IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DANNY ALLEN WESTBROOK — APPELLANT

V. — NO.2008-KA-00436-COA

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

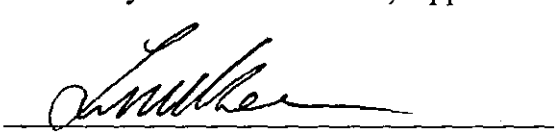
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Danny Allen Westbrook
4 Cono Caranna, and the Harrison County District Attorney's Office
5. Honorable Stephen B. Simpson

THIS 5th day of December, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Danny Allen Westbrook, Appellant

By: 

Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, and a judgment of conviction for the crime of murder against the appellant, Danny Allen Westbrook. Tr. 140, C.P. 60, R.E. 16. Westbrook was subsequently sentenced to life in the custody of the Mississippi Department of Corrections. Tr. 143, C.P. 61-62, R.E. 17-18. This sentence followed a jury trial on August 7-8, 2007, Honorable Stephen B. Simpson, Circuit Judge, presiding. Westbrook is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the testimony presented at trial, on August 22, 2006, members of the Gulfport Police Department responded to an assault call at Buddy's Inn. Tr. 77. Upon arriving, Officer Matthew Newport observed a white male lying face down on the ground. Officer Newport called an ambulance, secured the scene, and began searching for witnesses. Tr. 78. The injured man, George Sharpe, was transported to the hospital where he died two days later. Tr. 64, 91.

At trial, three individuals testified as witnesses to the events that transpired on the night in question, Daniel Wilson, Sabrina Dellamonica, and Nicole Ross. According to Daniel Wilson, he met Nicole Ross and her friend Sabrina Dellamonica at Buddy's Inn on August 22, 2006. Tr. 11-12. After he arrived, Wilson noticed the appellant, Danny Westbrook, come through the front door, go behind the bar, and then hurry outside. Tr. 13-14. Wilson followed Westbrook outside, but was about thirty seconds behind him. Tr. 14, 24. When Wilson made it outside, he saw Westbrook, the bouncer at the lounge, hit a man with a baseball bat several times. Tr. 14-15. Wilson did not see any weapons on the other man, but did not witness the beginning of the altercation. Tr. 18, 24. Wilson also testified that Westbrook was holding the bat in a defensive position when Wilson first walked outside. Tr. 27.

Sabrina Dellamonica and her friend Nicole Ross went to Buddy's Inn after they got off work on August 22, 2006. Tr. 29. Sabina drank about three or four beers. Later that evening, Sabrina observed an altercation between George Sharpe and a woman at the bar.

Apparently, the two were arguing over money. According to Sabrina, Westbrook told Sharpe to leave and the two had a verbal confrontation that did not contain any threats. Tr. 30-31.

At some point after Sharpe left the bar, Sabrina watched Westbrook grab a bat from the bar and walk outside. She could not, however, remember if Westbrook said anything before walking outside. Sabrina and Nicole sat for a few minutes then decided to look outside and see what was happening. Tr. 32. Sabrina testified that she saw Westbrook pull Sharpe from his truck and beat him with a baseball bat. Tr. 33-34. She never saw Sharpe with a weapon. Tr. 34. Afterwards, she returned to the bar and finished her drink. Tr. 35. When the police arrived she told everyone she was leaving to get a taxi, but instead got into a police car in order to give a statement. Tr. 36-37.

Nicole Ross was at Buddy's Inn with her friend Sabrina waiting to meet up with Daniel Wilson. Tr. 42-43. While Nicole was waiting for Daniel, she watched an altercation between George Sharpe and a women over twenty dollars. Westbrook told Sharpe to leave. Tr. 44. According to Nicole, later on two gentlemen came into the bar and told Westbrook that Sharpe was back. Nicole heard Westbrook tell the bartender, "I'm going to jail tonight." Tr. 47.

Nicole, Sabrina, and Daniel followed Westbrook outside, and Nicole saw Westbrook strike Sharpe three times. Tr. 49-50. Before Westbrook struck Sharpe, Nicole heard Sharpe state, "You do not want none of this, son," and saw him walking towards Westbrook. Tr. 50. Sharpe was being, "loud and aggressive." Tr. 59. Then Nicole, Sabrina, and Daniel went back inside the bar and screamed for someone to get help. Tr. 52.

Dr. Paul McGrarry, an expert in forensic pathology, completed an autopsy on Sharpe. Tr. 64. He concluded that internal bleeding and massive brain swelling from the blunt head injuries was the cause of Sharpe's death. Tr. 72.

The police arrived on the scene and immediately began investigating. It was not until thirty to forty-five minutes later that they suspected Westbrook of being involved. Tr. 83. Westbrook gave a statement on the scene in which he denied touching Sharpe. Tr. 79. Ultimately the police placed Westbrook into custody and transported him to the police station. Tr. 81. At the station, Detective Mark Clarite noticed dried blood on Westbrook's hands. Detective Clarite ordered his officers to take a swap of the blood on his hands. Tr. 93. Eventually, Detective Clarite searched Sharpe's car and did not find any weapons. Tr. 94.

SUMMARY OF THE ARGUMENT

This was a tragic case where the appellant, Danny Allen Westbrook, a bouncer in a local bar, was attempting to do his job, only to take the life of another human being. The facts in this case clearly do not support a murder verdict. The jury was never informed it could acquit Westbrook if they found his actions were justifiable under the law, as he had a right to defend his place of employment under Miss. Code Ann. §97-3-15 (Rev. 2006).

The jury was never told they shall presume Westbrook had a reasonable fear of death or serious bodily injury or of a felony being committed against him or his business. Miss. Code Ann. §97-3-15(3) (Rev. 2006).

In the alternative, this case is extremely similar to a typical "juke joint brawl." The trial judge erred in not instructing the jury on the proper types of manslaughter as originally requested by Westbrook. The defense had to rely only on culpable negligence manslaughter when the State was granted a depraved heart murder instruction. As the trial judge commented, those two offenses (depraved heart murder and culpable negligence manslaughter) are one in the same. The instructions granted gave no meaningful distinction between the two crimes. Taking the evidence in the most favorable light for Westbrook, he was entitled to at least an absence of malice manslaughter instruction as he requested.

The culpable manslaughter instructive that was granted, along with a depraved heart murder instruction was also inherently confusing to the jury. The jury was never instructed that depraved heart murder requires a higher degree of recklessness from which malice or deliberate design might be implied.

Based on the evidence presented, the jury's verdict of guilty of murder, as opposed to manslaughter, was not supported by the evidence. Although Westbrook should be entitled to have his conviction reversed and rendered, at the very least, his case should be reversed for a new trial with the jury properly instructed.

The trial judge also erred in not allowing the jury to consider that Westbrook may have acted in self-defense. Although not overwhelming, there was evidence presented to support the instruction. Although Westbrook asserts the trial judge should have recognized he had a right to present a defense on justifiable homicide, at the least, he should have been entitled to present a self-defense instruction to the jury.

Finally, in the alternative, Westbrook was clearly deprived of effective assistance of counsel. Counsel conceded guilt to manslaughter without presenting any affirmative defenses clearly apparent in the evidence. Counsel did not even request the proper manslaughter instructions and did not put forth any serious objection when the court denied his self-defense instructions that were supported by the evidence. Westbrook should be granted a new trial with competent counsel.

ARGUMENT

ISSUE NO. 1: WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF GUILTY OF MURDER, OR IN THE ALTERNATIVE, WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

A. Sufficiency of the Evidence.

Trial counsel requested a directed verdict at the close of the State's case, arguing the prosecution failed to show any intent.[1] The trial judge denied the motion, finding it was a jury question whether or not the State proved deliberate design. Tr. 99-100. The trial court also denied a defense peremptory instruction, D-1, and found this was sufficient to renew the motion for directed verdict after the close of all the evidence. Tr. 107. This issue was also raised in trial counsel's Motion for Judgment *Non Obstante Verdicto* Or For New Trial in the Alternative. C.P. 63-64, R.E. 19. The trial judge denied this motion. C.P. 89, R.E. 26. Westbrook asserts this was error.

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[1] At this time point in trial, the prosecution had yet to request a depraved heart instruction.

The standard of review regarding the sufficiency of the evidence is well-established. Review of a motion for a directed verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶15) (Miss. 2005). The court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* at ¶16 (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. *Bush*, 895 So. 2d at 844 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

This case should have never gone to the jury, as Westbrook was clearly not guilty of murder. The evidence supports that Westbrook's actions constituted justifiable homicide under Miss. Code. Ann §97-3-15(1)(e) and (3) (Rev. 2006), yet the trial judge did not *sua sponte* instruct the jury on justifiable homicide. Westbrook would concede that the trial court has no affirmative duty to instruct the jury *sua sponte* or suggest instructions to the parties. *Giles v. State*, 650 So.2d 846, 853-54 (Miss. 1995), citing *Conner v. State*, 632 So.2d 1239, 1254 (Miss. 1993). However, when an affirmative defense is so readily apparent from this evidence, appellant would assert that the failure to do so was an abuse of discretion. *McGregory v. State*, 979 So.2d 12 (¶12) (Miss. App. 2008)(trial court has the discretion to instruct *sua sponte*).

In Miss. Code Ann. §97-3-15, the Mississippi Legislature adopted what is commonly known as the Castle Doctrine. This law expanded the common law right to defend one's home, to include, among other places, one's business, and one's place of employment, along with the immediate premises surrounding them. The facts as related from the State's own witnesses, established Westbrook was employed by Buddy's Inn and had a right to be on the premises. As a part of his employment duties, he ejected a rowdy bar patron. Sharpe no longer had a right to be on the premises. When he returned to the bar's parking lot, under the law, Westbrook was given the presumption that he reasonably feared death or great bodily harm, or the commission of a felony against him. Miss. Code Ann. §97-3-15(3). The jury was never informed of this and could very well have found that the killing was therefore with authority of law. The trial judge should have recognized Westbrook was entitled to a directed verdict. This was plain error.

The Mississippi Supreme Court has held the plain error exists when there is a violation of a substantive right of a defendant.

> A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State*, 794 So.2d 181, 187-88 (Miss.2001). To determine if plain error has occurred, we must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." *Cox v. State*, 793 So.2d 591, 597 (Miss.2001) (relying on *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991); *Porter v. State*, 749 So.2d 250, 260-61 (Miss.Ct.App.1999)).

McGee v. State, 953 So.2d 211 (¶8) (Miss. 2007).

Westbrook asserts the trial court had a duty to inform the jury of this law even if Westbrook's counsel was unaware of its existence or believed it did not apply. Accordingly, Westbrook is entitled to have his conviction reversed and rendered. If this Court concludes that trial counsel somehow waived Westbrook's right to assert an affirmative defense of justifiable homicide, such conduct would clearly be ineffective assistance of counsel as set forth in Issue 5, *infra*.

Finally, even if the trial judge did not believe the Castle Doctrine applied, the case should never have been given to the jury with the option of murder. *Wells v. State*, 305 So.2d 333, 336-337 (Miss. 1974)(when the facts support a killing under Miss. Code Ann. §97-3-31, it is the duty of the trial judge to limit the charge under the facts shown in the case to manslaughter). The court should have instructed the jury to find Westbrook guilty of manslaughter or to acquit.

B. Weight of the Evidence.

If this Court finds the evidence supporting the charge of murder was sufficient to submit to the jury, in the alternative, Westbrook would assert that the verdict of guilty of murder was clearly against the overwhelming weight of the evidence. "In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an

unconscionable injustice will this Court disturb it on appeal." *Id.* *See also Benson v. State*, 551 So.2d 188, 193 (Miss. 1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss. 1987).

"Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury." *Windham v. State*, 520 So. 2d 123, 127 (Miss.1987). However, the Supreme Court has reversed jury verdicts of murder on more than one occasion, remanding for sentencing only for manslaughter, including *Williams v. State*, 729 So. 2d 1181, 1186 (Miss. 1998)(heat of passion manslaughter instruction was required as record contained sufficient evidence from which "the jury could infer that Williams acted on impulse or in the heat of the moment").

In *Dedeaux v. State*, 630 So. 2d 30, 31-33 (Miss. 1993), the court reviewed the facts of a barroom shooting where the Defendant was charged and convicted of murder for shooting his girlfriend's husband. Similar to the facts in this case, Dedeaux shot the victim three times, twice while the victim was moving toward him, and a third time as the victim lay on the ground. *Id.* Here, Westbrook first hit Sharpe while he was advancing on him. The evidence conflicted on how many times Sharpe was hit after he fell.

Even though the defense did not request a manslaughter instruction in the *Dedeaux* case, the Supreme Court found that the facts only supported a conviction for manslaughter because "this clearly was a killing in the heat of passion" even though a "greater amount of force than necessary under the circumstances" was used. *Id.* The *Dedeaux* court reversed the murder conviction and remanded the case for re-sentencing for the crime of manslaughter. *Id.*

In *Clemons v. State*, 473 So. 2d 943 (Miss. 1985), the court pointed out that there was "such contradictory testimony that it is virtually impossible to reconstruct what actually happened." *Id.* at 944. The *Clemons* case involved a barroom stabbing. The *Clemons* court pointed out "there is more than enough conflicting evidence to cast at least a reasonable doubt as to murder." The Supreme Court reversed the murder conviction and remanded for sentencing for manslaughter. *Id.* at 945. The case *sub judice* is the exact type of case that mandates a similar finding.

Westbrook, who the record indicates was the bouncer at Buddy's Inn, was doing his job in kicking a rowdy patron out of the bar. Sharpe apparently had to have the last word and returned. As argued in Issue No. 2, *infra*, the jury could have easily found this adequate provocation. Westbrook, not knowing what he was facing in the parking lot, retrieved a weapon for self-defense. Confidently, he told bystanders that he was going to jail that night. This was clearly a boast that he was going give Sharpe a good lesson. He did not leave the bar commenting he was going to kill the man. Once outside, he held a defensive posture until Sharpe advanced on him with Sharpe commenting, "You do not want any of this, son." Tr. 27, 50.

This factual scenario is similar to the "juke joint" killings in *Dedeaux* and *Clemons*. Namely, an argument with provocation, and an impulsive reaction by the accused involving more than reasonable force, resulting in the unfortunate and unnecessary death of the victim. The record indicates Westbrook did not have much time to consider his actions. He acted on impulse and grabbed the bat when he was told Sharpe had returned.

In *Tait v. State*, 669 So. 2d 85, 86-88 (Miss. 1996), the defendant was convicted of depraved heart murder. He appealed on weight and sufficiency of the evidence, and that the conviction should have been manslaughter by culpable negligence. Several young men were joking and horesplaying with a gun. The defendant put the gun to the victim's head and it went off. The Supreme Court ruled that the only proper verdict supported by the evidence was for manslaughter by culpable negligence. *Id.* at 90. The *Tait* facts are analogous in that there was no evidence of premeditation in the case at bar. In *Tait* there was horseplay, here there was drinking, an argument, a challenge by the victim, and ultimately physical violence.

In *Wells v. State*, 305 So.2d 333 (Miss. 1974), the defendant confronted an intoxicated man at a juke joint about cursing his wife. The man threatened Wells and grabbed him by the throat. Wells reacted by pulling his knife and putting it against the man's throat. The defendant claimed he accidentally cut the man's throat, killing him. On appeal, the Supreme Court found that the murder conviction was not supported by the evidence, but that the evidence did support a manslaughter conviction. *Id.* at 337, 340.

"Also typical of juke joint shootings is the inconsistent testimony given by various witnesses." *Dedeaux*, 630 So. 2d at 31. In the case at bar, the testimony of the three witnesses conflicted in varying degrees. Wilson, who was not present for the first altercation inside the bar with Westbrook and Sharpe, testified Westbrook came from *outside,* retrieved the bat and "went right back outside with it." Tr. 13-14, 17. He also testified Westbrook's first blow actually hit the truck's door, not Sharpe. Tr. 24, 26. Contrary to the other two witnesses, Dellamonica testified she saw Westbrook pull Sharpe from his truck. Tr. 33. Also

contrary to Wilson, she testified that Sharpe fell to the ground after the first blow and then defendant started hitting him in the head with the bat. Tr. 35. Ross, on the other hand, stated Sharpe was hit first on the neck and then huddled over, but was still standing. Sharpe was hit a second time and fell to the ground. Ross claimed Sharpe was hit a third time while on the ground. Tr. 49-50. Ross was also sure, however, that Sharpe was threatening and advancing on Westbrook before he was hit. Tr. 50. Sharpe was outside of his truck, shutting the door at this point. Tr. 58-59. Sharpe was clearly entering into the fray, not retreating.

Taking the State's case in its best light, the only conviction which could be supported by the credible evidence is one for manslaughter, not murder. Westbrook's actions were spontaneous and clearly not with premeditation. Westbrook respectfully asks this court to review the facts of this case with the guidance of the *Dedeaux*, *Clemons*, *Tait, Wells* and *Williams* decisions, and to reverse the murder conviction and remand the case for a new trial or at least a re-sentencing for manslaughter. In light of the evidence reflected in the record, the murder conviction in the case *sub judice* appears to rise to the level of manifest injustice.

ISSUE NO. 2: THE TRIAL JUDGE ERRED IN FAILING TO GRANT A REQUESTED INSTRUCTION ON ABSENCE OF MALICE MANSLAUGHTER, AND ONLY ALLOWING THE DEFENSE A CULPABLE NEGLIGENCE MANSLAUGHTER INSTRUCTION INSTEAD.

Westbrook presented a manslaughter instruction (D-19) which incorporated killing unnecessarily while attempting to prevent an unlawful act under Miss. Code. Ann. §97-3-31 (1972)[2], with both heat of passion manslaughter and absence of malice manslaughter, as

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[2] **§97-3-31. Homicide; killing unnecessarily, while resisting effort of slain to commit felony or do unlawful act.** Every person who shall unnecessarily kill another, either while

defined by Miss. Code Ann. §97-3-35 (1972)[3], and culpable negligence manslaughter as set forth in Miss. Code Ann. §97-3-47 (1972)[4]. C.P. 48. The trial court threw out the whole instruction after finding no evidentiary basis for heat of passion manslaughter.

> THE COURT: Well, my question is, look at D-19, as to whether or not it would be appropriate to give the jury a lesser included manslaughter for the killing of a human being without malice in the heat of passion but in a cruel and unusual – well, not – in the heat of passion by the use of a dangerous weapon without authority of law and not in necessary self-defense.
>
> MR. SCHMIDT: The problem with that, Judge, is there's no evidence in the record to support heat of passion. Just traditionally what I recall heat of passion is when there's some sufficient provocation that reduces the culpability, not the act. The record's unclear or is devoid of those kinds of facts because of – at this point.
>
> THE COURT: Well, I would tend to agree that the facts support a culpable negligence murder more than they really do a heat of passion manslaughter, but that issue is not before me. Deliberate design murder is before me. But the –
>
> MR. SCHMIDT: A depraved heart?
>
> THE COURT: *A depraved heart culpable negligence.* But it doesn't – it leaves the defendant, State, *if you object and I do not give a lesser included manslaughter, it leaves the defendant without any defense whatsoever*, and you know how the Supreme Court views that for appellate purposes.

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resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter.

[3]**§97-3-35. Homicide; killing without malice in the heat of passion.** The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter.

[4]**§97-3-47. Homicide; all other killings.** Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter.

[DEFENSE COUNSEL]: *Your Honor, I could in the morning provide you and the State with a case which actually discusses manslaughter in the absence of heat of passion. It's the definition except for heat of passion.*

THE COURT: Well, I mean, it could be the next section, every other killing, culpable negligence, or culpable negligence. The argument, of course, is that if you believe beyond a reasonable doubt that it was the defendant and he did strike what ended up being the fatal blows, that he had no intent at the time that he struck the blows to cause his death but merely to inflict injury, that could be considered culpable negligence manslaughter perhaps.

It's also depraved heart murder, an act so reckless and evidencing a disregard for the value of human life that it rises to the level of murder. *It could really be either one.*

Tr. 111-113 [emphasis added]

The State then requested to be allowed to give the jury the definition of depraved heart murder if the trial court was inclined to grant a manslaughter instruction. Tr. 113. The trial court then asked defense counsel if he desired a manslaughter instruction.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Under which subsection? Every other killing?

[DEFENSE COUNSEL]: Every other killing.

THE COURT: Culpable negligence?

[DEFENSE COUNSEL]: Yes, sir.

MR. SCHMIDT: The lack of proof as to deliberate design?

[DEFENSE COUNSEL]: Yeah, and the lack of proof. Basically I think they jury should be given the option of they don't find that there was deliberate design to cause death, they should have the option to go into the manslaughter, because logically and legally is where it leads.

Tr. 115-116.

The court then granted S-4, which read in part:

> ...the defendant, DANNY ALLEN WESTBROOK, did wilfully, feloniously and without authority of law, kill and murder George Wayne Sharpe,
>
> OR
>
> while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing George Wayne Sharpe
>
> then you shall find the defendant, DANNY ALLEN WESTBROOK, guilty of Murder.
>
> If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the defendant, DANNY ALLEN WESTBROOK not guilty of Murder and continue your deliberations to determine whether the State has proved beyond a reasonable doubt whether the defendant, DANNY ALLEN WESTBROOK is guilty of the lesser crime of Manslaughter.

C.P. 23-24, R.E. 9-10.

Trial counsel then submitted D-50[5], an elements instruction for culpable negligence manslaughter. C.P. 53, R.E. 11. The court did not agree that reckless conduct as defined by the instruction properly defined culpable negligence. The court then accepted D-50-A in place of D-50. Tr. 123, C.P. 30, R.E. 12. The court also stated it would grant D-51, which defined culpable negligence[6]. C.P. 54, R.E. 13. The jury was therefore instructed that the

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[5]**Jury Instruction D-50:** The Court instructs the Jury that, under the law of the State of Mississippi, the offense of Manslaughter has been defined as:

"Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law..."

If you find in your deliberations, beyond a reasonable doubt, that Danny Allen Westbrook caused or brought about the death of George Wayne Sharpe through reckless, negligent conduct, then you may find him guilty of the offense of Manslaughter.

[6] It should be noted that the clerk's papers indicate this instruction was refused. However, this appears to be a clerical error, as the supplemental transcript confirms the instruction was read to the jury. Supp. Vol. 1, Tr. 10.

only lesser included offense available in this case was culpable negligence manslaughter. Culpable negligence manslaughter was not the only manslaughter theory supported by the evidence[7]. The trial judge erred in not granting Westbrook's original request in D-19 that the jury be instructed as to alternative theories of manslaughter.

The standard of review for the granting of jury instructions is well established.

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

Poole v. State, 826 So.2d 1222, 1230(¶ 27) (Miss.2002) (quoting *Smith v. State*, 802 So.2d 82, 88(¶ 20) (Miss.2001)).

When dealing with lesser included offense instructions, the standard in determining if a lesser included offense in warranted in a non-capital case is whether the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense. *Beck v. Alabama*, 447 U.S. 625, 633-37(1980), and *Poole*, 826 So.2d at 1230 (¶ 27). This Court should not consider the requested instruction in isolation, but should consider all jury instructions as a whole. "A trial judge may refuse to give a requested instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Smith v. State*, 907 So.2d 292 (¶ 13) (Miss. 2005), citing *Parks v. State*, 884 So.2d 738, 746 (Miss. 2004). The alternative theories of

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[7] If fact, there is even case law to suggest a culpable negligence manslaughter instruction is inappropriate where there is an intentional act. See *Goff v. State*, 778 So.2d 779 (¶6) (Miss. App. 2000).

manslaughter set forth in D-19 were all supported by the evidence, and the trial judge erred in requiring Westbrook to choose only one. A criminal defendant has a right to assert alternative theories of defense. *Fryou v. State*, 987 So.2d 461 (¶18) (Miss.App. 2006).

Given the unique facts of this case, the actions Westbrook took can be defined as manslaughter under several different statutes. In D-19, trial counsel proposed four different types of manslaughter, each of which was supported by the evidence. Under Miss. Code Ann. §97-3-31 (1972), a killing is manslaughter if committed "either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed." Sharpe was clearly committing an unlawful act by trespassing on the property of Buddy's Inn after being instructed to leave by Westbrook, an employee of Buddy's. The jury could have reasonably found this to be an unlawful act[8]. Additionally, when Westbrook confronted Sharpe in the parking lot (in a defensive posture), Sharpe started toward Westbrook, commenting, "You do not want none of this, son." Tr. 27, 50.

Miss. Code Ann. §97-3-31 has been used extensively in the past to reduce cases that would otherwise be murder to manslaughter. Where the "the intention to kill was formed because of the criminal act of the deceased, in repelling that act the offense, which but for the statute would be murder, is by its plain meaning reduced to manslaughter." *Williams v.*

[8] Trespass is clearly an unlawful act. See Miss. Code Ann. §97-17-97 (Rev. 1997).

State, 122 Miss. 151, 177, 84 So. 8, 14 (1920). Furthermore, the involuntary killing of a trespasser is also considered manslaughter. See Miss. Code. Ann. §97-3-33 (1972)[9].

D-19 also defined manslaughter under Miss. Code Ann. §97-3-35, alleging both heat of passion manslaughter and manslaughter by the use of a deadly weapon without authority of law. Respectfully, Westbrook asserts that the trial judge erred in finding insufficient evidence to support heat of passion manslaughter. The Mississippi Supreme Court has defined heat of passion using the definition found in Black's Law Dictionary, 650 (5th Edition 1979), as

> In criminal law, a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Buchanan v. State, 567 So.2d 194, 197 (Miss.1990), quoting *Mullins v. State*, 493 So.2d 971, 974 (Miss. 1986).

The evidence as set forth in the lower court can not conclusively reject that Sharpe's return and subsequent aggressive words and actions were not sufficient provocation. Clearly, the jury can infer Sharpe and the all witnesses had been drinking, as the incident started in

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[9] **§97-3-33. Killing trespasser involuntarily.** The involuntary killing of a human being by the act, procurement, or culpable negligence of another, while such human being is engaged in the commission of a trespass or other injury to private rights or property, or is engaged in an attempt to commit such injury, shall be manslaughter.

the lounge and concluded in the lounge parking lot[10]. Sharpe was mad and loud. Tr. 38. All three witnesses testified Sharpe argued with Westbrook, or at least that words were exchanged between the two before the fatal blows were struck. Tr. 18, 32, and 58. Sharpe was also described as loud and aggressive. Sharpe shut his truck door and went toward Westbrook. Tr. 59. Sharpe was a well-developed, muscular young man. Tr. 65. He was 6 feet tall and weighed 250 pounds. Tr. 74. The evidence was sufficient to justify the instruction. "If there is any evidence that may warrant a manslaughter instruction certainly one should be given." *Roberts v. State,* 458 So.2d 719, 721 (Miss. 1984). The jury should have been allowed to decide whether or not these facts constituted sufficient provocation.

> In that moment of passion, while still enraged, if he slays the other person, the homicide may be manslaughter, even though it is not in necessary self-defense, depending upon the insult, provocation or injury causing the anger. Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury. *Kinkead v. State*, 190 So.2d 838 (Miss.1966); *Anderson v. State*, 199 Miss. 885, 25 So.2d 474 (1946).

Jackson v. State, 740 So.2d 832 (¶8) (Miss. 1999) citing *Windham v. State*, 520 So.2d 123, 127 (Miss. 1987).

Further, counsel also asked for a manslaughter instruction under the theory that the killing was without malice and unlawful by the use of a deadly weapon under the second section of Miss. Code Ann. §97-3-35. This is clearly allowed under the law. "We agree with Lanier that the statute may be read in the disjunctive and that the killing of a human being without malice, or by the use of a dangerous weapon without authority of the law and not in

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[10] The pathologist also testified a field test indicated that Sharpe also had drugs and alcohol in his system. Tr. 74-75.

necessary self-defense, may be manslaughter. *Lanier v. State*, 684 So.2d 93, 97 (Miss. 1996). Counsel asked the court for time to get a case to illustrate this, but the trial judge instead decided only culpable negligence manslaughter would suffice. Tr. 112-13. As in *Lanier*, this was reversible error. *Id.*

Westbrook's actions could certainly be considered imperfect self-defense. Even if his actions were not objectionably reasonable to allow the jury to find he acted in justifiable self-defense, there was testimony that showed he did not strike Sharpe until after Sharpe warned him and made an aggressive moved toward him. Tr. 50. This would have fit the definition of imperfect self-defense under *Lanier*.

Finally, D-19 also defined manslaughter under the culpable negligence theory under Miss. Code Ann. §97-3-47. Again, Westbrook submits it was reversible error to compel the defense to choose which manslaughter theory to pursue when the evidence supported them all. In fact, Westbrook would submit he could have also pursued a manslaughter instruction under Miss. Code Ann §97-3-29 (1972)[11], if the jury believed Westbrook intended to commit only a simple assault on Sharpe, or under Miss. Code Ann. §97-3-27 (Rev. 1994)[12], if the jury believed Westbrook intended to commit an aggravated assault on Sharpe.

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[11] **§97-3-29. Homicide; killing while committing a misdemeanor.** The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor, where such killing would be murder at common law, shall be manslaughter.

[12] **§97-3-27. Homicide; killing while committing felony.** The killing of a human being without malice, by the act, procurement, or culpable negligence or another, while such other is engaged in the perpetration of any felony, excpet those felonies enumerated in Section 97-3-19(2)(e) and (f), or while such other is attempting to commit any felony besides such as are above enumerated and excepted, shall by manslaughter.

> In a homicide case, as in other criminal cases, the court should instruct the jury as to theories and grounds of defense, justification, or excuse supported by the evidence, and a failure to do so is error requiring reversal of a judgment of conviction. Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court.

Hester v. State, 602 So.2d 869, 872 (Miss.1992) (citations omitted).

This Court had recognized the right of litigants to present alternative theories of a case to the jury, including inconsistent theories. *Guice v. State*, 952 So.2d 187 (¶29) (Miss. App. 2006), citing *Love v. State*, 441 So.2d 1353, 1356 (Miss.1983). As argued above, there was evidence to support each of the submitted manslaughter theories included in D-19.

A defendant is entitled to jury instructions on his theory of the case whenever there is evidence that would support a jury's finding on that theory. *Jackson v. State*, 645 So.2d 921, 924 (Miss. 1994). "Even the 'flimsiest of evidence' is sufficient to mandate a trial court's giving an instruction on the [defendant's] proposed theory, but there must be some 'probative value' to that evidence." *Miller v. State*, 733 So.2d 846 (¶7) (Miss. App. 1998)." *Goff v. State*, 778 So.2d 779 (¶5) (Miss. App. 2000).

> Our case law leans heavily in favor of instructing the jury on a lesser-included offense. As recently as 1997, we reaffirmed that the jury should be given the option of a lesser-included offense where there is *any* evidentiary basis. *Russell v. State*, 729 So.2d 781, 787 (Miss.1997). However, such an instruction should not be indiscriminately or automatically given. *Mease v. State*, 539 So.2d 1324, 1329 (Miss.1989). Such an instruction "should only be given after the trial court has carefully considered the evidence and is of the opinion that such an instruction is justified by the evidence." *Id.*

Agnew v. State, 783 So.2d 699 (¶11) (Miss. 2001) (emphasis supplied).

Clearly, the trial judge committed reversible error in not allowing the jury to consider alternative theories of manslaughter. Westbrook is entitled to a new trial where the jury is properly instructed on each theory. In the alternative, if this Court concludes that trial counsel somehow acquiesced in the trial judge's suggestion that he proceed only on culpable negligence manslaughter, and finds the issue is waived, such conduct would be ineffective assistance of counsel as set forth in Issue 5, *infra*.

ISSUE NO. 3: WHETHER THE JURY INSTRUCTIONS REGARDING CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER WERE CONFUSING TO THE JURY OR IMPROPERLY STATED THE LAW.

In Jury Instruction S-4, the jury was instructed that it could convict Westbrook of murder on the theory of deliberate design murder or depraved heart murder. If the State failed to prove murder, the jury could then consider if Westbrook was guilty of culpable negligence manslaughter. C.P. 23-24, R.E. 9-10. The instruction defined depraved heart murder as murder "while engaged in the commission of an act dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing..." C.P. 23, R.E. 9. Culpable negligence was defined in Instruction D-51 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. It is negligence of a degree so gross as to be tantamount to a wanton disregard of or utter indifference to the safety of human life." C.P. 54, R.E. 13.

However, the instructions given did not properly and completely state the law. The instructions conflicted and were ultimately confusing to the jury. None of the instructions

explained the differences between the three theories or degrees of culpability in each. The end result was that the jury verdict which convicted Westbrook of murder was not the product of fundamental due process of law guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and Art. 3 §14 of the Constitution of the State of Mississippi.

From the instructions in this case, there is no distinguishable difference between depraved heart murder resulting from "an act dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing," and culpable negligence manslaughter resulting from "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 *Scott v. State*, 446 So. 2d 580, 583 (Miss. 1984), the Mississippi Supreme Court held that "when a jury is given instructions which are in hopeless conflict this court is compelled to reverse because it cannot be said that the jury verdict was founded on correct principles of law." See also *Russell v. State*, 789 So. 2d 779, 780 (Miss. 2001), where the Supreme Court reversed a murder conviction where a manslaughter instruction was given, but the jury was not adequately instructed as to the definition of malice aforethought.

Trial counsel attempted to submit Instruction D-50 to clarify the difference, but that instruction was refused. Tr. 119-122. When discussing D-50, the trial judge stated,

> This properly sets out the elements, but my problem with D-50, the defendant's, was, was this language about through reckless negligent conduct

> the proper explanation or definition of what culpable negligence is? This doesn't give any definition of what culpable negligence is.

Tr. 122.

This Court just recently held that the difference between culpable negligence manslaughter and depraved heart murder is the degree of mental state of culpability. "[D]epraved heart murder requires a higher degree of recklessness from which malice or deliberate design might be implied." *Staten v. State*, 989 So.2d 938 (¶14) (Miss. App. 2008), quoting *Windham v. State*, 602 So.2d 798, 801 (Miss.1992). It was essential fo the jury to understand the degree of recklessness involved between the two crimes. The instructions given did not sufficiently accomplish this.

Westbrook respectfully submits that the trial judge committed reversible error in not granting D-50, or at the very least, grant the trial counsel an opportunity to redraft an inartfully drafted instruction to comply with the law. See *Harper v. State*, 478 So.2d 1017, 1022-23 (Miss. 1985). It was the only instruction which mentioned the degree of recklessness. The trial judge should have amended S-4 to properly inform the jury that depraved heart murder requires a "higher degree of recklessness from which malice or deliberate design might be implied." The instructions, as given, were hopelessly in conflict and confusing to the jury. Even the trial judge commented that Westbrook's conduct could be either offense. Tr. 113. The jury could not possibly decide between the two offense without this crucial distinction. Westbrook is entitled to a new trial with the jury properly instructed on the higher degree of recklessness needed for depraved heart murder.

In the alternative, if this Court concludes that trial counsel somehow acquiesced in the instructions given by not specifically objecting, such conduct would be ineffective assistance of counsel as set forth in Issue 5, *infra*.

ISSUE NO. 4: WHETHER THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S SELF-DEFENSE INSTRUCTIONS.

Trial counsel submitted several instructions regarding self-defense. During the discussion on jury instructions, the trial court found there was no overt act to support self-defense, and denied all the self-defense instructions.

> [THE COURT]....Is it your intention to try to offer a self-defense instruction?
>
> [DEFENSE COUNSEL]: Your Honor, I don't believe in good faith that we could –
>
> THE COURT: There was no overt act, any testimony of an overt act to support it that the Court recalls.
>
> [DEFENSE COUNSEL]: And as Your Honor pointed out, the only testimony was his approach where he walked toward the defendant.
>
> THE COURT: Given that, I'm going to refuse D-10 as being unsupported by the evidence. That would apply to D-11 and 12 and 13. Fourteen is refused also as a self-defense reasonable apprehension. So is 15 and is refused. So is 16 is refused....

Tr. 110-11.

However, in overruling the defense motion for a directed verdict, the trial judge acknowledged there was at least some evidence, albeit weak, to support a theory of self-defense.

> [THE COURT]...There is no evidence before the Court that Mr. Sharpe was armed in any way, nor is there any evidence that he made any overt acts of aggression in an effort to assault Mr. Westbrook in any form that any reasonable juror could have a design of an apprehension of a design on the part

of Mr. Sharpe to kill or injure, cause serious bodily injury to Mr. Westbrook. The only evidence to support even a hint of that is that Mr. Sharpe was walking towards Mr. Westbrook.

Tr. 99.

This Court has held that whether or not a self-defense instruction should be submitted to the jury ultimately turns on whether there is credible evidence in the record to support it. *Osborne v. State*, 843 So.2d 99, 102 (Miss.App. 2003), citing *Anderson v. State*, 571 So.2d 961, 964 (Miss.1990). It is well-settled law that a defendant has an absolute right to have every lawful defense he asserts, "even though based upon meager evidence and highly unlikely," to be submitted to the jury under proper instruction of the court. *O'Bryant v. State*, 530 So.2d 129, 133 (Miss. 1988). The trial testimony in the case at bar, however "meager," provided the basis for a self-defense instruction.

Daniel Wilson testified that when Westbrook went outside, he held the bat in a defensive position. Tr. 27. Furthermore, Nicole Ross did testify to an overt act.

Q. Could you tell us what, if anything, you heard.
A. The victim said to the bouncer, "You do not want none of this, son."
Q. Okay. And did you see what he was doing?
A. He was walking towards the bouncer.
Q. Could you see whether or not he had anything in his hands?
A. He didn't have anything in his hands.
Q. And at the time he said this to the defendant, was the defendant armed with this bat?
A. Yes, sir.

Tr. 50-51.

The jury could have reasonably found Sharpe voluntarily entered the fray at this point. He had closed the door to his truck and was advancing toward Westbrook in a "loud and

aggressive" manner. Tr. 58-59. Sharpe was 6 feet tall and weighed 250 pounds. Tr. 74. He was a well-developed, muscular young man. Tr. 65. Although not the strongest evidence possible, it was certainly sufficient to justify a self-defense instruction. The evidence must be considered from the view of the party requesting the instruction when examining jury instructions refused by the trial court. *Clark v. State*, 928 So.2d 192 (¶18) (Miss. App. 2006), citing *Splain v. Hines*, 609 So.2d 1234, 1239 (Miss.1992). Taking the evidence in the light most favorable to Westbrook, the trial court should have granted the self-defense instructions.

In the alternative, if this Court concludes that trial counsel somehow waived this issue,[13] or withdrew his request for the instructions by his comments, this action would amount to ineffective assistance of counsel as set forth in Issue 5, *infra*.

ISSUE NO. 5: IN THE ALTERNATIVE, WHETHER THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Westbrook would initially note that a claim of ineffective assistance of counsel was raised in the trial court in a *pro se* Motion for a New Trial or Motion for Reconsideration. C.P. 67-70, R.E. 22-25. There is no indication in the record that this motion was ever ruled on by the trial court. The benchmark for judging any claim ineffectiveness of trial counsel is whether counsel's conduct undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*,

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[13] Westbrook would also assert even if this Court finds trial counsel waived this issue, it was specifically addressed in Westbrook's *pro se* Motion for a New Trial. C.P. 68-69, R.E. 22-25..

466 U.S. 668, 686 (1984). In *Madison v. State*, 923 So. 2d 252 (¶10) (Miss. App. 2006), this Court reiterated that *Strickland* is the standard, as the Mississippi Supreme Court

> applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under *Strickland*, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court must examine the totality of the circumstances in determining whether counsel was effective. *Id.*

If the issue of ineffective assistance of counsel is raised on direct appeal, the Court will look to whether: "(a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed." *Madison*, 923 So.2d at ¶11, citing *Read v. State*, 430 So.2d 832, 841 (Miss. 1983).

The appellant assert the record clearly demonstrates ineffective assistance of counsel. Alternatively, appellant stipulates through present counsel that the record is adequate for this Court to determine this issue and that a finding of fact by the trial judge is not needed. "When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel's performance." *Roach v. State*, 938 So.2d 863, 870 (Miss.App. 2006)(citing *Colenburg v. State*, 735 So. 2d 1099, 1102 (Miss. App. 1999). Under the facts of this case, the trial judge had a duty to inform the jury of the

defense of justifiable homicide under Miss. Code. Ann §97-3-15, even if counsel failed to do so. The ineffectiveness was apparent from the record and the trial judge should have taken some action to protect Westbrook's constitutitional rights.

If this Court finds, however, that the record does not affirmatively show ineffective assistance of counsel, Westbrook respectfully requests the issue be dismissed without prejudice to allow appellant to supplement the record with additional evidence on post-conviction. See *Walton v. State*, No. 2006-KA-01065-COA (¶15) (Miss. App. November 13, 2007), *aff'd*, *Walton v. State*, No. 2006-CT-1065-SCT (Miss. November 13, 2008).

Westbrook claimed in his *pro se* Motion for a New Trial that trial counsel was constitutionally ineffective on several different grounds. Although each ground individually may not constitute ineffective assistance by itself, the cumulative effect of all the errors raised by both Westbrook *pro se*, and appellate counsel, mandate reversal.

Westbrook alleged five specific instances of ineffective assistance. He pointed out counsel failed to give an opening statement. This was after he stated in the presence of the jury that he was only reserving his opening statement until after the State's case in chief. Tr. 9. Westbrook would concede that opening statements are not mandatory. *Woods v. State*, 806 So.2d 1165 (¶15) (Miss. App. 2002). However, the failure to give one supports the lack of any definitive strategy at the start of the trial.

Westbrook then alleged counsel failed to call any witness. This was not entirely accurate as counsel did recall a police officer for the inexplicable reason of establishing that

Sharpe's wallet was still in his pocket. Tr. 103-04. Certainly there was no issue regarding robbery as a possible motive here. This could not have been any reasonable strategy.

Westbrook further asserts that trial counsel failed to inform the court that Westbrook had no criminal record. C.P. 68, R.E. 23. Either counsel was ineffective or woefully misinformed about Westbrook's record, as counsel filed a Motion in Limine to prevent the State from disclosing Westbrook's prior convictions. C.P. 57-58, Tr. 4. The trial court had a duty to have a hearing on this matter after receiving Westbrook's *pro se* motion for a new trial disputing he had a criminal record. At the very least, this Court should remand this cause for a full hearing on Westbrook's *pro se* Motion for New Trial based on ineffective assistance of counsel. If counsel believed Westbrook had prior offenses, this could have influenced his recommendation to Westbrook on whether or not he should take the stand.

Westbrook also alleged his counsel failed to adequately explain the law on self-defense to him. This is obvious, as counsel failed to seriously pursue self-defense. Westbrook could not intelligently decide to take the stand without being properly informed on what type of evidence is necessary to support a claim of self-defense. Once he testified, other character witnesses could have been called to attest to his reputation for truthfulness in the community.

Finally, Westbrook claimed ineffective assistance when counsel prejudiced him in front of the jury by stating Westbrook "killed the situation."[14] As a brief illustration, this is how counsel began his closing statement:

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[14]Westbrook also claimed counsel did not adequately investigate or prepare for trial.

> May it please the Court, counsel opposite, members of the jury. *John Smith* is driving to work one morning. It's a new job and he's late, so he starts to go faster than he should. The later he gets, the faster he goes. Finally, he's going really fast, and he sees ahead of him about a block away a man standing on the curb. He doesn't know whether or not this man sees him coming or not, but he doesn't slow down. At the last second the man steps off the curb, and John Smith hits him with his car. *The legal system would, after that kind of scenario, be faced with deciding what is to be done with John Smith.*
>
> *In a similar manner, you individuals are charged with basically what to do now with Danny Westbrook.* Danny Westbrook at about, say, one or 1:30 in the morning was sitting in Buddy's Inn. He was talking with a friend. A man comes in accompanied by a lady. The man goes to the bar, and the lady sits around the other end, but they did come in together. Before too long the man begins an altercation inside the bar, a verbal argument with this woman.
>
> Danny Westbrook is the bartender, sometimes bouncer, and it's his job to make sure that this kind of thing doesn't go on in Buddy's Inn. *So the louder the argument gets, the more aggressive it seems Mr. Sharpe is becoming. Mr. Westbrook takes it upon himself to kill the situation. I use that deliberately.*

Tr. 128-29 [emphasis added].

Counsel all but told the jury they could not acquit Westbrook on the evidence presented.

> ...You could just as easily decide that Mr. Westbrook, confronted with an individual considerably larger than he, took what action he deemed under those circumstances appropriate. We all know now and would agree that it was not appropriate. We'll agree he went too far...

Tr. 131.

Counsel told the jury a second time that Westbrook was not acting in reasonable self-defense: "We don't think he was acting necessarily in self-defense because, like we said, we think he went too far, but we don't think he went so far as to commit a murder." Tr. 132. He went on for a third time and reminded the jury, "It was way too much than was called for.

It may not have been necessary, but that still doesn't make it murder, the deliberate intended taking of another human's life." Tr. 132. Finally, he went on to tell the jury that it was going to be a "tough decision" on their part, but believed if they considered the evidence they would agree it was not murder. Tr. 132-33. "Mr. Westbrook needs to face the consequences, but it's not the consequences that the State wants him to face, because that just wouldn't be fair." Tr. 133.

Westbrook acknowledges that the Mississippi Supreme Court has found that conceding guilt to a lesser included offense before a jury can be considered trial strategy. *Faraga v. State*, 514 So.2d 295, 307-08 (Miss. 1987). However, the cumulative effect of all these so-called "strategic" moves actually prejudiced Westbrook and compels reversal. Westbrook would assert that using the phrase "kill the situation" in a murder case is per se ineffective.[15]

Appellate counsel would also point out, as argued in Issue No. 2, *supra*, trial counsel submitted an instruction (D-10) informing the jury of several different theories under which Westbrook could be convicted of manslaughter. If this Court determines that Westbrook waived this issue by accepting the trial judge's offer of only culpable negligence manslaughter, then surely trial counsel was ineffective. Failure to seek proper jury instructions is a fundamental right effecting a defendant's constitutional right to a fair trial, as a defendant is entitled to have the jury fully and properly instructed on theories of defense

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[15] The prosecution jumped on that phrase in its rebuttal closing argument. "And to quote counsel opposite, he was going to kill the situation. I bet they don't have a problem in that bar anymore. If you become unruly, you get sent to Riemann's. Tr. 134.

for which there is a factual basis in evidence. *Green v. State*, 884 So.2d 733, 735-38 (Miss. 2004).

As argued in Issue No. 2, there were several different manslaughter theories counsel could have pursued. However, he did not zealously present any of these theories to the trial court. He was clearly not prepared to defend these instructions when they were objected to by the State. Even though he prepared jury instructions which included the concept of absence of malice manslaughter and imperfect self-defense, he could not cite *Lanier v. State,* 684 So.2d 93 (Miss. 1996), to support his theory.

When asked which type of manslaughter instruction he wanted, counsel did not renew his request for all the options supported by the evidence, but accepted the trial court's suggestion of culpable negligence manslaughter only. Tr. 115-16. Again, as pointed out in Issue No. 2, there were several different manslaughter theories supported by the evidence[16].

Additionally, counsel failed to submit any type of instruction on manslaughter based on mutual combat. The evidence supported an instruction informing the jury that if it believed Sharpe was killed while engaged in mutual combat, Westbrook would be guilty of manslaughter. This case can be analogous to *Robinson v. State*, 773 So.2d 943 (Miss. App. 2000).

> Assuming, therefore, that the jury concluded that Robinson voluntarily entered into a mutual combat with Parks and that, in the process of that combat, Robinson purposely inflicted lethal injuries upon Parks that led to his

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[16]Manslaughter was supported by the evidence under Miss. Code Ann. §§97-3-31, 97-3-35 (heat of passion or absence of malice, imperfect self-defense), §§97-3-33, 97-3-29, or §97-3-27.

immediate death, the jury was justified in returning a verdict of guilty of manslaughter. *Wells v. State*, 305 So.2d 333, 335-36 (Miss.1974). In an oft-cited treatise on the criminal law, the following passage concerning mutual combat appears:

> When two persons willingly engage in mutual combat, and during the fight one kills the other as the result of an intention to do so formed during the struggle, the homicide has long been held to be manslaughter....

Wayne R. LaFave et al., Criminal Law § 76, p. 574 (1972).

Robinson, 773 So.2d at ¶8.

Both Sharpe and Westbrook voluntarily submitted to an altercation in a lounge parking lot. Unlike Robinson, Westbrook even openly carried the bat for Sharpe to see. Sharpe still engaged, walking toward Westbrook and threatening, "You do not want none of this, son." Tr. 50. This was sufficient to show an overt act by Sharpe to engage in mutual combat. *Conner v. State*, 177 So. 46 (1937). In mutual combat, initiated by the decedent, a defendant can not be guilty of an offense greater than manslaughter. See *Anderson v. State*, 199 Miss. 885, 895, 25 So.2d 474, 476-477 (Miss. 1946).

As argued in Issue No. 3 *supra*, the instructions given on culpable negligence manslaughter and depraved heart murder did not adequately distinguish the two offenses. However, when give the opportunity to draft a definition on culpable negligence which could have shown the higher degree of culpability of depraved heart murder, he failed to do so.

> THE COURT: Just a second. Just a second. The new manslaughter instruction definition, make it D-50. I know we don't have one of those. Where did this come from, [counsel]?
>
> [DEFENSE COUNSEL]: Straight out of the statute book, Your Honor.

THE COURT: I understand the every other killing part, but the paragraph below that, through reckless negligent conduct, where did that language come from?

[DEFENSE COUNSEL]: Actually, Your Honor, I put that in because of the use of the words procurement and culpable negligence. I thought it might be more explanatory to add the word reckless.

THE COURT: It might be, but is that what culpable negligence means under the statute?

[DEFENSE COUNSEL]: Your Honor, I can only – what it means under the statute?

THE COURT: Well, I don't want those two things to be in conflict with one another. Is there case law out there that says this is a good instruction?

[DEFENSE COUNSEL]: That this is a good instruction, actually I couldn't find that, Your Honor. But I included the reckless because a lot of times the Court in its discussion will use the word reckless in a case in which it's alleged that culpable negligence occurred. Like I said, I thought it was just more explanatory than the word culpable or the word procurement for the matter.

....

THE COURT: Mr. Schmidt, what's the State's position on D-50?

MR. SCHMIDT: It's just a matter of semantics, Judge. Like the Court has recognized, reckless and culpable negligence are two different standards. Reckless conduct resulting in the death of someone is not necessarily culpable negligence, which is the high criminal negligence. So to categorize reckless as criminal such to rise to the level of manslaughter is improper. I would have like to –

Tr. 119-21.

The court then requested the State to submit a manslaughter instruction and requested a definition instruction on culpable negligence. Tr. 121.

THE COURT: This [D-50-A] properly sets out the elements, but my problem with D-50, the defendant's, was, was this language about through

reckless negligent conduct the proper explanation or definition of what culpable negligence is? This doesn't give any definition of what culpable negligence is.

Tr. 122.

The State then had to get an instruction on culpable negligence manslaughter, D-51. Instead of requesting language to fix D-50, or at least add to D-51 to explain the differences in degrees of culpability, defense counsel stated he had no objection to D-51 as written. Tr. 122. Again, this was constitutionally deficient performance.

As argued in Issue No. 4, *supra*, there was evidence to support a self-defense instruction. However, if this Court finds the trial counsel withdrew the instructions by his comments, Westbrook would assert that counsel's concession was ineffective of counsel.

[THE COURT]....Is it your intention to try to offer a self-defense instruction?

[DEFENSE COUNSEL]: *Your Honor, I don't believe in good faith that we could –*

THE COURT: There was no overt act, any testimony of an overt act to support it that the Court recalls.

[DEFENSE COUNSEL]: And as Your Honor pointed out, the only testimony was his approach where he walked toward the defendant[17].

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[17] Trial counsel was presumptively referring to the comments the trial court made when denying the defense motion for a directed verdict.

> [THE COURT]...There is no evidence before the Court that Mr. Sharpe was armed in any way, nor is there any evidence that he made any overt acts of aggression in an effort to assault Mr. Westbrook in any form that any reasonable juror could have a design on the part of Mr. Sharpe to kill or injure, cause serious bodily injury to Mr. Westbrook. The only evidence to support even a hint of that is that Mr. Sharpe was walking towards Mr. Westbrook.

Tr. 99.

> THE COURT: *Given that, I'm going to refuse D-10 as being unsupported by the evidence.* That would apply to D-11 and 12 and 13. Fourteen is refused also as a self-defense reasonable apprehension. So is 15 and is refused. So is 16 is refused....

Tr. 110-11 [emphasis added].

Counsel was present when Nicole Ross testified and actually cross-examined her.[18] Ross's testimony formed the basis for self-defense. Tr. 50-51. Yet, counsel informed the court that he could not argue self-defense "in good faith." Abandoning an affirmative defense based in the evidence can not be strategy or even minimally reasonable professional assistance. It also seems as if counsel tried to present additional evidence to support self-defense, but never followed through. Counsel did get in evidence of Sharpe's size, 6 feet tall and 250 pounds, but never tried to get Westbrook's smaller size into evidence.[19] Although he cross-examined the pathologist on a field test which showed the presence of alcohol and drugs in Sharpe's system, he never attempted to introduce any subsequent toxicology report. Tr. 74-75. Such evidence may have been admissible, depending on if there was evidence

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[18] However, counsel was apparently confused about who he was cross-examining.

Q. ...How many beers do you recall Nicole Ross having?
A. I only had half a beer.
Q. I'm asking you, do you recall how many beers Nicole Ross had?
A. I am Nicole Ross.
Q. I'm sorry. Sabrina Day.

Tr. 54.

[19]Counsel in his closing argument did cite to Westbrook's smaller size, but no evidence was ever placed in the record. Tr. 130. Appellant counsel acknowledges that information on Westbrook's smaller size can be easily found *outside* the record on the Mississippi Department of Corrections website, but concedes there is nothing in the record that can be shown to this Court.

Sharpe became aggressive after drinking. MRE 404(a)(2). Again, this illustrates the lack of investigation.

Furthermore, in Instruction D-13, counsel attempted to articulate a "stand your ground" instruction. He should have submitted a justifiable homicide instruction. Under Miss. Code Ann. §97-3-15, the killing of a human being is justifiable:

> (e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling, in any occupied vehicle, in any place of business, in any place of employment or in the immediate premises thereof in which such person shall be;

There was apparently no attempt whatsoever by counsel to raise this defense, commonly known as the Castle Doctrine, in Westbrook's defense. The law, which went into effect on July 1, 2006, applied in Westbrook's case. The jury was never told that Westbrook "shall be presumed to have" been in reasonable fear under the law. Subsection (3) states:

> (3) *A person who uses defensive force shall be presumed to have reasonably feared imminent death or great bodily harm, or the commission of a felony upon him* or another or upon his dwelling, or against a vehicle which he was occupying, *or against his business or place of employment or the immediate premises of such business or place of employment, if the person against whom the defensive force was used, was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered*, a dwelling, occupied vehicle, *business, place of employment or the immediate premises thereof or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that* dwelling, occupied vehicle, *business, place of employment or the immediate premises thereof and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred.* This presumption shall not apply if the person against whom defensive force was used has a right to be in or is a lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or is the lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or if the person who uses

> defensive force is engaged in unlawful activity or if the person is a law enforcement officer engaged in the performance of his official duties;

Miss. Code Ann. §97-3-15(3) (emphasis added).

Clearly, the evidence presented at least required a jury determination on whether or not the Castle Doctrine applied in this case. Surely, no homeowner would be prosecuted for murder in a similar situation, even if the homeowner made a comment about going to jail before confronting the trespasser. Westbrook, acting as an employee of Buddy's Inn, ejected a loud and aggressive patron from the bar. When Sharpe returned, he was a trespasser. Westbrook had a right to remove him from the premises, which includes the parking lot under the statute.

Under the law, Westbrook was clothed with the presumption that his actions against Sharpe were reasonable. It can not be considered trial strategy in this case to neglect to include an instruction on justifiable homicide under the Castle Doctrine. The prejudice to Westbrook is apparent, as the jury was never given the option of finding Westbrook's actions justified under the law. As set forth above, counsel never even argued for an acquittal, but only that Westbrook's conduct was not murder. It is entirely possible that had the jury been instructed on the Castle Doctrine, the results would have been different.

The combination of all these deficiencies leaves no doubt that Westbrook was denied his Sixth Amendment right to effective assistance of counsel, as well his rights under Article 3 Section 26 of the Mississippi Constitution. In summary, the jury was not instructed on several viable manslaughter defenses, exacerbated by counsel's admitted inability to cite a case. Counsel failed to present an clear definition of culpable negligence manslaughter

which adequately explained the difference of the degrees of culpability with depraved heart murder. Counsel was also deficient in conceding the lack of evidence of self-defense. When combined with appellant's claims in his *pro se* Motion for a New Trial, Westbrook was clearly prejudiced by counsel's actions.

Once again, none of these actions can reasonably be considered trial strategy, and clearly evidenced counsel's lack of preparedness for trial. Given the nature of the offense and the conflicting testimony, there is a reasonable probability that but for counsel's performance, the result of this trial would have been different. *Colenburg*, 735 So.2d at ¶27. Under the totality of the circumstances, Westbrook is clearly entitled to a new trial. *Hiter v. State*, 660 So. 2d 961, 965 (Miss. 1995).

CONCLUSION

Given the evidence presented in the trial below, and based on the above argument, together with any plain error noticed by the Court which has not been specifically raised, Danny Allen Westbrook is entitled to have his conviction for murder reversed and rendered. At the very least, he is certainly entitled to a new trial with the jury properly instructed. In the alternative, the case should be remanded for resentencing for manslaughter. To affirm the verdict of murder in case would sanction an unconscionable injustice.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Danny Allen Westbrook, Appellant

By: 

Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 5th day of December, 2008, mailed a true and correct copy of the above and foregoing Brief of Appellant, by United States mail, postage paid, to the following:

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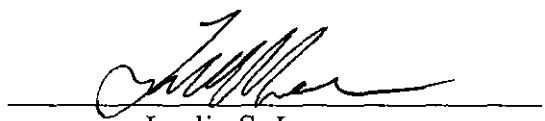

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