# APPENDIX H: Appellate Brief Excerpts Written for Opposing Sides

# Example 1

**Question Presented**

*For Plaintiff Arthur*

QUESTIONS PRESENTED

1. In Georgia, a battery occurs when the plaintiff can show the defendant intentionally touched the plaintiff in an offensive manner with *either* the intent to cause harm *or* to cause insult or offense, or both. Henry flung his door open when he knew someone was at the door and hit Arthur with the door, causing a bloody nose, and then laughed at Arthur after seeing that he was injured. Did Henry commit battery against Arthur?
2. Under Georgia caselaw for the intentional tort of battery, did Arthur consent to being hit in the face and receiving a bloody nose simply by knocking on his neighbor Henry’s door?

*For Defendant Henry*

QUESTIONS PRESENTED

1. In Georgia, a battery occurs when the plaintiff can show that the defendant intentionally touched the plaintiff in an offensive manner with *either* the intent to cause harm *or* to cause insult or offense, or both. Henry opened his door, the door struck Arthur, Henry laughed, and Arthur was injured. Is this sufficient for Arthur to establish a claim for battery against Henry?
2. Under Georgia caselaw for the intentional tort of battery, does Henry have a viable defense to battery because Arthur consented to the touch by knocking on and standing immediately in front of Henry’s door?

**Statement of Facts**

*For Plaintiff Arthur*

STATEMENT OF FACTS

Arthur, the plaintiff, and Henry, the defendant, are neighbors. Henry hit Arthur in Arthur’s face with Henry’s door, and Arthur sued Henry for battery.

Arthur and Henry are next door neighbors. One Sunday morning Arthur went next door to Henry’s home and knocked on the door to ask Henry if he could borrow some eggs. Arthur had borrowed eggs from Henry before, so he knew that Henry often aggressively swung his door open. Henry could see that Arthur was at his door because there are windows on either side of the door. Henry quickly threw open the door and hit Arthur in the nose, injuring him and causing his nose to bleed. Henry then stuck his head out the door and laughed at Arthur when he saw Arthur bleeding. Arthur, injured with blood streaming down his face, stated, “I’m going to go after you for everything you’ve got!” Henry then slammed the door in Arthur’s bloodied face.

Arthur sued Henry for battery. The trial court granted summary judgment in favor of Henry, and Arthur is appealing the trial court’s decision.

*For Defendant Henry*

STATEMENT OF FACTS

Arthur, the plaintiff, and Henry, the defendant, are neighbors. Henry accidentally struck Arthur in the face with his door after Arthur came to Henry’s door, and Arthur sued Henry for battery.

Arthur and Henry live directly next door to each other. One Sunday morning, Arthur went to Henry’s home and knocked on the door to ask Henry if he could borrow some eggs. Because Henry had kindly given Arthur eggs in the past, Arthur knew that Henry often opened his door very quickly. Henry’s door does not have any windows, so it is difficult for him to see who is at the door. Henry opened the door and the door hit Arthur in the nose, causing his nose to bleed. When Henry stuck his head out the door, he laughed. After Arthur angrily screamed at Henry, “I’m going to go after you for everything you’ve got!” Henry closed the door.

Arthur sued Henry for battery. The trial court granted summary judgment in Henry’s favor. Arthur appealed the trial court’s decision.

**Point Headings**

*For Plaintiff Arthur*

1. **The Trial Court Erred in Granting Henry’s Motion for Summary Judgment Because Arthur Properly Established the Required Elements of a Battery.**
   1. The touching was intentional because Henry purposefully hit Arthur with the door.
   2. The touching was offensive because Arthur was hit in the face, which is objectively offensive.
   3. The touching was harmful because Henry injured Arthur.
   4. The touching was insulting and offensive because Henry laughed at Arthur when he realized he was hurt.
2. **The Trial Court Erred in Granting Henry’s Motion for Summary Judgment Because Arthur Did Not Consent to the Touching and Therefore Henry Does Not Have a Viable Consent Defense to Arthur’s Battery Claim.**
   1. Arthur did not consent to the touching because he did not invite the touching.
   2. Arthur did not consent to the touching because he did not contract for the touching.

*For Defendant Henry*

1. **Arthur did not establish the required elements of a battery. Because Henry did not intend to touch Arthur and because Henry did not intend to cause harm, insult, or offense.**
2. **Henry has a viable consent defense to Arthur’s battery claim because Arthur consented to the touching by standing so close to the door.**

# Example 2

**Statutes Involved**

*For the State/Defendant Femmio*

STATUTES INVOLVED

The statute involved in this case is O.C.G.A § 16-5-21(a)(2) (2017):

“(a) A person commits the offense of aggravated assault when he or she assaults: . . . (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.”

**Standard of Review**

*For the State/Defendant Femmio*

STANDARD OF REVIEW

The standard of review for the denial of a motion for a directed verdict of acquittal is: “view[ing] the evidence in the light most favorable to the jury’s verdict . . . whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Durrance v. State, 250 Ga. App. 1, 1 (2011).

**Question Presented**

*For the State*

QUESTION PRESENTED

In Georgia, a person commits aggravated assault when they commit an assault with *either* a deadly weapon *or* with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury. Rolf Femmio threw a potentially venomous snake at Willy Zapka while he used a bathroom stall, causing a terrified Zapka to run into the door with such force that he suffered a possible concussion, severe headache, and a profusely bloody nose. Did Femmio commit aggravated assault?

*For Defendant Femmio*

QUESTION PRESENTED

In Georgia, a person commits aggravated assault when they commit an assault with *either* a deadly weapon *or* with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury. Rolf Femmio lobbed a pillowcase containing a snake (species unidentified) into a bathroom stall occupied by Willy Zapka, who accidentally ran into the door and sustained a headache and a nosebleed. Is this sufficient to establish Femmio committed aggravated assault?

**Statement of Facts**

*For the State*

STATEMENT OF FACTS

Rolf Femmio, the defendant, and Willy Zapka, the victim, are long-time rivals. (R.4). Femmio threw a snake at Zapka while he used a bathroom stall, causing Zapka to recoil and run into the bathroom door hard enough to knock him unconscious. (R.5). The State charged Femmio with aggravated assault. (R.11).

Femmio and Zapka were set to compete against each other in a local karate tournament at the West Athens Community Center. (R.5). Before the match, Zapka retreated to a bathroom stall in the men’s locker room to prepare himself for the encounter. (R.5). Aware of Zapka’s pre-match routine, Femmio followed Zapka into the locker room a few minutes later carrying a pillowcase. (R.1,5). After calling Zapka out by name, Femmio threw the pillowcase over the side of the bathroom stall and hit Zapka in the head. (R.5). When the pillowcase landed in the sink in front of Zapka, a large snake slithered out—Zapka recognized it as a venomous copperhead. (R.5). Terrified by the sight of a potentially deadly snake coiled up only a foot and a half from him, Zapka ran smack into the bathroom stall door, causing him to lose consciousness. (R.5). Alan Mills, an off-duty paramedic who was changing in the locker room, responded when he heard the bang of the stall door. (R.3). Witnessing an unresponsive Zapka on the floor of the bathroom, Mills climbed underneath the stall to administer medical treatment, resuscitating him with smelling salts. (R.3). Zapka declined further medical attention, but Mills believes he likely sustained a concussion and should have sought treatment at a hospital. (R.4). As a result of slamming into the stall door, Zapka suffered a profusely bloody nose and a debilitating headache, as well as a possible concussion. (R.6).

Although the snake was never positively identified, Zapka believed the snake to be a venomous copperhead. (R.5,7). While Mills’s description of the snake as four feet long and blotchy was consistent with the nonvenomous northern watersnake, other evidence (Zapka’s identification and a maintenance man’s description) suggests the snake was a venomous viper—either a copperhead or a cottonmouth. (R.2,3,5,7,8). Like the copperhead, the cottonmouth can strike from as far away as half the length of its body. (R.8). Such vipers may bite if agitated, stepped on, or picked up. (R.7,8). While bites from these vipers are rarely fatal, they can be extremely painful and the hemotoxic venom they deliver can result in temporary (or, without proper treatment, permanent) loss of use of the affected area. (R.7,8).

The State indicted Femmio for aggravated assault. (R.11). At trial, after the trial court denied a motion by Femmio for a directed verdict, a jury found Femmio guilty beyond a reasonable doubt. (R.11,13). The trial court denied Femmio’s motion for new trial. (R.14). Femmio is appealing the trial court’s decision to deny his motion for directed verdict. (R.15).

*For Defendant Femmio*

STATEMENT OF FACTS

Rolf Femmio, the defendant, and Willy Zapka, the victim, are long-time rivals. (R.4). Femmio lobbed a pillowcase containing an unidentified snake into a bathroom stall Zapka occupied. (R.5). Zapka panicked and accidentally ran into the door. (R.5). The State charged Femmio with aggravated assault. (R.7).

Femmio and Zapka were set to compete against each other in a local karate tournament at the West Athens Community Center. (R.5). Before the match, Zapka retreated to a bathroom stall in the men’s locker room to pump himself up to fight Femmio. (R.5). A few minutes later, Femmio entered the locker room carrying a pillowcase. (R.1). Aware that Zapka was in one of the bathroom stalls, Femmio lobbed the pillowcase over the side of the stall. (R.5). The pillowcase glanced off the side of Zapka’s head before landing in the stall sink. (R.5). An unidentified species of snake slithered out of the pillowcase. (R.5). Zapka saw the snake and began to panic, running into the bathroom stall door. (R.5). Alan Mills, an off-duty paramedic who was changing in the locker room, responded when he heard the commotion. (R.3). Mills looked underneath the stall door and saw Zapka sitting on the floor. (R.3). When he did not hear Zapka respond, Mills climbed underneath the stall to check on him. (R.3). Mills ensured Zapka was fully conscious and gave him gauze for his nosebleed. (R.3,5). Zapka told Mills not to call an ambulance, but to instead call the police, claiming that Femmio tried to kill him. (R.4). Mills later opined that the incident may have left Zapka concussed, but Zapka declined to see a doctor and ultimately walked away with only the nosebleed and a headache. (R.4–6). Zapka later testified that it was nothing he “wouldn’t gladly endure again if that meant Femmio gets the book thrown at him!” (R.6).

The snake was never positively identified and was not adduced as evidence at trial. (R.7). While Zapka believed the snake to be a copperhead, the snake could have been a nonvenomous northern watersnake based on Mills’s description of the snake as four feet long and blotchy. (R.3,5). Even if the snake was a viper—either a copperhead or a cottonmouth—such snakes are not aggressive towards humans and are more likely to retreat than confront a person. (R.8). While a bite from one can cause pain and swelling that can incapacitate the affected limb, bites only tend to occur when a person steps on, picks up, or agitates the snake. (R.7,8).

Femmio was charged with aggravated assault. (R.11). At trial, Femmio moved for a directed verdict. (R.11). The trial court rejected Femmio’s motion, and the jury rendered a guilty verdict against Femmio. (R.11, 13). Femmio timely filed a motion for new trial—the trial court denied his motion. (R.11–14). Femmio now appeals the trial court’s decision to deny his motion for directed verdict. (R.15).

**Point Headings and Argument**

*For the State*

1. **The Trial Court Properly Denied Femmio’s Motion for Directed Verdict Because the State Established the Required Elements of Aggravated Assault.**

Under O.C.G.A. § 16-5-21(a)(2), the elements of criminal aggravated assault are (1) an assault; (2) with *either* a deadly weapon *or* with an object, device, or instrument; (3) which when used offensively against another; (4) is likely to *or* actually does result in serious bodily injury. LaPann v. State, 191 Ga.App. 1, 1 (1989). Femmio’s act placed Zapka in reasonable apprehension of receiving a violent injury, thus meeting the first element of aggravated assault. Although a snake is not an offensive weapon per se, “a weapon primarily meant and adapted for attack and infliction of injury,” Ware v. State, 289 Ga.App. 1, 1 (2008), an animal can be considered an offensive instrument, Braziel v. State, 320 Ga.App. 1, 1 (2013). Whether an object qualifies as an offensive instrument depends on “all the circumstances surrounding the instrument,” including “the manner and means of the object’s use, as well as any wounds inflicted and other evidence of the capabilities of the instrument.” Weaver v. State, 325 Ga.App 1, 1 (2013) (citations omitted).

* 1. Femmio used the snake in an offensive manner.

Femmio used the snake in an offensive manner by targeting Zapka’s head with a menacing object. When a defendant approaches an assault victim during a confrontation while holding a claw hammer, provoking the victim to defend himself with a baseball bat, a court will find aggravated assault occurred even though the defendant did not strike given the victim’s reasonable fear of being struck and injured by the claw hammer. Crane v. State, 297 Ga.App. 1, 1 (2009). A defendant who throws a “normally non-offensive nondeadly” 12-ounce glass beer bottle at a police officer entering the defendant’s home from close range with such force that the bottle shatters upon impact is guilty of aggravated assault even when the bottle does not strike or injure the officer. Reese v. State, 303 Ga.App. 1, 1 (2010). But a defendant who strikes a victim in the face with the “non-business end” of a box cutter does not use the instrument offensively when no evidence shows the defendant ever exposed the box cutter blade or threatened the victim with it. Ware v. State, 289 Ga.App. at 1. Still, courts normally find offensive use when evidence shows a defendant targeted the victim’s head or face—witness testimony that the defendant hit the victim on the head with a lamp is enough to establish offensive use without the state introducing the lamp itself or any details about the lamp into evidence. Talley v. State, 137 Ga.App. 1, 1 (1976).

As with the defendant’s use of the claw hammer in Crane, the fact that the snake did not ultimately strike at Zapka does not preclude finding offensive use occurred. On the contrary, Zapka’s “flight” reaction to escape from the bathroom stall mirrored the Crane victim’s “fight” reaction to grab the baseball bat to defend himself— Femmio’s offensive use of the snake triggered Zapka’s reasonable fear of being bitten by a copperhead. Even if the pillowcase containing the snake Femmio used could be considered “normally non-offensive,” Femmio wielded the pillowcase in the same manner that the Reese defendant wielded the beer bottle by targeting Zapka at close range with an instrument that could injure if it struck its intended target. That the pillowcase Femmio threw struck Zapka in the head further bolsters the case for offensive use: Femmio, who could see underneath the bathroom stall and tell where Zapka stood, clearly targeted Zapka’s head or face as the Talley defendant had. Unlike the Ware boxcutter blade that was never exposed, the snake emerged from its sheath and threatened the victim. Therefore, even without the State adducing the snake Femmio used as evidence at trial, evidence that Femmio targeted Zapka’s head with a menacing object suffices to show offensive use as it did in Talley.

* 1. Femmio’s offensive use of the snake was likely to result in serious bodily injury.

Femmio’s offensive use of the snake was likely to result in serious bodily injury because the snake had the capacity to injure and incapacitate Zapka. When a defendant calls a victim over to his car and sprays him “directly in the face with mace,” temporarily blinding the victim, a court will find the defendant’s offensive use was likely to result in serious bodily injury due to pepper spray’s capacity to injure and incapacitate attackers. Weaver v. State, 325 Ga.App. 1, 1–2 (2013). Even where the victim suffers no visible injury as a result of the defendant’s offensive use of an instrument, the “likely to result in serious bodily injury” element is met if the offensive instrument used has the capacity to temporarily debilitate the victim. Id.

While Femmio did not call Zapka over like the defendant did to the victim in Weaver, stalking Zapka to the bathroom stall and throwing the four-foot-long snake so that it landed only two feet away put Zapka in range of the offensive instrument just the same. Femmio’s rough handling agitated the snake making it liable to bite, and just as pepper spray incapacitated the Weaver victim by temporarily blinding him, the snake’s bite had the capacity to injure and incapacitate Zapka by causing persistent pain and swelling that could temporarily deprive Zapka of the use of a limb.

* 1. Femmio’s offensive use of the snake did result in serious bodily injury.

Femmio’s offensive use of the snake did result in serious bodily injury by inflicting a head injury that both required medical treatment and caused a great deal of pain. Serious bodily injury results where a pregnant aggravated assault victim sustains injuries that trained medical personnel determine require examination and treatment at a hospital. Tyson, 358 Ga.App at 2. Serious bodily injury also results when a defendant’s offensive use of a piece of firewood accidentally glances off the arm of the victim attempting to defend herself and opens a gash in her head requiring ten sutures. LaPann, 191 Ga.App. at 1. When a defendant pepper sprays a victim who “suffered a burning sensation in his eyes and face,” serious bodily injury still results in lieu of an injury requiring medical care given the “great deal of pain” and temporary blindness the victim endures. Weaver, 325 Ga.App. at 1–2.

As in Tyson, a trained medical professional determined Zapka’s head injury should have properly been examined and treated at a hospital. As with the injury sustained in LaPann, that the resulting head injury requiring medical attention occurred as a result of Zapka’s reaction to the assault sufficiently establishes that serious injury resulted. Additionally, the painful and debilitating headache Zapka suffered further satisfies the element—even if Zapka’s headache was not as acutely painful as the burning sensation the Weaver victim experienced to his eyes, it lasted considerably longer and left him incapacitated for a full day.

Femmio used the snake in an offensive manner by targeting Zapka’s head with a menacing object, Femmio’s offensive use was likely to result in serious bodily injury because the snake had the capacity to injure and incapacitate, and Femmio’s offensive use did result in serious bodily injury by inflicting a head injury requiring medical treatment that caused Zapka a great deal of pain. Therefore, the trial court properly denied Femmio’s motion for directed verdict because the State established the required elements of aggravated assault.

*For Defendant Femmio*

1. **The Trial Court Erred in Denying Femmio’s Motion for Directed Verdict Because Femmio Did Not Use the Snake as an Offensive Instrument That Was Likely to or Did Result in Serious Bodily Injury.**

Under O.C.G.A. § 16-5-21(a)(2), the elements of criminal aggravated assault are (1) an assault; (2) with *either* a deadly weapon *or* with an object, device, or instrument; (3) which when used offensively against another; (4) is likely to *or* actually does result in serious bodily injury. LaPann v. State, 191 Ga.App. 1, 1 (1989). Femmio does not dispute that an assault occurred. A snake is clearly not a deadly weapon per se, “a weapon primarily meant and adapted for attack and infliction of injury,” Ware v. State, 289 Ga.App. 1, 1 (2008). Thus, whether a snake can qualify as an offensive instrument depends on whether the object is “an instrument that is likely to result in serious bodily injury depending on the manner and means of the object’s use, as well as any wounds inflicted and other evidence of the capabilities of the instrument” Reese v. State, 303 Ga.App 1, 1 (2010).

* 1. The snake was not an instrument used in an offensively against Zapka.

The snake was not an instrument used offensively against Zapka because it was not thrown at him in a way that could cause injury; the snake was an untrained animal that was substantially more likely to retreat than attack. When a defendant throws a 12-ounce glass beer bottle at a police officer with enough force that the bottle shatters upon impact with the doorway, offensive use occurs. Reese, 303 Ga.App. at 1. A court will not find that hitting a victim with a ceramic statute in a way that was not likely to produce death or great bodily injury constitutes offensive use. Banks v. State, 169 Ga.App. 1, 1 (1984). Instead, offensive use occurs when a defendant targets a victim’s face with pepper spray, a tool typically used for self-defense given its capacity to injure and incapacitate attackers. Weaver v. State, 325 Ga.App 1, 1 (2013) (citation omitted). But offensive use does not occur when a defendant strikes a victim once in the head with the “non-business end” of a box cutter whose blade was unexposed. Ware, 289 Ga.App at 1. Where a defendant commands a trained pit bull who had shown aggression in past encounters to “sic him boy, bite him” and the dog attacks an officer, a court will find the defendant used the pit bull as an offensive instrument. Braziel v. State, 320 Ga.App. 1, 1 (2013).

The snake was not forcefully thrown at Zapka like the hard glass beer bottle thrown at the officer in Reese but was instead lobbed into the stall inside of a pillowcase. That the pillowcase then happened to glance off the side of Zapka’s head does not show offensive use—as with Banks, no evidence shows such contact was likely to produce death or great bodily injury. Even if one considered Zapka the “target” of Femmio’s toss, a snake inside of a pillowcase hardly qualifies as a defensive tool-cum-offensive weapon like the pepper spray used in Weaver. As with the Ware boxcutter whose blade was unexposed when it struck the victim’s face, the snake was confined within its pillowcase sheath when the contact occurred. While the snake did emerge after the pillowcase landed, its capacity to attack and injure paled in comparison to the Braziel pit bull’s—the snake was neither aggressive towards humans nor trained to attack on command and was instead more likely to retreat than strike at Zapka.

* 1. The snake as used was not likely to result in serious bodily injury.

The snake as used was not likely to result in serious bodily injury because Femmio’s actions did not result in any bruises, lacerations, or serious bleeding and the snake was not likely to temporarily debilitate Zapka. Serious bodily injury results when a defendant slices a victim’s finger with a pocket knife while attempting to cut stockings containing money from around the victim’s neck, as the laceration evidences that the pocket knife could inflict the same injuries as a typical knife. Where a defendant delivers forceful blows to a victim with a piece of firewood, each of which results in bruising, a court will find the offensive use was likely to result in serious bodily injury. LaPann v. State, 191 Ga.App. at 1. Offensive use of hands and feet is likely to result in serious bodily injury where strikes by the defendant left his pregnant girlfriend with visible injuries to her face and head along with an injury that caused her to bleed down both legs. Tyson v. State, 358 Ga.App. 1, 1 (2021). When a defendant sprays a victim “directly in the face with mace” and temporarily blinds him, a court will find the pepper spray’s use was likely to result in serious bodily injury given its effectiveness at incapacitating attackers. Weaver v. State, 325 Ga.App. 1, 1–2 (2013).

Zapka did not sustain any lacerations like the Hambrick victim, bruises like the LaPann victim, or visible facial injuries like the Tyson victim. His sole visible injury—a nosebleed—is insignificant and unalarming compared to the pregnant Tyson victim’s injury that caused her to bleed down her legs. And while a bite from the snake could prove temporarily debilitating to the affected area, the snake was unlikely to deliver an incapacitating injury like the pepper spray in Weaver. Whereas pepper spray is often used for self defense precisely because it reliably incapacitates an opponent, the snake would not likely attempt to bite Zapka while curled up in the sink without provocation on his part.

* 1. No serious bodily injury resulted from Femmio’s actions.

No serious bodily injury resulted from Femmio’s actions because Zapka’s injuries were minor, did not require medical treatment or hospitalization, and were not exceptionally painful. No serious bodily injury results when a defendant hits her husband once with an unexposed box cutter, inflicting only a minor facial cut and an injury to the inside of his mouth. Ware, 289 Ga.App at 1. Serious bodily injury results when a defendant’s blow with a piece of firewood glances of his daughter’s arm and leaves a gash on her head requiring ten stitches. LaPann, 191 Ga.App. at 1. Injuries severe enough that trained medical personnel determine they require examination and treatment at the hospital qualify as serious bodily injury. Tyson, 358 Ga.App. at 1. Without any resulting permanent injury, a court can find serious bodily injury results when a defendant sprays a victim directly in the face with mace when the “extreme physical pain” endured by a victim who suffered a prolonged burning sensation in his eyes and face is apparent from their testimony. Weaver, 325 Ga.App. at 2 (citation omitted).

Like the minor facial and head injuries in Ware, Zapka’s resulting nosebleed and headache are insufficient to qualify as serious bodily injury. Neither the use of smelling salts to arouse a person nor giving gauze to staunch a nosebleed—acts any high school football coach can perform—qualify an injury as one requiring medical treatment like the cranial laceration that required ten stitches in LaPann. Nor is the ex-post opinion by an off-duty paramedic that Zapka may have been concussed equivalent to the trained medical determination that the victim required hospitalization that qualified the serious bodily injury in Tyson. And Zapka’s testimony that he would “gladly endure” the “pretty wicked headache” he walked away with again “if that meant Femmio gets the book thrown at him” certainly does not make apparent that Zapka suffered the type of “extreme physical pain” endured by the Weaver victim that can satisfy the serious bodily injury element in lieu of a lasting injury.

The snake was not an instrument used offensively against Zapka because it was not thrown at him in a way that could cause injury; the snake was an untrained animal that was substantially more likely to retreat than attack. As used, the snake was not likely to result in serious bodily injury because Femmio’s actions did not result in any bruises, lacerations, or serious bleeding and the snake was not likely to temporarily debilitate Zapka. No serious bodily injury resulted from Femmio’s actions because Zapka’s injuries were minor, did not require medical treatment or hospitalization, and were not exceptionally painful. Therefore, the trial court erred in denying Femmio’s Motion for Directed Verdict because Femmio did not use the snake as an offensive instrument that was likely to or did result in serious bodily injury.

**Conclusion and Closing**

*For the State/Defendant*

CONCLUSION

For the reasons set forth above, the [State/Defendant] respectfully requests the Court to [deny/sustain] the Motion for Directed Verdict denied by the trial court.

CLOSING

Respectfully submitted this \_\_ day of \_\_\_\_\_, 202\_.

X [Signature Line]\_\_\_\_\_\_\_\_\_\_

[Attorney Name]

Attorney for [the State/Defendant]

State Bar No. \_\_\_\_\_

[Office/Law Firm]

[Street Address]

[City, State Zip]

[Phone number]

[E-mail address]

# Example 3

**Policy Arguments**

*For the Plaintiff [HUSBAND]*

While Benham has yet to address whether an ex-spouse’s cohabitation or de facto marriage constitutes a material change to the parties’ separation agreement justifying a termination of alimony payments, jurisdictions with similar policy goals have. Mississippi determined that an ex-wife’s admitted cohabitation with a person to whom she was not married forfeited her right to future alimony payments just as if she had remarried. McRae v. McRae, 381 So.2d 1052, 1055–56 (1980). That court reasoned that in light of its continuing equity jurisdiction over the administration of the separation agreement, “it would be shocking to the conscience to compel the husband to continue to support the wife by payment of alimony while she is living in adultery with another man.” Id. at 1055 (citation omitted). Thus, when an ex-wife cohabitates with another man for an extended period without marrying, it constitutes a material change in circumstances of the parties—“her unconscionable conduct” repudiates her right to future alimony. Id. The court recognized that “[t]o hold otherwise would be to condone . . . cohabitating with a person rather than marrying and, in effect would penalize a person for marrying but reward them for cohabitation without benefit of marriage.” Id. at 1056.

Benham’s stated policies align with Mississippi’s policies that justified the termination of alimony in McRae. Like Ward, McRae recognizes the court’s equitable role requires it to administer separation agreements in a way that promotes marriage. To require one spouse to continue paying alimony while the other receives support from a cohabitant would hand the alimony recipient “essentially a double recovery,” an unconscionable outcome under Ward. A rule that precludes long-term cohabitation from constituting a material change of circumstances would create the negative incentives Ward warns of: “to allow a divorced spouse to refuse to say ‘I do’ just to continue collecting alimony at the former spouse’s . . . expense” effectively rewards a person for not marrying and cohabitating instead.

Other jurisdictions with different policy goals have reached other outcomes; their reasoning does not apply to Benham cases. In holding that a divorced spouse’s cohabitation “has no relevance except insofar as the arrangement actually affects the [divorced spouse’s] financial circumstances,” the Supreme Court of Maine expressly rejected the position that “it is against public policy . . . for one man to be supporting the wife of another who has himself assumed the legal obligation for her support.” Mitchell v. Mitchell, 418 A.2d 1140, 1143 (1980) (citation omitted). To the Mitchell court, that reasoning—applicable when a divorced spouse receiving alimony remarries—did not apply to the unmarried cohabitant who receives alimony. Id. Analyzing the cohabitant relationship as between the former wife and “her friend,” the lack of a “legal right to demand continued support from her companion” sufficed to prove the “superficial resemblance of cohabitation to marriage.” Id. So, because unmarried cohabitants were simply not obligated by law to support each other, cohabitation must be disqualified from consideration in the alimony termination inquiry in Maine. Id. The court then added that modifying alimony based on “moral judgments of the recipient’s living arrangements would be beyond the scope of the divorce court’s discretion.” Id.

Benham’s policy goals run counter to those espoused in Maine. Unlike Mitchell, the Ward court did not view the alimony termination inquiry only through the lens of remarriage’s comparability to cohabitation—it immediately established that “a remarriage answers the support question straightaway, the cohabitation scenario does not.” While the Ward court of course recognized that cohabitant-provided support has a discretionary component not present in the marital support relationship, it did not labor to frame cohabitation as some friendly agreement only loosely corresponds with marriage. On the contrary, the court instead spotlighted the burden trial courts would face in determining the extent to which a particular cohabitation agreement approximates marital financial support without the benefit of a rule that cohabitation terminates alimony. Whereas the Mitchell court focused only on the *legal* differences between cohabitation and marriage, the Ward court recognized that “excluding cohabitation from the alimony termination risks *inequity*” (emphasis added). And while both courts agreed that moral judgments about cohabitation alone should not determine the issue, Ward recognized a different moral basis—the promotion of marriage norms—that properly supports terminating alimony based on cohabitation so as to not disincentivize a divorced spouse from remarrying. Because Benham is primarily concerned with equity considerations and the promotion of marriage norms, it should adopt a rule holding that cohabitation terminates the obligation to provide future alimony. [HUSBAND’s] future alimony payments should be terminated.

*For the Defendant [WIFE]*

While Benham has yet to address whether an ex-spouse’s cohabitation or de facto marriage constitutes a material change to the parties’ separation agreement justifying a termination of alimony payments, jurisdictions with similar policy goals have. Maine determined that the reasoning supporting termination of alimony upon remarriage “does not apply to the case of an unmarried cohabitant receiving alimony.” Mitchell v. Mitchell, 418 A.2d 1140, 1143 (1980). That court established that “the sole purpose of alimony is to provide financial support to the former spouse where necessary.” Id. Consequently, a court abuses its discretion when it modifies alimony based on “moral judgments of the recipient’s living arrangements.” Id. Given that unmarried cohabitants have no legal obligation to provide for each other’s support, a receiving cohabitant has no assurance of the amount or duration of the supporting cohabitant’s voluntary contributions. Id. Because any comparison of unmarried cohabitation to marriage reveals no more than a “superficial resemblance,” it is improper to infer that cohabitation ends the need for alimony. Id.

Benham’s stated policies align with Maine’s policies that justified denying the husband’s motion to terminate alimony in Mitchell. Like Ward, Mitchell recognizes that alimony serves a support purpose based on economic necessity. Where Mitchell frames termination of alimony based on moral judgments as an abuse of discretion, Ward likewise states it would be “wholly improper” for a court to present a divorced spouse with the Hobson’s choice “to live chastely or else forfeit alimony payments.” Both courts instead recognize that because a contributing cohabitant’s support is purely discretionary and may discontinue at any time, cohabitation is a legally inferior means of support that does not end the need for alimony. In Ward’s words, it is this “legal incongruity [that] would plague a rule . . . equat[ing] cohabitation with marriage.”

Other jurisdictions with different policy goals have reached other outcomes; their reasoning does not apply to Benham cases. The Supreme Court of Mississippi held that a cohabitating ex-wife “forfeited her right to future alimony” by “openly living in adultery [and] enduring the embarrassment of it,” which “constituted a material change of circumstances of the parties.” McRae v. McRae, 281 So.2d 1052, 1055 (1980). Mississippi believed that an ex-wife’s moral choice in “setting that kind of example before her daughters” effectively repudiated her right to receive support. Id. Thus, her “admitted cohabitation . . . forfeited her right to future alimony the same as if she had been married to [her cohabitant partner].” Id. at 1055–56.

Benham’s policy goals run counter to those espoused in Mississippi. Unlike McRae, the Ward court expressly condemned attempts by a court “to impose its scruples on a divorced spouse for their lifestyle choices.” Taking such a “distinctly punitive” approach abuses the court’s equitable discretion. Instead understanding that “[a] divorced spouse owes his or her former spouse no duty to lead a virtuous life,” Ward recognized the permanent alimony inquiry should focus on “economic necessities and *not lifestyle*” (emphasis added). Whereas McRae wholly ignored the financial realities underpinning the need to retain permanent alimony, Ward viewed both sides of the issue through an economic lens: the court, while wary of a rule that could allow divorced spouse’s to collect more than strictly necessary, was certain that cohabitation does not answer the support question like remarriage does given that the need for support remains “[s]hould the cohabitants part ways.” Because Benham focuses on alimony as a legal guarantee providing economic necessities rather than a tool for imposing the court’s morality, it should adopt a rule holding that cohabitation is not legally equivalent to remarriage and does not terminate the obligation to continue providing certain, bargained-for alimony support. [WIFE’s] future alimony should not be terminated.

# Example 4

**Policy Arguments**

*For the Plaintiff [HUSBAND]*

Benham should hold that an ex-spouse’s cohabitation or de facto marriage constitutes a material change in circumstances necessitating termination of alimony payments. While an issue of first impression, this holding aligns with states that have addressed the issue sad have the same policies as Benham. In Mississippi, cohabitation creates a presumption of a material change in circumstances, as holding otherwise would “condone the living and cohabiting with a person rather than marrying and, in effect would penalize a person for marrying but reward them for cohabitation without benefit of marriage.” McRae v. McRae, 381 So.2d 1052, 1056 (1980). In McRae, an ex-wife’s cohabitation with a man repudiated her right to future alimony as her living situation was not “brought by want or penury” by an ex-spouse refusing payment or other financial need, but resulted from her own resolve. Id. at 1055. The Supreme Court of Mississippi explained that an ex-spouse “has a duty to society” and “setting that kind of example before her daughters” was “unconscionable conduct.” Id.

Benham is similarly concerned about promoting marital norms and equity considerations. Like Mississippi’s finding in McRae that “the divorced person has a duty to society,” Id. at 1055, Benham found that the divorced has “no duty to lead a virtuous life, except as a member of the public.” Ward v. Ward, 199 Ben. 419 (1988). As in McRae, Ward stated that promoting marital norms “strengthens civil society” and reduces community burdens. Id. at 420. Additionally, it runs against Benham’s equitable policy to allow divorcees to refuse remarriage “just to continue collecting alimony at the former spouse’s—and society—expense” and “collect essentially a double recovery,” Ward at 420. As McRae explained, this would essentially “penalize a person for marrying but reward them for cohabitation without benefit of marriage.” McRae at 1056.

Jurisdictions that reached other outcomes relied on policies that do not align with Benham’s. The Supreme Court of Maine explicitly *rejected* the rationale that it is “against public policy in the ordinary case for one man to be supporting the wife of another who has himself assumed the legal obligation for her support.” Mitchell v. Mitchell, 418 A.2d 1140, 1143 (1980). In denying termination of future alimony due to an ex-wife’s cohabitation, Mitchell held that this rationale does not apply because, though cohabitants may voluntarily support each other financially, “they have no legal obligation to pay.” Id. Since any financial support would be discretionary in amount and duration, “the superficial resemblance of unmarried cohabitation to marriage” warrants no “inference that unmarried cohabitation ends the need for alimony.” Id. Under this legal consideration, Mitchell limited the factors it will consider to only “the former spouse's financial circumstances,” since “the sole purpose of alimony is to provide financial support.” Id.

Although Mitchell may represent the majority view among jurisdictions, it differs from Benham’s view that “any rule that would categorically exclude cohabitation from the alimony termination inquiry risks inequity.” Ward at 419. Unlike Mitchell, Ward did not limit consideration solely to the cohabitant’s financials as Benham’s primary policy concern lies not in specific legal categories but the facts at hand under equitable principles of avoiding double recovery for unmarried cohabitants and promoting marital norms beneficial to society. Ward at 420. While Benham may not consider cohabitation or de facto marriage as a *per se* legal equivalent to remarriage—and acknowledged the trial court’s burden of fact finding with the inability to categorically declare cohabitation as legally equivalent—Ward made clear that the “test is whether there has been a substantial change *in the circumstances of the parties*.” Ward at 420. (emphasis added). Ward recognized these policies will be best promoted if Benham adopts a rule that cohabitation may constitute a material change in circumstances to prevent the double recovery that would otherwise corrode Benham’s objectives. Id. The trial court’s grant of summary judgment should be reversed and Plaintiff’s obligation to pay alimony should be terminated.

*For the Defendant [WIFE]*

Benham’s policies are best supported under its current view of not categorically considering cohabitation as equivalent to remarriage such that it terminates a spouse’s obligation to pay alimony. Although Benham has not addressed whether an ex-spouse’s cohabitation or de facto marriage constitutes a material change in circumstances to justify termination of alimony, the majority of jurisdictions that have considered the issue have similar policies to Benham and hold that neither situation equates remarriage such that it may categorically terminate alimony. In Maine, the court refused to terminate an ex-husband’s alimony obligation because his ex-wife’s cohabitation was a “superficial resemblance” to remarriage not warranting an inference to end alimony. Mitchell v. Mitchell, 418 A.2d 1140, 1143 (1980). Mitchell focused on the legal consideration that, although cohabitants may voluntarily support each other financially, there is no legal obligation for financial support so any aid was too uncertain to create a material change in circumstances. Id. Thus, Mitchell limited the relevant factors solely to the ex-spouse’s financial circumstances. Id. Mitchell also reasoned that alimony termination based on moral judgment of an ex-spouse’s living arrangement was “beyond the scope of the divorce court’s discretion” and had “no relevance” to its equitable policies. Id.

Benham’s policies regarding alimony termination are like those in Mitchell and the majority of jurisdictions. Just like Mitchell, Benham sees the “legal inconsonance between remarriage and cohabitation relationships” and focuses only on “weigh[ing] the economic impact of a particular cohabitation arrangement.” Ward v. Ward, 199 Ben. 419, 420 (1988). Ward explained that permanent alimony “serves a support purpose, so the focus is on economic necessities and not lifestyle,” just as Mitchell found it would not rely on a cohabitant’s moral judgment. Id. Moreover, Ward made clear its desire to avoid “the substantial fact-finding burden that would be thrust upon trial courts who cannot conclude cohabitation categorically constitutes a substantial change in circumstances.” Id.

A minority of jurisdictions conversely treat cohabitation as the legal equivalent of remarriage such that it terminates alimony obligations, but their policies differ from Benham’s. For example, the Supreme Court of Mississippi held that “it would be shocking to the conscience to compel the husband to continue to support the wife by payment of alimony while she is living in adultery with another man.” McRae v. McRae, 281 So.2d 1052, 1055 (1980). McRae focused on the cohabitant’s moral judgments and terminated the ex-husband’s alimony due to the ex-wife “openly living in adultery, enduring the embarrassment of it, and, in addition by silence, setting that kind of example before her daughters constituted a material change.” Id. McRae ignored economic factors, stating only that the ex-wife repudiated her alimony rights because she lived with another man out of her own resolve—not “by want or penury” due to an ex-spouse refusing payment or other financial needs. Id. at 1055.

Unlike McRae, Benham’s policies focus not on moral judgment but equitable factors such as the ex-spouse’s financial situation and current need for support. Ward held that Benham courts must focus *only* on “weigh[ing] the economic impact of a particular cohabitation arrangement” to find a material change justifying alimony termination. Ward at 420. This is unlike McRae, which focused on the morality of the ex-wife “openly living in adultery” and “setting that kind of example before her daughters.” McRae at 1055. Although Ward expressed concern of avoiding double recovery by ex-spouses refusing remarriage to keep alimony, it recognized that any financial support from cohabitation was “offered solely at the cohabitant’s discretion” and there is still a chance “the cohabitants part ways.” Ward at 420. While Benham does share McRae’s policy of promoting marital norms for societal benefits, Ward avoided the moral judgment McRae stressed. It clarified that Benham “courts foster those norms by administering separation agreements in ways that incentivize marriage formation.” Ward at 420. Further, Ward expressed Benham’s desire to avoid the substantial fact-finding burden otherwise unnecessary under its current categorical considerations of cohabitation versus remarriage. This is unlike McRae’s determination that “no hard and fast rule or mold may be laid down” in this inquiry, which “must be faced and determined on a case-by-case basis.” Id. Benham’s policies of equity and marital norms—like those in the majority of jurisdictions—are best upheld if Benham continues to recognize the “superficial resemblance” between cohabitation and remarriage and holds that cohabitation itself may not terminate alimony. Defendant’s right to receive alimony should not be terminated.