showed. The Appellant "killed the

situation," as the attorney put it, and no good would have come to the defense by attempting to avoid that fact. It never harms the credibility or effectiveness of an attorney to admit what cannot be credibly denied.

The balance of the attorney's summation was clearly aimed at convincing the jury that the Appellant was not guilty of murder. It is true that the defense more or less conceded that the killing did not occur in self - defense, but then, given the instructions to the jury, which did not include self - defense, this was not surprising.

The jury's options were malice murder, depraved heart murder, culpable negligence manslaughter, or not guilty. A verdict of not guilty was not reasonably likely, given the facts concerning the killing itself and the extent of injury the Appellant caused, leading to the victim's death. Self - defense, even had there been an instruction on it, was not a likely finding by the jury given the absence of any serious indication that the victim was about to cause the Appellant death or serious harm, and given the fact that the beating administered by the Appellant was highly excessive. Consequently, it was a reasonable choice to attempt to steer the jury away from murder, more or less suggesting that manslaughter would be a proper verdict. To attempt to go whole hog and argue for an acquittal, under the facts of the case, would have risked annoying the jury.

As the Appellant notes, conceding guilt to a lesser - included offense can be regarded as sound trial strategy. *Faraga v. State*, 514 So.2d 295 (Miss. 1987). Here, though, the defense attorney never actually expressly conceded the Appellant's guilt for manslaughter. What he conceded was (1) that the Appellant killed Sharpe and (2) that it might not have been in self - defense. The primary aim of the argument, apparently, was an attempt to avoid a conviction of murder. This was not unreasonable under the facts of the case, and was not an instance of

ineffective assistance of counsel.[3]

Continuing on with this attack on his attorney, the Appellant then says that his attorney was ineffective because he did not press forward with three versions of manslaughter set out in Instruction D-10 (*sic*). (Brief for the Appellant at 33). First of all, again, the trial court did not compel the attorney to accept culpable negligence manslaughter. The attorney was asked what form of manslaughter and he chose culpable negligence. He did not seek one or more forms of manslaughter alleged in Instruction D-19 besides culpable negligence manslaughter.

The decision as to what instructions to seek is a matter of trial strategy. *Myhand v. State*, 981 So.2d 988 (Miss. Ct. App. 2007). The record here offers no clues as to the attorney's views, but it may well be that he decided that since the killing itself was not in dispute, and since he was of the view that a case of self - defense had not been made out in the evidence, the issue basically came down to whether the killing was murder or manslaughter. Which form of manslaughter was more of an academic question, given the fact that the same penalty for all the ones set out by the proposed instructions was the same. Miss. Code Ann. Section 97-3-25 (Rev. 2006). In light of the attorney's summation, it seems sufficiently clear that the defense rested on the idea that the victim's death resulted from a culpably negligent use of force. Had the defense sought an

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[3] The Appellant claims that the phrase "kill the situation" is ineffectiveness *per se*, evidently because the prosecutor used it in a quip on rebuttal. The Appellant does not explain why this should be so, nor does he cite authority as to why it should be so. Needless to say, it happens quite often in trials that attorneys attempt to hoist their adversary on his own rhetorical petard. That this sometimes happens is no indication of itself that someone has been ineffective. Here, the "kill the situation" phrase was meant to connect the story the attorney began with in his summation with the facts of the case at bar. In any event, we see no prejudice to the Appellant: again, it was not in dispute that he killed Sharpe. The attorney could have admitted that the Appellant killed Sharpe. Another way of putting it, since Sharpe had previously caused a "situation", was that the Appellant killed the situation. It was no more prejudicial to say that he killed a situation than it was that he killed Sharpe, and it was not prejudicial at all since that fact was simply not in dispute.

instruction under Miss. Code Ann. Section 97-3-31 (Rev. 2006), the defense argument to the jury would have been very little different from the one it made in support of culpable negligence.

Nonetheless, the Court is here told that any number of versions of manslaughter was supported by the evidence and should have been sought. It may well have been the trial attorney's view, though, that a cloud of instructions on various ways to commit manslaughter would have been confusing to the jury. It may have been his thinking, too, that the defense risked being thought desperate and simply grasping for straws by asking for so many forms of manslaughter. There is nothing in the record to show that the choice made by the attorney was not the product of a reasonable trial strategy. There is certainly no basis in this record to find that the trial court should have declared a mistrial on account of the decision by the defense to forego these instructions.

There was nothing in support of a heat of passion manslaughter theory. The facts were that the Appellant took hold of a bat, had the presence of mind to realize that he was going to jail if he carried through with what he was intending to do, and that after he finished beating the victim, returned to his drink. There was nothing to show that the Appellant was in the kind of rage necessary to support the giving of the instruction.

The Appellant then asserts that the defense should have requested a manslaughter instruction on the basis of "mutual combat." The Court is told that the case at bar is analogous to the facts in *Robinson v. State*, 773 So.2d 943 (Miss. Ct. App. 2000). However, the facts are not analogous. In *Robinson*, the facts were that the victim and the accused intended to and did engage in mutual combat, that the accused armed himself with a knife, and that the accused repeatedly stabbed the victim in the course of the fight. Here, there was no mutual combat. While it may be that the victim told the Appellant that he did not want to get into a fight, or

words to that effect, there was no mutual combat: the Appellant attacked the victim without the victim having offered violence to him. The Appellant cites *Conner v. State*, 179 Miss. 795, 177 So. 46 (1937) for the notion that the victim's statement and act of walking toward the Appellant were sufficient acts to show a willingness to enter mutual combat. *Conner* does nothing of the sort. There, the accused struck the victim, dazing the victim. A third party pushed the victim to cause him to stand upright, but the victim fell upon a metal object, which caused his death. The case concerned the issue of whether there was an intervening cause of death. The Court simply noted that there was no evidence to show that the victim in that case did enter or was about to enter into mutual combat with the accused.

There was no evidence that the victim wanted to fight the Appellant, notwithstanding the Appellant's interpretation. The victim's words tend to indicate that it was his purpose to dissuade the Appellant. After all, it was the Appellant who armed himself with a bat, accosted the victim, and offered a fight. There was no evidence of a mutual willingness to engage in a fight. The Appellant simply took it upon himself to begin striking the victim. It was the Appellant who was spoiling for a fight. There was, in any event, no need or purpose to this instruction.

Adding yet another form of manslaughter would have been pointless and perhaps counterproductive. The defense theory was that the Appellant's actions in dealing with the victim were culpably negligent. This theory seems a better fit to the facts than mutual combat, resisting an unlawful act and so forth. The imposable sentence, had the Appellant been convicted of manslaughter, would have been the same. There was no prejudice to the Appellant in consequence of the strategic choice by the attorney to proceed on the basis of culpable negligence.

But, of course, there are more complaints about the attorney in the dock. The Appellant complains that his attorney was ineffective in failing to see to it that culpable negligence manslaughter and depraved heart murder were sufficiently distinguished. The instructions granted did sufficiently distinguish them; whether this was by the State's instructions or by the defense instructions is a matter of no consequence. In any event, the Appellant wholly fails to demonstrate prejudice arising from the lack of some further or other instruction. Beyond this, the jury might have found malice murder, rather than depraved heart murder, and there was ample evidence in support of malice murder. In such a case, the issue would be moot.

And then the Appellant faults his attorney for having decided that defense of self was not made out by the evidence. Toward demonstrating this, he point to the testimony of the witness Ross. Ross testified that the victim told the Appellant that he did not want this, that the victim walking toward the Appellant when the Appellant attacked, that the victim was unarmed, and that the victim was loud. Here, the Appellant attempts to add to this by stating facts not of record concerning the relative sizes of the two men, allegations of fact that are to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983). The Appellant also claims that there was a toxicology report concerning the victim that might have been introduced, but this too is outside the record. In any event, there was some evidence that the victim had been drinking.

The fact that the victim told the Appellant that he did not want to engage in violence and walked toward the Appellant was insufficient to permit an instruction on self - defense. It was the Appellant who armed himself and accosted the victim. If any one had a potential self - defense claim, it was the victim. The Appellant, in any event, disabled the victim on the first blow; the subsequent blows, the ones that actually killed the victim could not possibly be seen as having been struck in self - defense.

One may not use excessive force to repel an attack. *Ellis v. State*, 956 So.2d 1008 (Miss. Ct. App. 2007). Here, the victim was unarmed, and there was no evidence to demonstrate that he was attacking or was about to attack the Appellant. But beyond this, once the Appellant overcame such threat as there was, his actions thereafter in striking the victim and dropping the victim's head on the pavement were not committed in any kind of self - defense. Those blows, inflicted after the victim had been overcome, were the fatal ones; self - defense simply was not available.

It was, in any event, a strategic decision whether to attempt a defense based on self - defense. Given the merciless and unnecessary beating the Appellant inflicted after the victim had been overcome, it is not difficult to see how an attorney would believe that such an approach would have been futile, and possibly injurious to the defense. The jury might have become offended by such an attempt. There was simply no reasonable likelihood that the jury would have acquitted the Appellant on the ground of self - defense. There was no prejudice to the Appellant that the defense was eschewed.

The Appellant then says the attorney was ineffective for having failed to attempted a defense on the basis of Miss. Code Ann. 97-3-15. As we have said above, the evidence did not support such a defense since there was no evidence of force on the part of the victim. Whatever the so - called castle doctrine may have done to the law of defense of persons and property, it most assuredly did not authorize the use of deadly force against a mere trespasser. The attorney cannot be faulted for having failed to seek an instruction that had no basis in the evidence. An attorney is not ineffective because he did not pursue a futile objective. *Walker v. State*, 863 So.2d 1 (Miss. 2003).

The Appellant has alleged quite a few instances of ineffective assistance of counsel.

However, in view of the facts of the case, and assuming that the record before the Court is sufficient to address all of these instances, we submit that the decisions counsel made with respect to what theory to pursue was clearly a reasonable one. The defense chosen was fitted to the facts of the case. It is difficult to see how the Appellant was prejudiced because the jury was not instructed on other forms of manslaughter. Conviction under some other form of manslaughter would not have benefitted the Appellant in any material sense. Defense of self was not made out in the evidence and, in any event, would have surely been rejected by the jury.

Despite the Appellant's best attempt to obfuscate and unduly complicate this case, the facts of the case are quite straightforward. The Appellant, upon hearing that the victim had come upon the property of the bar, armed himself, indicated that he was going to jail, and then went onto the parking lot. When the victim told him that he did not want to do this, and walked toward the Appellant, the Appellant attacked him with his bat. At the first blow, any physical threat as there was to the Appellant was overcome. But at that point, the Appellant continued to strike the victim. The Appellant then picked up the victim's head and dropped it on the pavement. The Appellant went back into the bar, had a sip from his drink, and told the patrons in it that they had seen nothing. When interviewed by law enforcement, the Appellant denied knowledge of what had happened to the victim.

The savagery of this beating is fully demonstrated by the pathologist's testimony. This was no manslaughter. It was a completely unnecessary and brutal killing. If not malice murder, it was certainly depraved heart murder. The verdict of the jury was fully supported by the evidence; the attorney for the Appellant fashioned a defense for the Appellant that fitted the facts of the case and that placed the best light possible on the Appellant's action. The defense would have had little credibility in attempting a defense based on self - defense; instructions on

various other forms of manslaughter were superfluous and would not have benefitted the Appellant any more than the culpable negligence manslaughter instruction would have.

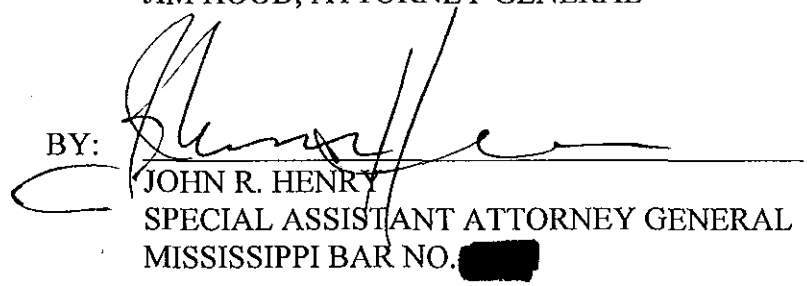
There was no deficient performance by the attorney and there was no prejudice to the Appellant that the attorney proceeded in the way he did. The Fifth Assignment of Error is without merit.

## 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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