

Volume II of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

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SC Supreme Court

JOHN HENRY WARD,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

P O Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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D GARRISON - DIRECT EX BY MR. DURANT

501

1 MR. BUTLER Who are the people from Columbia,
2 what are they testifying to?

3 MR. DURANT. Firearms guy, obviously

4 MR BUTLER. Same testimony as last time?

5 MR DURANT. Same testimony --

6 MR RUNYON It won't be the same testimony. I
7 have other questions for him

8 MR DURANT -- for the medical examiner

9 MR RUNYON And the firearms man, too

10 MR DURANT And the firearms man

11 MR BUTLER My only additional questions would
12 be a little bit more on the ME and a little bit more on
13 crime scene, but no more than -- if you add it all up, 30
14 minutes, 45 minutes.

15 THE COURT: Okay

16 MR DURANT No issue in terms of what actually
17 came into evidence, physical evidence last time?

18 MR BUTLER I don't think so

19 MR DURANT It's up to you, Judge I mean, I
20 can have them all here, I just hate to drag the people
21 down from Columbia if they're not going to testify

22 THE COURT. Do you think it's something we can
23 get it all done this afternoon if we work maybe a little
24 later?

25 MR DURANT I'm thinking it's a possibility I

1 can't guarantee that, though

2 THE COURT Why don't we just bring them on down
3 and we'll finish them today That will be the end of your
4 case?

5 MR. DURANT Pretty much I mean, I was
6 planning on finishing with the ME Of course, the ME,
7 he's like 20 minutes away, I mean, not even that far away

8 THE COURT Let's bring your people down from
9 Columbia, get a feel for how late we are at and then we
10 may are may not take the ME --

11 MR DURANT Because, I mean, I'm going to do my
12 crime scene people and then I'm going to go straight into
13 my SLED people. So I think I can get it in, I'm pretty
14 sure I can get it in I may not get to the ME

15 MR BUTLER If you don't get to her, she come
16 back tomorrow

17 MR RUNYON. There shouldn't be any problem with
18 the people from Columbia It was 163 million dollars
19 surplus and \$13 million worth of sustained veto, so
20 there's money up in Columbia to pay for the people to come
21 down here

22 THE COURT That transcript, can we have
23 somebody make 12 copies of it.

24 MR DURANT Did all of that get on the record
25 about changing it into a State's exhibit and introducing

D. GARRISON - DIRECT EX BY MR DURANT

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1 it without objection?

2 MR BUTLER Without objection.

3 THE COURT That would be State's Exhibit?

4 MR DURANT 78

5 (WHEREUPON, State's Exhibit No 78 was marked
6 for identification and received into evidence.)

7 (WHEREUPON, a lunch recess transpired.)

8 THE COURT I got another note from the jury
9 We didn't discuss the testimony, but he asked if everybody
10 had difficulty understanding and everybody did

11 MR DURANT. Was that before or after or are you
12 going to tell them about the transcript?

13 THE COURT I'm going to tell them we'll make a
14 copy of the transcript available for the jury. It said
15 they all said they did have difficulty understanding, but
16 they believe that they got most of what was said and,
17 hence, have an understanding or the gist of what was said
18 So it may just be a Yankee thing, meaning him

19 Are you ready?

20 MR. DURANT. Yes, Your Honor

21 MR RUNYON. Yes, Your Honor

22 MISS JENKINSON Yes, sir

23 THE COURT Okay. Bring the jury in

24 (WHEREUPON, the following proceedings were held
25 in the presence of the jury)

D GARRISON - DIRECT EX BY MR DURANT

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1 THE COURT We had some communication that some
2 of you may have had some difficulty hearing the last audio
3 testimony And what we're going to do is make a copy of
4 the transcript, which was already prepared, and had we
5 probably thought about it a lot, we could have given you a
6 copy to read along with while we were doing it
7 Nevertheless, our options were making copies available and
8 giving it to you in the jury room when you were
9 deliberating later or replaying it all with the
10 transcript. We figured you would just as soon have it in
11 the jury room, not listen to it again So that's the way
12 we will proceed if that's all right with everyone

13 Mr Durant, call your next witness.

14 MR. DURANT Thank you, Your Honor The State
15 would call Shawn James

16 SHAWN JAMES,
17 being first duly sworn, testified as follows

18 THE CLERK Please be seated. State your full
19 name and spell your last for the record

20 THE WITNESS Shawn James, last name, J-A-M-E-S

21 DIRECT EXAMINATION

22 BY MR DURANT

23 Q Where are you employed, Shawn?

24 A Charleston County Sheriff's Office

25 Q How long have you been with the sheriff's

S JAMES - DIRECT EX BY MR DURANT

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1 office?

2 A Since 1998

3 Q And what are your current duties?

4 A Patrol deputy

5 Q Where are you a patrol deputy?

6 A In the north area of North Charleston

7 Q And what were you doing in May of 2003?

8 A I was a crime scene investigator

9 Q At the technical services unit at the sheriff's
10 office?

11 A That is correct.

12 Q In that capacity, did you have an opportunity to
13 respond to the scene of a shooting at 6619 Toogoodoo Road
14 in the early morning hours of May the 11th of 2003?

15 A Yes, sir

16 Q What type of business is located at that
17 address?

18 A Club Diamante, or it was back then.

19 Q And do you recall what time you were dispatched
20 or arrived at the scene?

21 A Can I refer to my original report? I don't know
22 the exact time.

23 Q If that will refresh your recollection, yes,
24 sir

25 A I was notified at 3 31 a m and I arrived at

1 4 29

2 Q 4 29 in the morning Were you the first crime
3 scene technician to arrive?

4 A That's correct

5 Q What other crime scene technicians responded
6 that night?

7 A Investigator McManigal, Sergeant Presnell,
8 Investigator Ringley and also Investigator Wenger.

9 Q At various times?

10 A Yes, sir, that's correct

11 Q Who was in charge of the crime scene that
12 morning?

13 A Sergeant Presnell I was the main investigator,
14 he was the sergeant in charge.

15 Q Okay And what were your responsibilities at
16 the crime scene?

17 A Collect evidence, photograph the evidence and
18 secure the scene

19 Q Had the evidence already been roped off at the
20 time you arrived?

21 A Yes, sir, both sides of the road

22 Q By uniform officers?

23 A That's correct

24 Q Was the victim still present when you arrived at
25 the scene?

S. JAMES - DIRECT EX BY MR DURANT

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1 A No, sir

2 Q Were you able to determine where the victim had
3 been located?

4 A Yes, sir.

5 Q And where was that?

6 A He was on the passenger side of his Honda Accord
7 that was parked on the side of the roadway facing
8 Hollywood He was on the passenger side of the grass
9 area

10 Q Okay And referring to State's Exhibit No. 6,
11 just briefly, could you point out to the jury?

12 A Sure, right where they have the little guy right
13 here

14 Q Roughly in that area?

15 A That's correct

16 Q And how could you determine that's where the
17 body had been located?

18 A From where EMS had actually worked on him, there
19 was actually numerous medical supplies, to include there
20 was lots of spots of blood that we actually tested for
21 blood

22 Q Were there any vehicles out there?

23 A Yes, sir --

24 Q In the vicinity of the victim's body?

25 A Yes, sir, there was a GEO Tracker

1 Q Where was the GEO Tracker?

2 A The GEO tracker was on the driver's side beside
3 the Honda Accord, almost flush with the Honda Accord.
4 There was a white Oldsmobile Alero, which we found out
5 later had nothing to do with the shooting It was
6 actually in front of the club

7 Q What was beside the GEO Tracker?

8 A What was beside the GEO Tracker?

9 Q Right

10 A Was the Honda Accord

11 Q And do you know who that Honda Accord belonged
12 to?

13 A Yes, sir, that belonged to the victim

14 Q Now, with regard to the Tracker, it was located
15 where? Once again, referring to State's Exhibit No. 6?

16 A After the shooting, it was actually -- the GEO
17 Tracker was right here at the end of the shooting Before
18 the shooting started, as I've observed Deputy Frichtl's
19 video numerous time, the GEO Tracker was not there. The
20 GEO Tracker was right behind the Honda Accord

21 Q You observed that on Deputy Frichtl's video?

22 A That's correct

23 Q Anything unusual about the Tracker?

24 A Yes, sir.

25 Q And what was that?

S. JAMES - DIRECT EX BY MR DURANT

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1 A In the rear of the vehicle, there was an entry
2 wound -- or an entry of a bullet that went from the rear
3 of the vehicle to the front of the vehicle and exited out
4 of the windshield

5 Q And what was the path that the bullet took?

6 A It went from Baptist Hill towards Hollywood.
7 From the rear of the vehicle, it went towards the front of
8 the vehicle

9 Q And from the back door of the vehicle to where
10 the -- where in the vehicle?

11 A It actually went from the rear door of the GEO
12 Tracker. It went through the headrest of the driver's
13 seat, which also you can see in some photographs, which
14 I'm sure you will be shown later, actually where you can
15 see the cushioning exiting And then after that, it left
16 there and actually took kind of a left and upward angle
17 and went and exited out of the windshield.

18 Q And how were you able to determine the path of
19 the bullet was from the back of the car to the front of
20 the car?

21 A At the rear of the vehicle, as well as you could
22 see in the photographs, you could see where the metal is
23 bent inward It's very obvious that the metal is bent
24 inward And then, of course, the cushioning that's on the
25 driver side headrest where it actually poked out from

1 where the bullet exited And also, there are shards of
2 glass that were on the hood of the car

3 Q And referring once again to State's Exhibit No
4 6, based upon what you know as to where the GEO Tracker
5 was parked at the time of the shooting and your
6 investigation concerning the track of the bullet, from
7 what direction did that shot come from?

8 A It came from Baptist Hill

9 Q From Baptist Hill?

10 A It was very obvious it came from this direction

11 Q The Baptist Hill side?

12 A Yes, sir

13 Q Do you know what D and E are in that particular
14 diagram?

15 A Yes, sir, that's two 9-millimeter shell casings
16 that were located on the ground right beside the -- same
17 side of the road --

18 Q Okay.

19 A -- as the victim

20 Q Those were in the same general direction as the
21 path of the bullet?

22 A That's correct

23 Q Did you make a video of the crime scene, sir?

24 A I did

25 Q And I hand you what's been marked as State's

S JAMES - DIRECT EX BY MR DURANT

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1 Exhibit No 61 Ask if you recognize that?

2 A Yes, sir, from the last time we watched it

3 Q Okay And you've had an opportunity to observe
4 the crime scene video in the case?

5 A Yes, sir

6 Q Does it fairly and accurately depict what you
7 observed out there that day through the camera?

8 A Yes, sir

9 MR DURANT: Your Honor, we would offer State's
10 Exhibit No 61 into evidence if there's no objection.
11 Once again, we would like to also move State's Exhibit 61A
12 into evidence, which is basically the same video
13 transferred to DVD format

14 MR RUNYON No objection

15 MR BUTLER No objection.

16 THE COURT. So ordered

17 (WHEREUPON, State's Exhibit No 61 was admitted
18 into evidence)

19 MR DURANT If I can have just a moment, Your
20 Honor?

21 THE COURT Go ahead

22 MR DURANT May the witness come down?

23 BY MR DURANT

24 Q Or you may be able to do it from there with the
25 laser pointer, if you need it If you would, I'm going to

1 play this and you tell the jury what it's depicting, okay?

2 A What you see right there is the video I made the
3 morning of the shooting You see the GEO Tracker. The
4 GEO Tracker right here, of course

5 Q What is the car to the left of the GEO Tracker?

6 A The GEO Tracker -- the car to the left is
7 Jamie's vehicle The GEO Tracker, of course, is the
8 vehicle that had the bullet entry to it And the
9 background is the club

10 Q The way that you're pointing now would be which
11 way?

12 A That's Baptist Hill down that way. There's the
13 bullet hole where the bullet actually exited the vehicle

14 Q What is that area right there?

15 A This is the parking lot If you will notice,
16 there are a lot of tire marks where people after the
17 shooting started -- people were exiting the parking lot

18 Also, there's a set of tire marks where the
19 driver of the GEO Tracker, the owner of the GEO Tracker,
20 actually, after he got back into his vehicle, he actually
21 peeled out, as you stated, and peeled out back into the
22 roadway. This is going to be the entry wound to the rear
23 of the vehicle. As you can see, the metal is pushed
24 inward as an entry wound.

25 There's the seat You notice the seat was

S JAMES - DIRECT EX BY MR DURANT

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1 extremely -- it's leaned very far to the rear There's
2 the cushioning, of course, where the bullet went through
3 and then deflected off of something We believe it
4 deflected off the spring inside the cushioning of the seat
5 because it actually took a little bit of an angle, which
6 you'll see later on where I actually put the probes and
7 the probes show it kind of went up at an angle a little
8 bit to the left

9 Q That was basically glass?

10 A There are shards of glass on the hood This is,
11 of course, Jamie's vehicle here Down near that sign
12 right there is where we found the 40 caliber shell casings
13 right near the --

14 Q That's down near Coon Club Road?

15 A That's correct, towards Hollywood The area you
16 see over there has nothing to do with the shooting, but
17 the vehicle was parked there so we didn't let it move
18 The vehicle had bumped into a Cadillac and they wanted to
19 report the wreck as everybody was leaving the parking lot

20 In this area is where the 25 caliber shell
21 casing that we also located was found What I'm pointing
22 out there is where the vehicle actually had been struck by
23 the -- right there, you can see some paint transfer from
24 the green Cadillac

25 Q If I could go back and play one thing

1 A Right in that general area, if you can back that
2 up, right in this general area

3 Q Can you tell from that view where the -- roughly
4 where the 9-millimeter shell casings were found?

5 A Yes, sir, right here in this area is where the
6 9-millimeter, which is very consistent with where the GEO
7 Tracker, of course, was actually during the shooting and
8 both of them were in very close proximity to each other

9 Q Okay Speaking of shell casings, what effort
10 did y'all make to locate shell casings and things of that
11 nature?

12 A I apologize, I couldn't understand your
13 question

14 Q Speaking of shell casings, what efforts did you
15 and the other crime scene technicians make with regards to
16 trying to locate them?

17 A We searched very, very thoroughly over the
18 entire area, including both sides of the road
19 approximately 100 yards toward Hollywood, 100 yards back
20 toward Baptist Hill For about 45 minute to an hour, we
21 searched, of course, on our hands and every time we
22 located a shell casing or any type of evidence, whether it
23 be a beer can, cup, anything, we collected all of the beer
24 cans, cups, gum wrappers, anything we found on the ground
25 We'd actually get on our hands and knees and search the

S JAMES - DIRECT EX BY MR DURANT

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1 area Of course, when it was dark, it was actually moving
2 in the light So when it got back light again, we
3 researched the area and brought in a metal detector, which
4 if you will notice on the 40-caliber shell casing, I start
5 out and I marked them -- we were marking them with letters
6 first before we get to numbers And you will see on the
7 -- Mr Durant, I believe it's D --

8 Q I'll bring it up to you Are you referring to
9 State's Exhibit No 6?

10 A Yes, sir On F and G, if you will notice on F
11 and G, actually, there's a seven there which is totally
12 out of sequence The reason is because after we went
13 back, we actually located with the metal detector a few
14 more -- or that shell casing, actually, which is number
15 seven, which was kind of squished into the ground a little
16 bit

17 Q So in terms of listing these things, you started
18 with A and went through with Z and started out with
19 numbers, is that correct?

20 A That's correct

21 Q So you collected a lot more stuff in evidence
22 than what's shown on that?

23 A Oh, yes, sir Yes, sir

24 Q What areas around the club did you search? I
25 believe you said both sides of the road, and where else?

1 A Yes, sir, we started all the way -- well, we
2 started out, of course, these were the two -- when I
3 arrived at the scene, Deputy Campbell had marked or got
4 the blue cups and placed over the two 9-millimeter shell
5 casings, which -- because near the victim, they did a
6 quick search of the area and found these.

7 At that point, of course, we started here and
8 started gridding our way and kind of gridded our way back
9 toward the victim's vehicle, went down this way And
10 that's why -- and you will notice D, E, F, G because we
11 found those as we walked down this roadway

12 As we walked down this roadway, of course, we
13 went back over the grass lot, went all back in here, all
14 of the way back into the dirt gravel parking lot.

15 The only place I did not search was the rear
16 most of the club because there was no way the bullet
17 path -- from where the rear of the club is, there's no way
18 that Jamie could have been struck by the bullet that way
19 We searched all of the way around outside here, all the
20 way down toward Baptist Hill, all the way down towards the
21 sign that's down here, both sides of the roadway and, of
22 course, through the roadway

23 Q How far down the Baptist Hill way?

24 A About a hundred yards, went down past that speed
25 limit sign that you saw, we went well past that, past the

S JAMES - DIRECT EX BY MR DURANT

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1 crime scene tape

2 Q How far down the Hollywood way?

3 A We went all the way past this sign right here
4 probably about another 100, 150 yards

5 Q Both visually and with a metal detector?

6 A That's correct, sir We went through with a
7 metal detector because it was daylight and metal detectors
8 weren't going to lie to us about that as far as the -- you
9 know, it's very accurate

10 Q After all of that searching, how many shell
11 casings did you locate?

12 A Six

13 Q And those are all depicted on State's Exhibit
14 No 6?

15 A Yes, sir All of them are there, yes, sir.

16 Q And they've already heard this, but show them
17 what they are and where they were found

18 A Three 40-caliber shell casings that you see down
19 here are near the sign and then the two 9-millimeter shell
20 casings right here in the gravel in the driveway exiting
21 the parking lot. And then a 25 caliber shell casing which
22 we collected even though it was old You could tell it
23 was squished and everything was tarnished on it It
24 definitely didn't look like it was recent.

25 Q I'm showing you what's marked as State's

1 Exhibit --

2 MR DURANT Can we dim the lights just a little
3 bit?

4 BY MR DURANT

5 Q I believe that's State's Exhibit No 27, tell
6 the jury what that is

7 A That is the passenger side of the victim's
8 vehicle, approximately where he was lying when EMS worked
9 him

10 Q State's Exhibit No 28

11 A A close-up shot of the red spots, the blood
12 spots on the ground

13 Q State's Exhibit No 29?

14 A That is the rear side facing Hollywood of the
15 GEO Tracker and the Honda Accord

16 Q That's where the GEO Tracker was located at the
17 time of your arrival?

18 A That's correct

19 Q State's No 30?

20 A That's the rear of the victim's vehicle.

21 Q Thirty-one

22 A That's the rear of the GEO Tracker

23 Q And bullet hole two, State's No 32?

24 A Close-up shot of the bullet hole and the rear of
25 the GEO Tracker

S JAMES - DIRECT EX BY MR DURANT

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1 Q State's 33?

2 A That's the exit of the bullet's path coming out
3 of the driver's seat of the GEO Tracker

4 Q Thirty-four?

5 A That's a close-up shot of the same thing

6 Q Thirty-five?

7 A That's the exit of the bullet exiting the
8 windshield to the front of the GEO Tracker.

9 Q Thirty-six?

10 A That's a shot of the bullet probe with Sergeant
11 Presnell The bullet probe, which is a straight rod
12 running from the seat all the way to the windshield.

13 Q Thirty-seven?

14 A That's a side angle showing when it struck the
15 seat that it actually struck something and caused it to
16 deflect up in the left

17 Q Thirty-eight?

18 A And that's a close-up picture of the same thing

19 Q And what is that right there?

20 A That's another bullet probe that you will see
21 The probe that we used from the rear, which if you'll --
22 it's kind of hard to tell from that angle, it's almost
23 straight from the rear of the vehicle to the front of the
24 seat And then, of course, just like any bullet, it takes
25 the path of the least resistance and actually when it

1 struck something in the seat, of course, deflected upward

2 Q Thirty-nine?

3 A A shot of the club and the tire marks you can
4 see coming out of the parking lot If you look close, you
5 can see the blue cups that are there marking the
6 9-millimeter shell casing

7 Q Forty?

8 A Close-up view The two cups that are on top of
9 the 9-millimeter shell casings there

10 Q Forty-one?

11 A Picture going towards Hollywood whereafter we
12 had actually found the evidence that we located, whether
13 or not the letter or numbers are depicted, pieces of
14 trash, all of the way up to the bullet --

15 Q That basically shows everything that you would
16 have like categorized?

17 A That's correct Anything that we found that
18 wasn't a rock or a piece of grass

19 Q Forty-two?

20 A That's a close-up shot of D and E, which, of
21 course, are the 9-millimeter shell casings

22 Q Those represent where the two 9-millimeter shell
23 casings were found?

24 A That's correct

25 Q Can we go back to State's 41?

S JAMES - DIRECT EX BY MR DURANT

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- 1 A And that's --
- 2 Q Those correspond to what on that picture?
- 3 A To also the top left near the grass right there
- 4 Q You have the --
- 5 A Oh, I've got the pointer, sorry Right there
- 6 and there
- 7 Q Where was the GEO Tracker at the time?
- 8 A At the time of the shooting?
- 9 Q Yes.
- 10 A The GEO Tracker was in this area right here
- 11 Q Where is the victim's car?
- 12 A The victim's car was right there
- 13 Q Okay. The victim's car is still there, isn't
- 14 it?
- 15 A Well -- oh, there it is, I'm sorry.
- 16 Q And the GEO Tracker was behind it, right?
- 17 A Correct The GEO Tracker was up in this area
- 18 right here And, of course, there's the victim's car
- 19 where he actually bailed out of his vehicle whenever the
- 20 shooting started
- 21 Q Okay Forty-three, I think?
- 22 A Close-up shot of --
- 23 Q Item D on the map?
- 24 A That's correct
- 25 Q Forty-five?

1 A That's G and F before I found with the metal
2 detector number seven, two 40-caliber shell casings.

3 Q Did I miss one there? Let's go to 44 I missed
4 that one? That's the other 9-millimeter, is that correct?

5 A That's correct

6 Q Forty-six?

7 A That's after we marked number seven with G and F
8 with the additional 40-caliber shell casing

9 Q So all three of those 40 calibers were found
10 right about there, is that correct?

11 A Uh-huh

12 Q And that's the club way in the background?

13 A Correct

14 Q Forty-seven?

15 A It's going to be -- that's where the 25-caliber
16 shell casing was located directly in front of the club

17 Q And 48?

18 A Close-up shot, same thing

19 Q Thank you, sir Did you personally collect any
20 of the shell casings yourself?

21 A Yes, sir I collected all of the 40-caliber
22 shell casings and the three down by the sign, G, F and 7

23 Q I hand you what's previously been marked as
24 State's Exhibit No 62 and ask if you recognize that item
25 and the contents?

S JAMES - DIRECT EX BY MR DURANT

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1 A That's my handwriting on the bag The boxes
2 that you see here are remarked by the IVIS technician, who
3 actually goes and takes the first box, takes the bullet
4 out And then, of course, this right here came from the
5 first box where they actually cut it That's my
6 handwriting there And then he actually takes the placard
7 off the top of the other box where I marked it and places
8 it inside here with the bullet I will check the other
9 two. That's my handwriting As well as this one And
10 the third as well, which are G, F and 7, which are the
11 40-caliber shell casings That's my handwriting as well

12 Q And these correspond with items G, F and seven
13 on State's diagram No 6; is that correct?

14 A Yes, sir.

15 Q Do they appear to be in substantially the same
16 condition as when you recovered them?

17 A Yes, sir

18 MR DURANT Your Honor, we would offer State's
19 62 in evidence if there's no objection

20 MR RUNYON No objection from Defendant
21 Washington

22 MR BUTLER No objection

23 THE COURT Admitted

24 (WHEREUPON, State's Exhibit No 62 was admitted
25 into evidence)

1 BY MR DURANT

2 Q Did you examine the entrance to the back of the
3 GEO Tracker?

4 A Yes, sir

5 Q Did the hole appear to be consistent with being
6 made by a 25-caliber shell?

7 A No, sir, it was too big for a 25-caliber.

8 MR DURANT Would you please answer anything
9 that the defense counsel may have for you

10 THE WITNESS Yes, sir

11 CROSS-EXAMINATION

12 BY MR RUNYON

13 Q Deputy James, you indicated that you didn't
14 check the back of the club, towards the back of the club
15 because there was no way that Mr Simmons could have been
16 shot from back there?

17 A I didn't I'm not going to tell you that none
18 of the other investigators did, but I was more
19 concentrated on the area where the victim was lying.

20 Q Did anybody attempt to make a determination as
21 from what direction the shot came?

22 A Well, it was very consistent with the evidence
23 of the 9-millimeter shell casings where they were laying
24 at on the ground compared to where, of course, the GEO
25 Tracker was struck and where Jamie was struck

1 Q The distance from the ground to the GEO Tracker,
2 the hole in the GEO Tracker, what was that measurement?

3 A I'm unsure, sir

4 Q Did y'all take it?

5 A I can't answer that I'm not sure if we took
6 that or not That would be something I don't know if
7 Investigator McManigal took, but I don't believe I took
8 that

9 Q Okay That's a very level shot, correct?

10 A Very level

11 Q And so weapons -- based on your experience in
12 crime scene investigation, weapons very rarely fire around
13 corners without the projectile showing an angle, correct?

14 A That's correct, they don't go around corners

15 Q So that this came in the GEO Tracker from -- at
16 a 180-degree kind of straight on in and then later on
17 changed course?

18 A I can't say the exact angle it came in, but
19 there were no signs it came in from an upward angle or a
20 downward angle or anything like that, no, sir

21 Q So your testimony you can't tell us the distance
22 from the shot behind the GEO Tracker and the ground?

23 A Correct

24 Q And did you have anything to do with processing
25 the Dodge truck?

1 A No, sir, I did not

2 Q Okay So you don't know the distance from the
3 window of the truck to the ground?

4 A No, I don't

5 Q Okay. Now, when you examined or when you
6 photographed the scene or videotaped it, you photographed
7 where the body was still laying, correct?

8 A Correct

9 Q And the Honda Accord was parked on the shoulder
10 of the road and kind of tilted downhill, so to speak,
11 wasn't it?

12 A It was a slight grade Not much, but it was a
13 slight grade

14 Q And the body was -- if I use the phrase below
15 grade, I'm referring to the highway?

16 A Correct

17 Q How far below grade was the body, did you
18 measure that?

19 A No, sir, it's almost impossible to measure
20 whenever you start to measure grades unless you have some
21 type of a level that's actually a level degrees. But it
22 wasn't very low

23 Q Okay. Now, you located these items where you
24 located them, correct?

25 A Correct.

1 Q And the scene had been roped off, and correct me
2 if I'm incorrect, but you do that so stuff doesn't get
3 moved around?

4 A Sure

5 Q And -- because in crime scenes things can get
6 moved around, correct?

7 A Yes, sir

8 Q And with a large crowd and with vehicles coming
9 and going, the location of those -- of that firearm
10 evidence doesn't necessarily indicate where the firearm
11 was, in fact, discharged?

12 A When you're talking about something that small,
13 it's not really going to move very far. When you're
14 talking about shell casings where they were at, especially
15 in a gravel parking lot, they're not going to move that
16 far It's like rolling over rocks, they're not going to
17 travel very far

18 Q Well, how far would they travel if they
19 traveled?

20 A That's unknown

21 Q Okay So we don't know if they traveled at all,
22 but your experience is they don't travel that far?

23 A No, sir If not, they would have many dents on
24 them Those shell casings were relatively in good
25 condition if a vehicle had run over them As the

1 25-caliber where someone had ran over it, you could see
2 where it had indentations There were no indentations
3 where the 9-millimeter shell casings were even run over

4 Q Or if someone was running and accidentally
5 kicked it, not knowing it was there, that wouldn't
6 necessarily be reflected?

7 A That's probable, not practical, but it is
8 probable

9 Q Okay. Now, were you involved in attempting to
10 reconstruct the location on where the shots had struck the
11 victim, the deceased, may have come from?

12 A It was very consistent with as far as where the
13 9-millimeter shell casings were laying because they were
14 very close in proximity to each other and where the GEO
15 Tracker was struck in reference to those coming from the
16 same weapon and the 9-millimeter shell casings And, of
17 course, where he was standing at was almost at the same
18 identical spot from where the GEO tracker was

19 Q Okay The question was did you attempt to
20 reconstruct the angle of the deceased's wounds and where
21 that angle led you?

22 A No, sir, I did not, no, sir

23 Q Okay.

24 A Because I didn't do the autopsy -- I don't go to
25 the autopsy, so therefore, I don't --

S JAMES - CROSS-EX BY MR RUNYON

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1 Q So you don't know?

2 A I don't have any knowledge of where actually he
3 was struck on the body, no, sir

4 Q Okay

5 MR RUNYON I have no further questions

6 CROSS-EXAMINATION

7 BY MR BUTLER

8 Q Investigator James, do you have your report with
9 you, your field report?

10 A Yes, sir.

11 Q And there you documented the year of the GEO
12 Tracker was 1994; is that right?

13 A That's correct

14 Q I want to talk to you about some of the
15 photographs that you went over Referring to State's 29,
16 the victim's car is here?

17 A Correct

18 Q And you can tell from that photograph that even
19 from parking that close to the road, his vehicle angles
20 downward, slopes downward?

21 A Slightly, yes, sir

22 Q So that from the grade of the road, not even
23 through the width of his car, that the slope starts to go
24 down there, is that correct?

25 A A little bit, yes, sir

1 Q Okay And you know that the victim was found --

2 A On the passenger side

3 Q -- on the other side of his vehicle?

4 A Correct

5 MR DURANT Give me State's 31, please.

6 BY MR DURANT

7 Q And that shows the rear of the Tracker?

8 A Yes, sir

9 Q And it's your understanding as depicted in
10 State's 6 that at the time of the shooting, the Tracker
11 was more or less directly behind the victim's vehicle?

12 A Right It was almost -- it was slightly over a
13 little bit as you can see on the picture You can see
14 whenever you watch Deputy Frichtl's video that it was and
15 from witnesses' accounts, it was slightly over more off
16 the road

17 Q And the two 9-millimeter shell casings were
18 found as depicted in State's 6, you don't have an exact
19 measurement, but could you estimate within a matter of
20 feet, yards?

21 A I would say somewhere around 20 feet, yes, sir

22 Q Okay And close to each other, being close to
23 each other?

24 A Yes, sir I don't know what the exact distance
25 between them were, but it wasn't very far

S JAMES - CROSS-EX BY MR BUTLER

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1 Q Okay And, actually, if I could first see --
2 I'm sorry, State's 36 -- State's 38 Do you recognize
3 that photograph?

4 A Yes, sir

5 Q And my understanding of your testimony is that
6 the trajectory of the bullet as it goes from the rear of
7 the Tracker to the back of the headrest is level?

8 A No, sir

9 Q And then it goes up?

10 A No, sir. When the bullet struck the rear of the
11 vehicle and once it strikes -- once that bullet strikes
12 anything, it's going to take a path of least resistance,
13 therefore, it's going to move slightly It barely moved
14 whatsoever from the rear because it went in so straight in
15 the rear to the seat When it went through the seat, at
16 that point, it took an upward and left angle toward the
17 windshield

18 Q I think we're saying the same thing Before it
19 hits the rear of the seat, it's level?

20 A Correct

21 Q Not going up, not going down?

22 A That's correct

23 Q Before it hits the rear of the seat?

24 A Correct

25 Q If I could see State's 31 You use these things

1 all the time, correct?

2 A Right

3 Q What are they called?

4 A Probes

5 Q Probes You insert the probe into a point of
6 entry of a bullet and then it gives you an idea of the
7 trajectory of the bullet?

8 A Yes, sir

9 Q If I'm understanding you, the rear of the seat
10 to the back of the vehicle is level?

11 A Of course not 100 percent level, we didn't stick
12 a level on it

13 Q I've got you But it's not going up or not
14 going down any kind of appreciable way that you could
15 tell?

16 A No, sir

17 Q Then it angled up?

18 A Correct, slightly, not that much

19 Q Looking at State's 31 where I'm pointing there,
20 that depicts the -- right there, the point of entry?

21 A Yes, sir

22 Q Did you measure the height of that bullet point
23 of entry?

24 A I did not, no, sir.

25 Q From looking at that photograph, do you have an

1 estimate as to what it would be?

2 A No, sir, I don't

3 Q Would you agree or disagree with the opinion
4 that it was about 41 inches high?

5 A I can't say exactly

6 MR DURANT If he wants the officer to testify,
7 the officer has already testified that he didn't measure
8 and he wouldn't speculate And now he's trying to give
9 him an exact number I mean, if he wants to put that in,
10 let him put a witness up there This is pure speculation

11 MR BUTLER He can estimate from looking at the
12 picture If he can't estimate at all, he can tell me
13 that

14 MR DURANT He's already said he couldn't

15 THE COURT If he says he can't, he can't. It's
16 cross-examination, I'll give him some latitude

17 THE WITNESS It's below shoulder level, I can
18 tell you that

19 BY MR BUTLER

20 Q It's below shoulder level, okay. And the
21 trajectory of the bullet after it enters the rear of the
22 tracker is more or less straight, more or less straight,
23 then the trajectory of the bullet would have been more or
24 less straight before it went in the Tracker, right?

25 A More or less

1 Q Okay. And so if we knew this measurement here,
2 the height of the bullet wound going into the rear of the
3 Tracker on State's 31, we would know more or less the
4 height from which the shot was fired, wouldn't we?

5 A No, sir, not 100 percent because you're talking
6 about once that bullet strikes that vehicle and depends on
7 how far it's shot. If it's shot 20 feet, the four to 12
8 inches isn't going to make that big of a difference in
9 that bullet traveling and going into that vehicle. Once
10 it strikes that vehicle, it's hard to tell if it took a
11 little bit of a slight path. Even though it looks like
12 it's going straight, you know, it's still hard to tell
13 which way --

14 Q I'm not asking you to be 100 percent accurate
15 Okay. When it goes into the vehicle, it's going in level,
16 straight, not appreciably upwards or downwards?

17 A For the most part

18 Q Okay. If it goes in at somewhere below shoulder
19 height, the height from which it was shot is going to have
20 to be around that same height if it goes in level?

21 A (Witness nods head)

22 Q You're nodding yes, I take that to mean you
23 agree with me?

24 A Yes and no. I mean, like I said, it depends on
25 where it's coming from, but, yes, for the most part, it's

1 got to be somewhere around the same angle

2 Q If it was coming from 100 yards away, you
3 couldn't say that, right?

4 A Right

5 Q Okay How far were those shell casings, were
6 they 100 yards away?

7 A No, sir

8 Q Were they 50 yards away?

9 A No, sir

10 Q Were they 10 yards away?

11 A I'm not exactly sure of the exact measurement

12 Q 20 feet, right, more or less?

13 A Give or take 10 Depending on where the GEO
14 Tracker was at, actually, when the exact -- I don't know
15 the exact feet away the Tracker was when the shooting
16 happened I know where the Tracker was in relation to
17 when the shooting started, but not the exact measurement
18 where it's going to be at

19 Q I asked you about State's 6 and the location of
20 the Tracker in State's 6, right?

21 A Right

22 Q Are you backing off of what you said a minute
23 ago?

24 A No, sir What I'm telling you is that there's
25 not -- you can't tell exactly -- I don't know exactly how

1 many feet away the GEO Tracker was from the where the
2 9-millimeter shell casings were

3 Q I understand But you said 20 feet, give or
4 take 10?

5 A Yes, sir

6 Q And, of course, had you measured that height,
7 then we would have a better idea, right?

8 A Yes, sir I'm not going tell you it wasn't
9 measured I'm telling you that I didn't measure it.

10 MR BUTLER Beg the Court's indulgence.

11 BY MR BUTLER

12 Q Investigator, do you know from your years in
13 training how much a bullet will rise and fall within
14 20 feet of flight?

15 A No, sir, I don't

16 MR BUTLER Thank you. That's all I have.

17 REDIRECT EXAMINATION

18 BY MR DURANT.

19 Q Just a couple, Officer In looking at this,
20 this is State's Exhibit No 38 Now, of course, we don't
21 have any pictures of that trajectory from the back door to
22 the seat cushion that are taken directly from the side, is
23 that correct?

24 A Yes, sir

25 Q And you, of course, didn't put a level on the

1 probe, did you?

2 A No, sir

3 Q You cannot testify, can you, sir, that it is
4 straight level or maybe slightly downward? It looks as
5 though -- wouldn't you agree it looks slightly downward?

6 A Nothing that would be, of course -- you know,
7 not like he was saying when he was pointing his hand this
8 way (indicating)

9 Q And also, Officer, when -- now, obviously, that
10 bullet comes in there and it, obviously, deflects up; is
11 that correct?

12 A Correct

13 Q And if you were to look at that from the back,
14 not only did it deflect up, it deflected to the left?

15 A Correct

16 Q When the bullet goes in there, that's not just
17 one piece of metal, is it?

18 A No, sir

19 Q You've got the outside metal, correct?

20 A And anything in between it

21 Q And the inside metal, correct?

22 A That's correct

23 Q And the mechanism of the door?

24 A Yes, sir

25 Q And the frame?

1 A That's correct

2 Q So the point is how do you know it didn't
3 deflect going through the door?

4 A Correct, you're correct

5 Q It sure deflected there, correct?

6 A Yes, sir

7 Q Isn't it equally possible it could have
8 deflected there?

9 A Yes, sir

10 Q Now, 9-millimeter shell casings, we've already
11 seen where they're located You're familiar with them?

12 A Yes, sir.

13 Q Semi-automatic pistols, correct?

14 A Correct

15 Q You go to the firing range?

16 A Yes, sir

17 Q And how do 9-millimeter shell casings eject?

18 A Out the side port

19 Q Okay And that, of course, depends on how
20 you're holding the weapon, correct?

21 A Correct, depending on whether or not you --

22 Q Whether it's straight up --

23 A Correct

24 Q -- a gangster hold?

25 MR BUTLER I object, this is beyond the scope

S JAMES - REDIRECT EX BY MR DURANT

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1 of my cross

2 MR. DURANT. It's not beyond the scope of Mr.

3 Runyon's

4 MR RUNYON I object to his characterization of
5 gangster hold

6 MR DURANT. Okay

7 BY MR DURANT

8 Q Have you been to the range before?

9 A Yes, sir

10 Q When they eject, where do they go?

11 A In the direction of whichever way you're holding
12 the weapon Whether or not you're holding it sideways or
13 you're holding it straight up and down it's going to go --
14 sometimes it will go straight up and -- but I've seen them
15 project in different distances and everything whenever
16 they eject

17 Q In other words --

18 A There's no telling

19 Q In the general vicinity?

20 A That's correct They're not going to go very
21 far

22 Q There are shell casings all over the place from
23 where the weapon is shot, isn't it?

24 A No, sir.

25 Q I mean, every shell casing does not go in the

1 exact same place?

2 A No, sir

3 Q And, of course, getting back to Mr Runyon's
4 question, how about a bullet may have gone in Jamie
5 Simmons' body, of course, depends on what position Jamie
6 Simmons is in, correct?

7 A Correct.

8 Q And number one, you didn't see Jamie Simmons at
9 all, right?

10 A No, sir

11 Q And you know whatever the path of the bullet is
12 in him depends on whether he was standing up like this, or
13 over like this or like this or like this (indicating)?

14 A Yes, sir

15 Q Correct And you don't know a precise distance
16 between the shell casing and the GEO Tracker?

17 A No, sir

18 Q And you don't know a precise distance between
19 the shell casings and Jamie Simmons?

20 A No, sir

21 Q As a matter of fact, Jamie Simmons wasn't even
22 there then, right?

23 A That's correct

24 Q And, of course, assuming that there's no
25 deflection with that bullet going through the back door --

S JAMES - REDIRECT EX. BY MR DURANT

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1 MR BUTLER Object to the leading and assuming

2 THE COURT I'm sorry?

3 MR. BUTLER Use of the word assumption in his
4 question and the leading

5 MR DURANT Okay

6 BY MR DURANT:

7 Q Let me ask you this question Just for the
8 purpose of this question, if the bullet was not deflected
9 in the back going through the back door, basically, that
10 distance makes -- would make a difference, would it not,
11 as to what the angle would be when it penetrated the
12 vehicle?

13 MR BUTLER Objection, leading

14 THE COURT The way it's stated, I don't believe
15 that's leading

16 Go ahead

17 THE WITNESS Yes, sir, that's correct

18 BY MR DURANT:

19 Q For example, if I were here shooting down, the
20 angle would be more acute than if I was back there
21 shooting -- back in this area shooting the same direction,
22 correct?

23 A That's correct

24 Q If all you're going by is a bullet probe,
25 correct?

1 A Yes, sir

2 Q And unless you know precisely where the gun was
3 when it was fired and the precise distance away --

4 A Correct, the bullet probe --

5 Q -- that the gun was --

6 A The bullet probe just gives us -- they just give
7 us an idea They're not -- definitely not specifically
8 very accurate as far as where the gun could have been shot
9 'from

10 Q Exactly. Thank you, sir

11 RE CROSS-EXAMINATION

12 BY MR BUTLER.

13 Q Mr Durant was asking you about which way shell
14 casings go when you fire on the range Do you remember
15 that line of questioning?

16 A Sure

17 Q Have you ever had the experience that you fire
18 straight ahead in the way that I'm holding the gun now,
19 pretending to hold the gun, okay, and the shell casing
20 eject and go back over the weapon?

21 A No, sir

22 Q That would be contrary to the laws of physics,
23 would it not?

24 A Correct I mean, it's not impossible, but it
25 depends if you're holding the weapon --

S JAMES - RECROSS-EX BY MR BUTLER

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1 Q I'm not asking you holding it that way, I'm
2 asking you holding it this way, can it go back over the
3 gun?

4 A I've never seen that happen.

5 Q As a member of law enforcement, you're
6 objective, right?

7 A Try to be, yes, sir

8 Q The way you answer questions in court doesn't
9 vary depending on who's asking them, does it?

10 A No, sir

11 Q On direct, you said that the trajectory of the
12 bullet before it hits the rear of the cushion was level,
13 isn't that what you said?

14 A It's pretty level, yes, sir

15 Q Before I even asked you any questions, you said
16 it didn't go up and it didn't go down, right?

17 A No, sir, I told you that it didn't go --

18 Q I'm not asking what you told me. On direct for
19 Mr Durant, you said it was level, didn't go up, didn't go
20 down Isn't that what you said?

21 A No, sir

22 MR BUTLER. Beg the Court's indulgence.

23 BY MR BUTLER

24 Q Not upward, not downward You didn't say that?

25 A Significantly, I was talking about

1 significantly Like I explained to you earlier that it's
2 not exactly level because I didn't have a level to level
3 it off

4 Q Not significantly upward or significantly
5 downward, that's your testimony now?

6 A That's correct I mean, when you say upward, I
7 can't tell you -- I told you earlier, you can't tell if
8 it's exactly level

9 Q I'm happy with what you said on direct, level
10 My point is this, when Mr Durant asked you and you said
11 level, it's fine Then when I start pointing out that
12 it's level, then you start to equivocate or waiver; isn't
13 that right?

14 A No, sir, I gave the same testimony, however you
15 want to depict it

16 Q Then on redirect for the first time, Mr. Durant
17 gets you to say well, yeah, it's kind of going down

18 A From that angle of that picture that is what it
19 looks like Like I said, once it entered, if it moved a
20 little bit, then it moved a little bit, but it's not
21 enough for it to be -- not enough for it to be something
22 that would be totally -- something that would need to be
23 talked and be able to say that hey, it went up or down,
24 no, sir, it wasn't that it was that It was pretty level
25 whenever it came through

S JAMES - RECROSS-EX BY MR BUTLER

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1 Q That picture is the same picture that Mr Durant
2 referenced on direct when you said it was level, right?
3 The picture hasn't changed, has it?

4 A No, sir

5 Q On direct, you said it was level, right? Then I
6 asked you some questions and then I point out the height
7 of the bullet on the outside, now, all of a sudden, you
8 say down?

9 A I've never said that it was perfectly level.

10 MR DURANT Your Honor, asked and answered.
11 The jury has heard what he said on direct

12 THE COURT: Overruled

13 BY MR BUTLER:

14 Q It's not that all of a sudden you're worried
15 that I pointed out something that you didn't consider and
16 now you're changing your testimony, it's not that, right?

17 A No, sir, not at all

18 MR BUTLER Thank you

19 THE COURT Mr Runyon, do you have any
20 questions?

21 MR RUNYON No, Your Honor

22 THE COURT. You may step down

23 MR. DURANT. -The State would call Paul
24 McManigal

25 PAUL MCMANIGAL,

1 being first duly sworn, testified as follows

2 THE CLERK. Please be seated State your full
3 name and spell your last for the record, please

4 THE WITNESS Paul David McManigal,
5 M-C-M-A-N-I-G-A-L

6 DIRECT EXAMINATION

7 BY MR DURANT

8 Q Good afternoon, sir Would you please tell the
9 jury where you're employed?

10 A I'm employed with the Charleston County
11 Sheriff's Office as a crime scene investigator

12 Q How long have you been with the sheriff's
13 office?

14 A Seventeen years

15 Q How long in the crime scene office?

16 A I've been in crime scene for the past eight
17 years

18 Q And did you have an opportunity to participate
19 in the processing of the scene at 6619 Toogoodoo on
20 May 11th, 2003?

21 A Yes, I did

22 Q What time did you get out there?

23 A I arrived on scene about 5.30 in the morning

24 Q And who else was out there that you recall?

25 A When I arrived, Sergeant Presnell and

P MCMANIGAL - DIRECT EX BY MR DURANT

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1 Investigator James, along with several of the detective
2 officers and patrol units

3 Q And could you please explain to the jury the
4 efforts y'all made to locate shell casings out there at
5 that location?

6 A We did an extensive search When we first
7 arrived, it was fairly dark out There were some street
8 lights lit, we did a visual examination From where the
9 club was positioned, we went approximately 100 yards to
10 either side of the club on the road We searched the area
11 directly in front of the club, both sides of the club, the
12 opposite side of the street We also ran through that
13 entire area with a metal detector And after marking
14 evidence, we went back and did a second search in the
15 daylight

16 Q Okay And do you recall how many shell casings
17 y'all located altogether?

18 A Altogether there were three 40-caliber casings,
19 two 9-millimeter casings and one 25-caliber casing.

20 Q Okay And I would like to hand you what's
21 previously been marked as State's Exhibit No 63 and ask
22 if you would examine the contents of that

23 A This is a 9-millimeter shell casing that I
24 collected that was labeled D

25 Q Item D. That would correspond to what?

1 A That is a 9-millimeter shell casing marked D
2 right there

3 Q Any other items? That one marked D has been
4 previously marked as State's Exhibit what, sir?

5 A 63A.

6 Q 63A And you're now examining 63B, is that
7 correct?

8 A That is correct

9 Q And what is that, sir?

10 A This is a 9-millimeter shell casing labeled E
11 that I also collected at the scene

12 Q And that would correspond to item E on the
13 diagram?

14 A Item E on the diagram

15 Q Do they appear to be in substantially the same
16 condition as when you collected them?

17 A Yes, they do

18 MR DURANT Your Honor, we would offer 63
19 containing 63A and B into evidence at this time if there's
20 no objection

21 MR. RUNYON No objection from Defendant
22 Washington

23 MR. BUTLER No objection

24 THE COURT Admitted

25

P MCMANIGAL - DIRECT EX BY MR DURANT

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1 (WHEREUPON, State's Exhibit No. 63 was admitted
2 into evidence)

3 BY MR. DURANT

4 Q I hand you what's been marked as State's Exhibit
5 No. 64 I ask if you recognize that item?

6 A This is the 25-caliber shell casing labeled M
7 that I collected from the scene.

8 Q And does it appear to be in substantially the
9 same condition now as when you collected it?

10 A Yes, it does

11 MR DURANT: Your Honor, we would offer State's
12 64 into evidence at this time if there's no objection.

13 MR RUNYON No objection from Defendant
14 Washington

15 MR BUTLER No objection.

16 THE COURT Admitted

17 (WHEREUPON, State's Exhibit No 64 was admitted
18 into evidence)

19 MR DURANT: Would you please answer any
20 questions that defense counsel may have for you

21 THE WITNESS Yes, sir.

22 CROSS-EXAMINATION

23 BY MR RUNYON

24 Q Did you take any measurements of any kind of
25 anything or did you just search for and collect evidence?

1 A I primarily searched for and collected evidence
2 as well as marked it, but no, I did not take any
3 measurements

4 Q No ground measurements, no vehicle measurements,
5 nothing?

6 A No, sir

7 MR RUNYON No further questions, Judge.

8 MR BUTLER No questions of this witness.

9 THE COURT Any redirect?

10 MR DURANT I'd ask that Officer McManigal be
11 excused

12 MR RUNYON No objection from Defendant
13 Washington.

14 MR BUTLER No objection.

15 THE COURT You may step down You're excused
16 Thank you.

17 Call your next witness

18 MR DURANT The State would call Dennis Wenger
19 DENNIS WENGER,

20 being first duly sworn, testified as follows

21 THE CLERK. Please be seated State your full
22 name and spell your last for the record

23 THE WITNESS Dennis Russell Wenger,
24 W-E-N-G-E-R

25 DIRECT EXAMINATION

D WENGER - DIRECT EX BY MR DURANT

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1 BY MR DURANT

2 Q Good afternoon

3 A Hello

4 Q Could you tell the jury what you were doing for
5 a living in May of 2003?

6 A I was an evidence and crime scene investigator
7 for the Charleston County Sheriff's Office

8 Q I believe you are currently medically retired,
9 is that correct?

10 A That's correct I'm retired as a result of two
11 on-the-job injuries

12 Q How long were you with the sheriff's office?

13 A I was with the sheriff's office from July of
14 1985 until last August

15 Q And what were you doing with the sheriff's
16 office in May of 2003?

17 A I was an evidence and crime scene investigator
18 with the sheriff's office

19 Q Did you have an opportunity to become involved
20 in the investigation of the Club Diamante on May 11th,
21 2003?

22 A Yes, I did

23 Q How did you become involved?

24 A I was called about 6 00 that morning and asked
25 to respond to the Club Diamante as a result of a shooting

1 Q Okay. And did you actually go to the club?

2 A No, I didn't get there, sir I was diverted
3 before I arrived on scene

4 Q And where were you diverted to?

5 A I was diverted to a nearby road, I believe it
6 was Harry Street

7 Q Why were you diverted to Harry Street?

8 A There was a vehicle in a ditch there that was
9 perceived to be involved in the shooting that had
10 occurred

11 Q Where is Harry Street located in reference to
12 Club Diamante?

13 A It's very close by It's less than a half mile
14 It's very close by

15 Q And going in which direction from the club,
16 toward Hollywood or toward Baptist Hill?

17 A Back towards Charleston

18 Q What did you do at that scene?

19 A I took photographs to start with There were
20 skid marks that led to the vehicle I took pictures all
21 around the vehicle I generally looked around it without
22 going into it very much

23 Q Okay What did you have done with the vehicle?

24 A We had it towed back to our evidence area in
25 North Charleston on Pinehaven Drive sheriff's office

D WENGER - DIRECT EX BY MR DURANT

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1 Q Where did you go from that location?

2 A From the evidence compound, I headed back toward
3 that same area.

4 Q And were you dispatched to somewhere else?

5 A Yes, I was

6 Q Where was that?

7 A I don't remember the street name, sir It was a
8 dirt road with several trailers on it I don't remember
9 the street name.

10 Q Okay. Let me show you something and maybe it
11 will help you remember

12 A All right

13 Q If you will refer your attention to State's 66
14 and see if you recognize that document?

15 A Yes, I do It's a map that I did on a computer
16 program of various locations I went to that day

17 Q Did you prepare that map yourself?

18 A Yes, I did

19 Q Does it set forth the relative locations of all
20 of the various places you went to that day?

21 A Yes, sir

22 MR DURANT: Your Honor, we would offer
23 State's 66 into evidence at this time if there is no
24 objection

25 MR RUNYON No objection from Defendant

1 Washington, Judge

2 MR BUTLER Beg the Court's indulgence
3 (Counsel confer off the record and review
4 exhibit)

5 MR BUTLER No objection

6 THE COURT It's admitted

7 (WHEREUPON, State's Exhibit No. 66 was admitted
8 into evidence)

9 BY MR DURANT.

10 Q Can you see that from up there?

11 A Yes, sir

12 Q If you would, just orient the people on the
13 jury Does your map show roughly where Club Diamante is
14 and if you could, point it out on the map up here?

15 A Okay Club Diamante --

16 Q Can you see it?

17 A I can't see my mark

18 Q You may have to come down where you can see it a
19 little better

20 A This block here represents Club Diamante. Club
21 Diamante is at that location right there.

22 Q Okay. And you said you were dispatched to Harry
23 Drive where the Honda Accord was Where is that?

24 A That's that area right there

25 Q Okay It says up there it's a little bit

D WENGER - DIRECT EX BY MR DURANT

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1 further up to the right Do you see the map?

2 A Oh, yes, I'm sorry That's Harry right there.

3 Q Okay

4 A That's Harry Road right there

5 Q And show the jury where Toogoodoo Road is that
6 the club is on

7 A Toogoodoo Road is this road right here

8 Q And it bends on around to the left and Harry
9 runs off it?

10 A Yes

11 Q Okay And what is this road right here?

12 A That's Coon Club.

13 Q Okay Do you know what this road is right here?
14 If you don't, that's fine.

15 A It has been a long time since I've been out
16 there, not offhand, I don't know

17 Q What is this location right here?

18 A That is the secondary location I was sent to
19 from headquarters back off of Brewer Road

20 Q What was located at Brewer Road?

21 A There was a silver pickup truck of interest
22 behind the trailer that was located on that road

23 Q And what did you do after you got to the
24 location where the pickup truck was? Was it still behind
25 the residence at that time?

1 A Yes, it was

2 Q What did you do?

3 A I took pictures of it as we found it, walked all
4 around it Took pictures of various marks on the pickup
5 truck I was there for a short amount of time

6 Q Okay And did you arrange to have that vehicle
7 towed as well?

8 A Someone did, I didn't. I think it was the
9 sergeant that called for the wrecker

10 Q Where did you go from there?

11 A Prior to the wrecker showing up, I went to the
12 residence right there beside Club Diamante

13 Q And that would be the residence on Coon Club
14 Road?

15 A That's correct

16 Q And what did you go to that location for?

17 A There was a mobile home where a resident had
18 woken up and found a bullet hole in his trailer

19 Q Okay. What did you do at that location?

20 A I took photos of the trajectory rod I used to
21 probe the hole I took pictures of the area, took
22 pictures of the bullet recovered from that scene and took
23 pictures around the residence

24 Q Okay Then where were you dispatched to?

25 A Then I responded -- then I went back to Brewer

D WENGER - DIRECT EX BY MR DURANT

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1 Road where the wrecker hadn't showed up yet And from
2 there, I was sent to Cherry Hill

3 Q Which is this way?

4 A Yes, sir

5 Q That's what's known as the Cherry Hill area?

6 A I believe so

7 Q And that is the Petersfield area, correct?

8 A That's correct

9 Q Okay. What did you go to Cherry Hill Road for?

10 A There was a lime green Cadillac down there that
11 the owner claimed had been shot There was some damage to
12 the Cadillac When I got there, I took pictures of the
13 Cadillac, took a picture -- took the picture and showed
14 some interest on the thumb release knob, which is the
15 button that you push in to get into the older style cars,
16 of the passenger front door which had been damaged. There
17 was also a groove lower down on his door that may or may
18 not have been done by a bullet I couldn't tell at the
19 time There was also some damage to the rear bumper

20 Q Okay I'm going to go through a few pictures
21 with you, Officer Wenger Just take a look at them and,
22 if you would, tell the jury what they are. This is
23 State's Exhibit No 7 Do you recognize that?

24 A Yes, I do

25 Q And what is that?

1 A That is the photograph that I took of the skid
2 marks that led up to the vehicle that was in the ditch.

3 Q What road is the road right there?

4 A That would be Toogoodoo Road

5 Q And which way is the club oriented from this
6 photograph, behind the camera or in front of the camera?

7 A As I take the photo, the club is to my back.

8 Q Okay And what's the road that runs off there?

9 A That would be Harry Road

10 Q Okay State's No 8?

11 A That's a closer up photograph of the skid marks
12 leading to the vehicle That also shows the vehicle --
13 photographing the vehicle laying over almost on the
14 driver's side in the ditch

15 Q State's No. 9?

16 A That's the lime green Cadillac that was on
17 Cherry Hill Road

18 Q That's the same with 10?

19 A Same vehicle, a different perspective, license
20 tag

21 Q And 11 as well?

22 A That's the side of the vehicle that showed
23 interest in with the door handle and the door edge
24 damaged

25 Q Twelve?

D WENGER - DIRECT EX BY MR DURANT

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1 A That's the door handle that I spoke about
2 previously

3 Q Thirteen?

4 A That's the residence that the silver pickup
5 truck was found behind

6 Q Fourteen?

7 A That's the silver pickup truck that we
8 ultimately towed from the scene

9 Q State's 15?

10 A Same vehicle From this side, you can see a
11 gouge in the side of the passenger side of the rear wheel

12 Q And State's 16?

13 A That's a closer up photograph of that dent over
14 the wheel well

15 Q Okay And State's 17?

16 A That is a still closer photograph of the same
17 thing with a scale in the picture so you can see the size
18 of the dent

19 Q Now, did you also participate in the search of
20 that truck at a later time?

21 A Yes, I did.

22 Q I want to show you State's Exhibit 18 and see if
23 you recognize that.

24 A That's a photograph that I took during the
25 search warrant of the center console -- of the console

1 between the driver's seat and the passenger front seat

2 Q And what does that depict in there next to the
3 CD's?

4 A That's a firearm magazine, pistol magazine.

5 Q And State's 19?

6 A That's the same console with a pistol magazine
7 that has a bullet -- that contains bullets that was in the
8 second tier of -- the console had a two-tiered system like
9 a lot of tool boxes do You pull out the first tier and
10 there's what was underneath it

11 Q Was the one in the top on the previous exhibit
12 18, was that magazine empty or full?

13 A It was empty

14 Q State's 20?

15 A That was a holster that we found in the driver's
16 side small storage area It was actually on the door

17 Q Was the holster empty?

18 A Yes, it was

19 Q State's 21?

20 A That's the dash ashtray which we found an
21 unfired bullet, photograph of that.

22 Q That would be this item right here?

23 A That's correct

24 Q State's 22?

25 A That's the front of the pickup truck that we've

D WENGER - DIRECT EX BY MR DURANT

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1 been referring to On the front vent fins in front of the
2 windshield, the little part in the center, you will see a
3 empty bullet casing

4 Q And State's 23?

5 A That's a closer photograph of the same bullet --
6 I'm sorry, same shell casing

7 Q Okay Did you collect those items into
8 evidence?

9 A Yes, I did

10 Q Okay Thank you, sir, could you resume your
11 seat

12 (The witness resumes the witness stand)

13 Q I have a number of items that I want to show
14 you Let's start with State's Exhibit No 67 I ask you
15 to take a look at that and see if you recognize that item?

16 A Yes, sir, I do

17 Q What is that?

18 A That's the empty nylon holster that I recovered
19 from the driver's inside door pocket

20 Q Is that the photo showed up on the top tier?

21 A I'm sorry?

22 Q The one on the top tier, not the one on the
23 bottom?

24 A No, sir, this is the holster

25 Q I'm sorry, that's the one found in the door?

D WENGER - DIRECT EX BY MR DURANT

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1 A That's correct, sir

2 Q Does it appear to be in the same condition now
3 as when you recovered it?

4 A Yes, sir.

5 MR DURANT We would offer State's 67 at this
6 time, Your Honor

7 MR RUNYON No objection from Defendant
8 Washington

9 MR BUTLER No objection

10 THE COURT. Admitted

11 (WHEREUPON, State's Exhibit No 67 was admitted
12 into evidence)

13 MR DURANT State's 68

14 THE COURT You're offering?

15 MR DURANT Yes, sir, Your Honor

16 MR RUNYON No objection

17 MR. BUTLER No objection

18 MR. DURANT Do y'all have any objection to any
19 of these, maybe we can save some time I've got 68 is the
20 empty magazine from the center console

21 MR RUNYON No objection, Judge

22 MR DURANT Sixty-nine is the full magazine
23 from the lower center console

24 MR RUNYON No objection, Judge

25 MR DURANT Seventy is the unfired bullet from

D WENGER - DIRECT EX BY MR DURANT

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1 the ashtray and 71 is the shell casing from the hood.

2 MR RUNYON No objections from Defendant

3 Washington

4 MR BUTLER No objection to any of those.

5 THE COURT They're all admitted

6 MR DURANT Your Honor, we would offer them

7 all.

8 (WHEREUPON, State's Exhibits Nos 68 through 71

9 were admitted into evidence)

10 MR DURANT Would you please answer any

11 questions that defense counsel may have for you

12 CROSS-EXAMINATION

13 BY MR RUNYON

14 Q Mr Wenger, how are you doing now?

15 A I'm all right, sir

16 Q Okay Mr Wenger, you've been doing this crime
17 scene -- you did this crime scene work until you retired
18 for how long?

19 A From April 1988 until last August -- last June

20 Q Okay Now, that's about 14, 15, 16 years,
21 something like that, right?

22 A That a stretch, sir

23 Q Yes, sir Now, in the course of doing that
24 work, you, of course, are equipped and given the equipment
25 to do the work as precise as you can do it, wasn't that

1 correct?

2 A That's correct

3 Q Okay Now, I refer you to State's Exhibit No.
4 12 which was showed up there That's the picture of the
5 lime green Cadillac, correct?

6 A Yes, sir

7 Q Where the door -- the damage to the entryway?

8 A Yes, sir, the damage to the door handle.

9 Q And it was no explanation of why anyone would
10 have painted a Fleetwood Cadillac lime green, is there?

11 A I guess you would want to stand out

12 Q Now, there's something in that picture that was
13 shown up there that is more or less hanging on the door
14 there What is that?

15 A It's a scale It's a scale, a photographic
16 scale It's an L scale. It's actually called an ABFO
17 scale

18 Q A what?

19 A An ABFO, American Board of Forensic Odontology
20 is what is stands for

21 Q When you took pictures all of the time that you
22 were in crime scenes, you tried to use the scales to put
23 what you're taking a picture of somewhat into scale?

24 A That's correct, sir

25 Q And I show you State's Exhibit No 17. Get to

1 the point, I assume, that that hand in the picture is
2 yours?

3 A That is my hand, sir

4 Q And you're holding another type of scale?

5 A That is a larger scale We characteristically
6 refer to these as our placards, which assigns a case
7 number, the date that we took these pictures and the
8 investigator's name to the photo -- to the roll of film

9 Q Now, those are the photographs that you took.
10 You didn't take any photographs down around Club Diamante,
11 did you?

12 A I took some photographs of a residence nearby

13 Q At the residence nearby, you used scales, your
14 photo scales, didn't you, sir?

15 A To the best of my recollection, I'm sure I did

16 Q But you didn't take any photos down by Club
17 Diamante of any vehicles or anything of that sort other
18 than those two vehicles, the lime green Cadillac and the
19 pickup truck?

20 A No, sir, not that I can recall No, sir, I
21 didn't

22 MR RUNYON No further questions, Judge.

23 MR BUTLER No questions of this witness.

24 THE COURT. Any redirect?

25 MR DURANT No, sir We'd ask that Mr Wenger

1 be excused

2 MR RUNYON No objection, Judge

3 MR. BUTLER No objection

4 THE COURT You may step down

5 Folks, it's about time for our afternoon break
6 Go ahead and I will let you take a smoke break if you need
7 to Again, don't begin deliberations or discussions and
8 we'll meet you back here about 3 30, about 15 minutes.
9 Thank you.

10 (WHEREUPON, the following proceedings were head
11 outside the presence of the jury)

12 THE COURT Have you got your next witness?

13 MR. DURANT Yes, sir, Your Honor

14 THE COURT: All right Let's bring the jury in
15 (WHEREUPON, the following proceedings were held
16 in the presence of the jury)

17 THE COURT All right Call your next witness

18 MR DURANT The State calls Mike Ringley

19 MIKE RINGLEY,

20 being first duly sworn, testified as follows.

21 THE CLERK Please be seated State your full
22 name and spell your last for the record.

23 THE WITNESS Michael B Ringley, Jr ,

24 R-I-N-G-L-E-Y.

25 DIRECT EXAMINATION

M RINGLEY - DIRECT EX BY MR DURANT

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1 BY MR DURANT

2 Q Could you please tell the jury what you do for a
3 living?

4 A Yes, sir. I'm employed by the Charleston County
5 Sheriff's Office. I'm currently a sergeant supervisor on
6 the road in the north area, which covers all the way from
7 Lincolnvile to McClellanville.

8 Q Okay And what were you doing in May of 2003?

9 A I was assigned to the technical services unit of
10 the Charleston County Sheriff's office, otherwise known as
11 the crime scene unit.

12 Q And in that capacity, did you have an
13 opportunity to attend an autopsy on the victim in this
14 case, Jamie Simmons, on May 11th, 2003?

15 A Yes, sir, I did

16 Q I hand you what's been marked as State's
17 Exhibits 65, which appears to contain State's Exhibits 65A
18 and 65B, and ask if you recognize those items, sir?

19 A Yes, sir, I do

20 Q What are those?

21 A One of which is a projectile four, the other is
22 a projectile jacket

23 Q And those were the core and fragments removed
24 from the deceased in this case, Jamie Simmons, at the
25 autopsy, is that correct?

M RINGLEY - DIRECT EX BY MR DURANT

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1 A Yes, sir

2 Q By the medical examiner?

3 A Yes, sir

4 Q And you collected those items into evidence?

5 A Yes, sir, I did

6 MR. DURANT Your Honor, we would offer State's
7 65 containing 65A and 65B at this time if there's no
8 objection

9 MR RUNYON No objection from Defendant
10 Washington, Judge

11 MR. BUTLER No objection

12 THE COURT. Admitted.

13 (WHEREUPON, State's Exhibit No 65 was admitted
14 into evidence)

15 MR. DURANT I have no more questions of Officer
16 Ringley.

17 MR. RUNYON I have no questions of Officer
18 Ringley

19 MR BUTLER I have no questions

20 THE COURT You're dismissed Thank you.

21 MR DURANT The State would call Ben Moore
22 May Mr Ringley be excused, Your Honor?

23 MR. RUNYON No objection

24 MR. BUTLER No objection

25 BEN MOORE,

1 being first duly sworn, testified as follows

2 THE CLERK Please have a seat, please State
3 your full name and spell your last for the record

4 THE WITNESS Ben Moore, M-O-O-R-E

5 DIRECT EXAMINATION

6 BY MR DURANT

7 Q Good afternoon, Mr. Moore Would you tell the
8 jury where you're employed?

9 A South Carolina Law Enforcement Division

10 Q And how long have you been with SLED?

11 A Approximately 17 years

12 Q And what is your current position with SLED?

13 A I'm a lieutenant in the regulatory department

14 Q And does regulatory SLED -- regulatory services
15 maintain records regarding the purchase of weapons,
16 handguns in the State of South Carolina?

17 A Yes, sir, handguns in the State of South
18 Carolina.

19 Q And are gun dealers required by law to provide
20 that information to you?

21 A Yes, sir.

22 Q And does SLED maintain those records?

23 A Yes, sir

24 Q Is SLED regulatory services the custodian of
25 those records in the State of South Carolina?

1 A Yes, we are.

2 Q At the request of my office, was SLED regulatory
3 requested to run a handgun check on Tremayne Rashaad
4 Washington?

5 A Yes, sir

6 Q What were the results of that check, sir?

7 A The check showed that on October the 19th of
8 2000, a Ruger 9-millimeter, serial number 31370221 was
9 purchased by Tremayne Rashaad Washington from Best Bet
10 Howell Company

11 Q Was that information reduced to writing in the
12 form of a letter to my office?

13 A Yes, sir.

14 Q I hand you what's been marked State's Exhibit
15 No. 72 and ask if you recognize that?

16 A I do.

17 Q And is that the letter from the SLED regulatory
18 setting forth the information you just testified?

19 A It is

20 MR DURANT We would offer State's 72 into
21 evidence at this time if there's no objection, Your Honor

22 MR RUNYON No objection from Defendant
23 Washington

24 MR BUTLER: No objection

25 THE COURT: Admitted

1 (WHEREUPON, State's Exhibit No 72 was admitted
2 into evidence)

3 MR. DURANT Would you please answer any
4 questions that defense counsel may have

5 MR RUNYON. No questions, Judge

6 MR. BUTLER No questions

7 THE COURT You're excused. Thank you

8 MR DURANT: The State would call Dan DeFreese
9 May Agent Moore be excused, Your Honor?

10 THE COURT Yes, you're excused.

11 DAN DEFREESE,

12 being first duly sworn, testified as follows:

13 THE CLERK Please have a seat State your full
14 name and spell your last for the record

15 THE WITNESS. My name is Frank Dan DeFreese,
16 D-E, capital F-R-E-E-S-E

17 DIRECT EXAMINATION

18 BY MR DURANT

19 Q Good afternoon, sir

20 A Good afternoon

21 Q Could you please tell the jury where you work?

22 A I work for the South Carolina Law Enforcement
23 Division, what many people call SLED I'm assigned to the
24 forensic services laboratory -- excuse me, the crime
25 laboratory in Columbia

1 Q In what capacity are you assigned to the crime
2 laboratory?

3 A I'm assigned to the part of the laboratory where
4 we do the examination of firearms and toolmark evidence,
5 what many people call the ballistics laboratory, but it's
6 properly the firearms identification laboratory

7 Q Okay And how long have you been in the field
8 of firearms identification?

9 A Since January of 1967, that's about 38 years

10 Q That's a long time?

11 A Yes, sir

12 Q What does the field of firearms identification
13 consist of?

14 A Most often, the request is to identify a
15 particular bullet or a particular cartridge case back to a
16 gun in which it was fired We also do a number of other
17 analyses, such as analyzing ammunition components to try
18 to determine their origin. In some cases, we'll suggest a
19 list of possible guns that may have fired a particular
20 bullet when the gun is not submitted We do certain
21 distance determinations from shot spread. But the
22 principal things that we do consist of the identification
23 of bullet and cartridge cases

24 Q And what specialized training have you had in
25 that field?

D DEEFREESE - DIRECT EX BY MR DURANT

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1 A Most of my specialized training was obtained at
2 SLED After my employment, I was first assigned to the
3 firearms laboratory and I undertook a period of training
4 that lasted about two and a half years. I trained in the
5 technique of firearm and toolmark identification under a
6 gentleman named Miller Cate Mr Cate established the
7 SLED laboratory when SLED itself was established as an
8 agency in 1947

9 I've also attended numerous seminars put on by
10 the association of firearm and toolmark examiners, of
11 which I am a member And I've received other specialized
12 training at the FBI Academy and at other places

13 Q And you are, of course, authorized by SLED to do
14 firearms identification?

15 A Yes, sir, I am

16 Q Do you have any teaching or instructional duties
17 in this area either now or in the past?

18 A I do In the past, I frequently taught at the
19 Criminal Justice Academy And now, about the only
20 educational activity I'm engaged in is at the National
21 Center in Columbia I teach prosecutors from time to
22 time.

23 Q Have you been qualified as an expert in the
24 field of firearms identification?

25 A Yes, sir, I have

D DEEFREESE - DIRECT EX BY MR DURANT

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1 Q How many times, sir?

2 A I don't know exactly I estimate it's in excess
3 of 600 times

4 Q In what courts?

5 A Principally, in courts of general session in
6 this state, also in federal court

7 MR DURANT Your Honor, we would offer
8 Mr DeFreese at this time as an expert in the field of
9 firearms identification

10 MR RUNYON No objection from Defendant
11 Washington

12 MR BUTLER No questions, no objection

13 THE COURT Ladies and gentlemen, when we have a
14 witness testifying -- normally, witnesses are only allowed
15 to testify as to things that they saw, they heard, they
16 touched, they felt, they smelt, that sort of thing.
17 They're not usually allowed to testify in the form of an
18 opinion However, the law says that when a witness,
19 because of education or expertise in a field, has reached
20 the level of expertise, then they may be qualified as an
21 expert and may be allowed to testify in the form of an
22 opinion and they can give their reasons for the basis of
23 their opinion

24 This witness has now been qualified as an expert
25 in firearms identification He will be allowed to testify

D DEEFREESE - DIRECT EX. BY MR DURANT

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1 as an expert and give an opinion as the basis of his
2 testimony Expert witnesses are not required -- you are
3 not required to give an expert's opinion any more weight
4 because he's an expert or any less weight because he is an
5 expert You take his testimony along with any other or
6 all of the other testimony that you have heard and will
7 hear and decide how much weight that you feel it deserves

8 Mr Durant

9 MR DURANT Thank you very much, Your Honor.

10 BY MR DURANT

11 Q Relative to this particular case, Mr DeFreese,
12 which would be your lab number, I believe, L0306086?

13 A Yes, sir

14 Q Did you receive some items of evidence from the
15 Charleston County Sheriff's Office?

16 A Yes, sir, I did

17 Q And do you recall when you received those items?

18 A They were actually submitted to the laboratory
19 on June the 12th of 2003

20 Q And when did you perform your examination, sir?

21 A I performed my examination between September the
22 2nd and September the 9th

23 Q Of 2003 as well?

24 A Of 2003

25 Q I'm going to hand you a number of items here and

1 I want you to take a look at them and see if you recognize
2 them as being items that were submitted to you relative to
3 this case I'm starting out with State's Exhibit No. 65
4 Please feel free to open that and examine it if you would
5 like

6 A Yes, sir, I have seen them before

7 Q And how do you know that, sir?

8 A I know it because at the time that I receive
9 evidence, I place certain marks on the evidence items so
10 that I will know it when I see them again In this case,
11 each of these items has my specimen number, my case number
12 and my initials on it

13 Q What is item 65A?

14 A Item 65A is a fired brass-colored bullet jacket
15 and a fragment of a bullet jacket

16 Q What is item 65B?

17 A Item 65B is a fired lead bullet core

18 Q Okay. And does it come as a set usually?

19 A They do The complete bullet consists of an
20 outside covering, which is the bullet jacket It's sort
21 of like a cup with a round bottom. And into the middle of
22 it, the lead core is placed and then the two items are
23 crimped together So that when you see the finished
24 bullet, most of what you see is the brass outer jacket
25 unless you look at the very base of the bullet, the flat

D DEEFREESE - DIRECT EX BY MR DURANT

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1 bottom end, and then you see part of the lead core up
2 there And it's not uncommon for them to separate when
3 they strike something

4 Q Okay And that was the bullet and fragment
5 retrieved from the victim at the autopsy of this case; is
6 that correct?

7 A It is so marked, yes, sir

8 Q Let's see what else we have here. I hand you
9 what's previously been marked as State's Exhibit No. 63

10 A Yes, sir, I recognize these

11 Q And what is item 63? I believe it contains two
12 subitems, is that correct, 63A and 63B?

13 A That is correct.

14 Q And let's start with 63A, which I believe was
15 your item 12 on your report. What is that?

16 A It's a fired 9-millimeter Luger caliber
17 cartridge case bearing the Winchester 9-millimeter head
18 stamp.

19 Q Okay And is that in the box that is designated
20 as D, item D?

21 A It is

22 Q Okay. And how about item 63B -- or State's 63B?

23 A State's 63B, my item 13, is also a fired
24 9-millimeter Luger cartridge case bearing the Winchester
25 9-millimeter Luger head stamp And it's received in a box

1 marked item E

2 Q Okay Let me show you State's Exhibit No. 70

3 Ask if you recognize that item?

4 A Yes, sir, I do

5 Q And what is that, sir?

6 A State's Exhibit 70 is an unfired Winchester

7 9-millimeter Luger cartridge It's the case, the bullet,

8 the primer and the repellent powder inside all together

9 Q And that was your item number 16, is that
10 correct?

11 A That's correct, sir

12 Q And it was in the box labeled how?

13 A It was marked silver Dodge PU, among other
14 things Unfired bullet ashtray

15 Q Okay I believe you have State's 71 right there
16 in front of you on the counter here See if you recognize
17 that?

18 A Yes, sir, I do. State's Exhibit 71 is my 14
19 And it is also a fired Winchester 9-millimeter Luger head
20 stamped cartridge case It's marked in part hood SW,
21 silver Dodge PU

22 Q Finally, we've got State's Exhibit No 62

23 A Yes, sir, I recognize these

24 Q And what are those?

25 A Let's see, three of these together are item 62

D DEEFREESE - DIRECT EX BY MR DURANT

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1 All three of them are fired 40 Smith & Wesson cartridge
2 cases that bear the Sphere S & W head stamp

3 Q These are spent casings?

4 A Yes, sir, fired cartridge cases.

5 Q How are they labeled?

6 A One of them is marked item G40 S & W casing.

7 One of them is marked item, I believe, F or 7, one 40 S &
8 W spent casing And the other one is marked item F, one S
9 & W spent casing

10 Q Okay Just a couple of other items I want you
11 to take a look at State's Exhibit 64.

12 A State's Exhibit 64 contains a fired 25 auto
13 caliber cartridge casing State Exhibit 64 was not
14 submitted for examination

15 Q Okay.

16 A By me

17 Q How about item -- State's Exhibit 68 and 69?
18 This is 68

19 A Item 68 is a Ruger 9-millimeter pistol magazine
20 of the type that fits the P series Ruger pistol

21 Q Okay. And item 69, sir?

22 A Item 69 consists of a Ruger P series
23 9-millimeter pistol magazine and nine unfired 9-millimeter
24 Luger caliber cartridges

25 Q And item 69 is marked how, sir, in the bag?

1 A It's marked lower center console silver Dodge
2 PU, among other things

3 Q And with regard to item 68 you previously
4 viewed?

5 A It's marked empty magazine center console SW
6 silver Dodge PU

7 Q Thank you, sir In addition to the items --
8 most of those items you've seen and a couple you have not
9 seen, is that correct?

10 A Yes, sir, there were two that were not submitted
11 for identification.

12 Q Okay In addition to those items, were any
13 firearms submitted to you?

14 A Yes.

15 Q And are you aware that those items were
16 submitted to you for elimination purposes?

17 A They were, yes

18 Q What firearms were those?

19 A One was a high point model C 9-millimeter Luger
20 caliber semiautomatic pistol, serial number P077826, with
21 a magazine. And the other was a Ruger Model P95 DC
22 9-millimeter Luger semiautomatic pistol, which had a
23 magazine and its serial number was obliterated

24 Q Okay And State's 52 and 53 for identification,
25 does that appear to be one of the weapons that you

D DEEFREESE - DIRECT EX BY MR DURANT

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1 examined?

2 A Yes, sir, it does

3 Q And I hand you what's previously been marked as
4 State's 59 for identification purposes and ask if that
5 appears to be the other one that was submitted?

6 A Yes, sir, it does.

7 Q And did you test fire those weapons?

8 A I did -

9 Q And they were both 9-millimeter weapons?

10 A They were. They were both 9-millimeter Luger
11 caliber semiautomatic pistols

12 Q And were the projectiles and shell casings that
13 were test fired in those weapons compared with the
14 projectiles and shell casings submitted as evidence in the
15 case?

16 A Yes, sir.

17 Q And what conclusion did you reach with regard to
18 with your examination or your comparison?

19 A I concluded that none of the submitted fired
20 bullets or cartridge cases were fired by either one of
21 those two pistols

22 Q Okay And moving on to the spent projectile
23 that you examined With regard to the bullet core and the
24 fragment, which is State's Exhibits No 65A and B, were
25 you able to reach any type of conclusion as to what the

1 caliber of that projectile was?

2 A Yes, sir, I was

3 Q And this would be the projectile that was
4 removed from the decedent's body in this case?

5 A That's correct

6 Q And what conclusion did you reach?

7 A It was -- the projectile was totally consistent
8 with bullets loaded into 9-millimeter Luger caliber
9 cartridges

10 Q How did you make that determination, sir?

11 A Based on its weight, its size and its
12 construction

13 Q Could it have possibly been a 40-caliber
14 projectile?

15 A It could not have been a 40

16 Q Could it have been a 25-caliber projectile?

17 A No

18 Q Could it have possibly -- so in your opinion, it
19 was a 9-millimeter?

20 A It's most consistent with a 9-millimeter in that
21 it's completely -- everything about it is consistent with
22 a 9-millimeter to the exclusion of other calibers. I
23 can't rule absolutely out that some other 9-millimeter
24 other than a 9-millimeter Luger because there are several
25 others or some other near 38-caliber cartridge could not

D DEEFREESE - DIRECT EX BY MR DURANT

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1 have had a bullet like that loaded into it and fired from
2 it. But it's -- what there is of it is just like a
3 9-millimeter Luger

4 Q So it would have to be a special reload or
5 something like that?

6 A It could be a special reload or it could be
7 something that's just odd. There's nothing else that it's
8 consistent with except 9-millimeter Luger, but the
9 absolute possibility of it coming from some other source
10 can't be ruled out

11 Q Based upon the rifling characteristics that you
12 observed on State's Exhibit 65, were you able to determine
13 what type and makes of firearm could have fired that
14 particular round?

15 A Well, we have a database assembled for the
16 purpose of doing just that. I measured the land and
17 groove widths that were present on the bullet jacket
18 portion of the bullet And from the database, I found
19 guns which we know have similar land and groove class
20 characteristics and I made a list of such guns as an
21 investigative aid in the case

22 Q And referring to State's Exhibit No 72?

23 A Yes, sir

24 Q Indicating a purchase of a Ruger 9-millimeter by
25 a Mr Tremayne Washington, is that one of the weapons that

1 could have fired that particular projectile?

2 A Yes, sir, it is

3 Q Not the only one, of course, but that is one who
4 makes that model that have similar lands and grooves?

5 A Yes, sir A -- Ruger P series pistols have the
6 same land and groove widths as the bullet jacket in this
7 case

8 Q Does your database reveal any type of revolver
9 that could have fired that round?

10 A No, sir, it does not

11 Q And just so the jury, although they probably do
12 know, what's the difference between a revolver and a
13 semiautomatic pistol?

14 A A revolver is the type of handgun that uses a
15 cylinder in its center part In the cylinder, there are a
16 number of chambers cut and into each chamber, you can put
17 a separate cartridge During the course of firing, the
18 cartridges are rotated -- the cylinder is rotated to bring
19 the cartridge into alignment with the barrel, like the
20 Western 6 gun, so that every time the hammer is cocked,
21 the cylinder rotates and the gun is prepared for the next
22 firing A revolver would customarily not eject cartridge
23 cases every time it's fired Nothing would come out of it
24 but the bullet.

25 A semiautomatic pistol is the type of handgun

D DEEFREESE - DIRECT EX BY MR DURANT

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1 that does not use a cylinder It has a chamber in the
2 back of the barrel into which cartridges are loaded one at
3 the time. When the trigger is pulled and the cartridge is
4 fired, the bullet goes out the barrel and very rapidly the
5 slide or the breach of the pistol goes to the rear and a
6 cartridge case is ejected automatically. The slide closes
7 and grabs the next cartridge in the magazine so the gun is
8 prepared for the next fire Usually, semiautomatic
9 pistols are sort of flat and slab-sided looking. And
10 revolvers, of course, are round because they have a
11 central cylinder

12 Q And the big difference in terms of the injection
13 mechanism is that a semiautomatic has one and a revolver
14 does not, is that correct?

15 A Yes

16 Q So once you fire a revolver, the spent shell
17 casing stays in the weapon?

18 A Until it's manually removed, ejected or
19 reloaded

20 Q And that's not true with a semiautomatic?

21 A No, sir If the semiautomatic is in good
22 working order, it will eject a fired cartridge case every
23 time it's fired-

24 Q Okay. Now, with regard to the two clips you
25 just took a look at?

1 A Yes, sir

2 Q The magazines One I think was 68 and the other
3 was 69?

4 A Yes, sir

5 Q The ones that are labeled the center console and
6 the center console lower of the pickup truck, are those
7 magazines consistent with a Ruger P series pistol as set
8 forth in State's Exhibit No 72?

9 A Yes They are the type of magazine that would
10 go into that described pistol and some other Ruger
11 pistols.

12 Q And was the ammunition in State's Exhibit No --
13 I believe it's 69, is that correct?

14 A Yes.

15 Q Is the ammunition consistent as a 9-millimeter
16 ammunition?

17 A It is It's the type that would be fired in a
18 Ruger P89 pistol

19 Q Now, with regard to those particular items --
20 first of all, let me ask you this Did you examine the
21 ammunition in State's Exhibit No 69?

22 A Yes, sir, I did

23 Q And did you -- which came from the lower console
24 magazine And you also said you observed or examined
25 State's Exhibit No --

D DEEFREESE - DIRECT EX BY MR DURANT

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1 A Seventy

2 Q -- 70 In comparison to each other, what's the
3 difference between the rounds in State's Exhibit No 70
4 and the rounds in State's Exhibit No 69? In other words,
5 the ones from the magazine as opposed to the one found in
6 the ashtray?

7 A All of these cartridges are all 9-millimeter
8 Luger caliber cartridges All of them are loaded with
9 nominal 115-grain full metal case or full metal jacketed
10 bullets Of the nine unfired cartridges in State's
11 Exhibit 69 received with the magazine, all but one bear
12 the Winchester 9-millimeter Luger head stamp They're
13 Winchester brand unfired cartridges All of the unfired
14 cartridges in item 69 are loaded with copper alloy
15 jacketed bullets, which have a copper color to them

16 The single unfired cartridge in State's
17 Exhibit 70 also has the Winchester 9-millimeter Luger head
18 stamp The cartridge case portion of this is the same as
19 the cartridge case portion of the unfired cartridges in
20 State's Exhibit 69 But the bullet, while it's the same
21 caliber and the same weight, is constructed with a
22 brass-colored jacket instead of a copper-colored jacket
23 Some Winchester 9-millimeter Luger caliber ammunition is
24 loaded with this brass-colored jacket and some is loaded
25 with the copper-colored jacket.

1 Q Is the copper-colored jacket more frequent, I
2 should say?

3 A I see it more often

4 Q Okay

5 A The brass-colored ammunition has been on the
6 market for a few years now And the only place I have
7 seen it offered for sale is at the Wal-Mart stores And
8 it's usually offered for sale in a big white box that
9 holds 100 rounds The other ammunition is usually sold in
10 50 round boxes and it's sold everywhere

11 Q But other than the actual jacket on the bullet,
12 it's identical to the other 9-millimeter rounds, the other
13 Winchester 9-millimeter rounds?

14 A Yes, the cartridge case portions of them are the
15 same

16 Q Now, in State's -- was it 70, State's 70?

17 A Seventy is the one bullet, yes, sir

18 Q With the brass?

19 A Correct

20 Q That came from the ashtray?

21 A Yes, sir, so marked.

22 Q Did you compare that projectile or that type of
23 bullet with the bullet that was removed from the victim in
24 the autopsy in this case, which I believe is State's
25 Exhibit No 63

D DEEFREESE - DIRECT EX BY MR DURANT

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1 A Yes, sir, I did

2 Q It would be State's Exhibit 65

3 A Yes, 63 is that 65 is the bullet As I said
4 previously, State's Exhibit 65A actually has two
5 fragments One of them is most of a brass-colored bullet
6 jacket, which is the -- it's the same construction as the
7 bullet portion of item 70 or the bullet portion of the
8 unfired cartridge in State's Exhibit 70 So these are the
9 same color, the same type They're consistent in their
10 construction

11 Q Same bullet, type of bullet, same brass jacketed
12 bullet from the deceased and the truck of the pickup -- I
13 mean, the ashtray of the pickup?

14 A Correct. And they're different in color than
15 the copper alloy -- copper-colored jackets on the
16 Winchester brand cartridges in State's Exhibit 69

17 Q Okay Mr. DeFreese, did you -- during your
18 examination, did you have an opportunity to compare
19 State's Exhibit No. 63A and B, the two 9-millimeter shell
20 casings designated items D and E with the item number 71,
21 a 9-millimeter shell casing recovered from the windshield
22 of the pickup truck?

23 A - Yes, sir, I did

24 Q What conclusion did you reach based upon your
25 examination?

1 A My conclusion was that all three of the fired
2 cartridge cases in State's Exhibits 65 -- 63, 63A, 63B and
3 71 were all fired by the same gun

4 Q And how did you make that determination, sir?

5 A Based on either matching breach face or matching
6 firing pin impressions on the three of these

7 Q Okay. What's a breach face impression?

8 A The breach face is the portion of the gun that
9 seals off the back of the chamber. It's the portion of
10 the firearm that comes into contact with the primer and
11 the very back side of the cartridge case, what we call the
12 case head. When the cartridge is fired, it creates a
13 pressure inside which forces it very, very strongly
14 against the breach face and against other surfaces inside
15 the gun. And it embosses on the cartridge case the
16 imperfections that are left on the breach face during
17 manufacture and during its use thereafter.

18 The firing pin is a structure which looks like a
19 pin that strikes the primer at the rear of the cartridge
20 and initiates its firing. There are imperfections on
21 firing pins that are also transferred to the cartridges
22 that are fired by that firing pin. And I found
23 sufficiently unique markings of one sort or another on the
24 three of these to conclude that they were all three fired
25 by one firearm.

D DEEFREESE - DIRECT EX. BY MR DURANT

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1 Q And is the caliber of those three cartridge
2 cases -- are those cartridge cases consistent with the
3 projectile which killed the deceased in this case which
4 has been designated as State's Exhibit No 63?

5 A Yes, these are 9-millimeter Luger caliber as
6 well.

7 Q With regard to State's Exhibit No 62, the three
8 40-caliber shell casings, were you able to make any
9 determination as to whether or not those three cartridge
10 cases were fired by the same weapon?

11 A Yes, I was

12 Q What conclusion did you reach?

13 A I concluded all three of the fired 40 Smith &
14 Wesson cartridge cases were all fired by one firearm, by
15 the same firearm.

16 Q Okay

17 A But not by the gun that fired the three
18 9-millimeter Luger caliber cartridges

19 Q Because, in fact, you can't shoot a 40-caliber
20 projectile out of a 9-millimeter weapon, can you?

21 A Correct You can't fit a 40 Smith & Wesson
22 caliber cartridge into a 9-millimeter Luger chamber
23 because it's too big You can sometimes shoot a
24 9-millimeter Luger cartridge in a 40 Smith & Wesson. But
25 when you do, it ordinarily swells and distorts the

1 cartridge case much more so than it would be if it were
2 fired in its proper caliber And I found no evidence of
3 that in this case

4 MR DURANT: Would you please answer any
5 questions that defense counsel may have

6 CROSS-EXAMINATION

7 BY MR RUNYON

8 Q Good afternoon, Mr DeFreese

9 A Hey

10 Q I will probably have you out of here just in
11 time to catch the --

12 A 5 00 traffic

13 Q -- 5.00 traffic back to Columbia Sorry about
14 that

15 A And the rain storm

16 Q Mr DeFreese, to cut to the chase because you've
17 been asked a lot of questions and to render your opinion
18 and what have you, the fatal bullet, State's Exhibit No
19 63, A and B?

20 A Yes

21 Q You say is consistent with a 9-millimeter Luger
22 projectile?

23 A Yes.

24 Q Okay Now, tell me what's the difference
25 between a 9-millimeter projectile and a 9-millimeter Luger

D DEFREESE - CROSS-EX. BY MR

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1 projectile, is there a difference?

2 A Well, 9-millimeter is the nominal bore diameter
3 of a lot of guns 9-millimeter Luger is probably the most
4 popular of the 9-millimeter firearms in production today
5 But there are other 9-millimeter cartridges that have
6 nominally the same bore diameter and would shoot the same
7 diameter of bullet, such as the 9-millimeter Browning, the
8 9-millimeter Largo There are probably half a dozen
9 different obscure, mostly European, 9-millimeter calibers
10 that shoot bullets of about the same size

11 Q All right Now, you indicated that -- in
12 referring to State's Exhibit No 72, that's the report
13 showing the type of firearm owned by a particular
14 defendant in this case?

15 A Yes

16 Q That fatal bullet, if we can call it that, is
17 consistent with the toolmarks on that type of weapon and
18 several others?

19 A Yes, sir Ruger makes a number of pistols
20 They make a P85, the P89, the P95 There are a number of
21 9-millimeter Luger caliber pistols made by Ruger They
22 all use the same ammunition and some of them even use the
23 same magazine But the Ruger firearms and 9-millimeter
24 Ruger caliber have rifling standards that are
25 substantially the same as well.

1 Q Okay So you've got to understand, it took me a
2 long time to get through science in college, so bear with
3 me You have a barrel of a firearm?

4 A Yes, sir

5 Q And, basically, as I understand it, you said
6 that you can -- based upon your research and expertise and
7 your studying of the projectiles and what have you, you
8 can tell the type of gun that may fire a projectile based
9 on the -- for lack of a better expression, the toolmarks
10 on the rifling of the barrel?

11 A Well, we're almost there

12 Q All right

13 A Different manufactures use different numbers of
14 lands and grooves They use different directions of
15 twists and they use different widths of land and grooves

16 Now, when I'm talking about lands and grooves
17 inside a gun barrel, I'm referring to a series of
18 spiraling grooves on the inside surface of the gun barrel
19 or the gun tube. And they're sized so that the bullet
20 fits very tightly, so that the bullet's, really,
21 interference fits with the land portion of it So the
22 lands grip the bullet and imparts a spin on the bullet to
23 make it accurate in flight

24 When it comes to identifying bullets, I'm
25 looking at the individual microscopic toolmarks left over

D DEFREESE - CROSS-EX BY MR

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1 from the manufacture, left over from use and abuse in the
2 field that is imparted by a particular barrel off of a
3 particular bullet That's the basis for identifying the
4 bullet back to the barrel

5 In this case, we're backing up a step and we're
6 looking at the class characteristics Like in this case,
7 we have a six land and groove right-hand twist with a
8 certain width of land and certain width of groove I'm
9 not focused on individual microscopic characteristics,
10 just on the manufacturing specifications

11 In this case, I found the land and groove class
12 characteristics were consistent with a Ruger firearm and
13 with, potentially, a number of other firearms But they
14 had the same number of lands and grooves They have the
15 same direction of twists and they were a 9-millimeter
16 Luger caliber And I made that list for the investigators
17 so they would know what to send me and what not to send
18 me

19 Q Okay So that as a practical matter, this
20 particular type of weapon as identified in State's
21 Exhibit 72 has a particular land and groove?

22 A Yes, sir.

23 Q That could have fired that projectile?

24 A Correct

25 Q Along with -- since we don't have the individual

1 weapon itself, along with sister or brother weapons
2 manufactured in that same type of weapon class by Ruger?

3 A Correct

4 Q And along with other models made by Ruger that
5 use the same land and groove processing of the barrel?

6 A That use the same specifications, along with
7 other Rugers and other brands.

8 Q And other brands What other brand -- to your
9 recollection, what other brands would use the same land
10 and twists?

11 A It's a very popular land and groove class
12 characteristic or class specification And I've got maybe
13 40 other possible known makes of firearms that use land
14 and groove class characteristics that are close enough to
15 those observed on the fatal bullet that they could also
16 have been the firearm that fired it

17 Q So without the weapon itself, your basic
18 conclusion is that fatal bullet was fired from any one of
19 possibly up to 40 different models of 9-millimeter Rugers?

20 A Yes

21 Q And more importantly, so there's no misleading
22 here, it's also your opinion that the fatal bullet could
23 have been fired by the type of weapon as identified in
24 State's Exhibit No 72?

25 A That's correct

D DEFREESE - CROSS-EX BY MR

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1 Q Now, of those 40 models, could you give us some
2 manufacture's names, not every single one of them, but
3 Smith, Colt, Winchester, who are they?

4 A Of the names anyone might know, there are
5 Walkers, Mousers, H & K's, Burgmans, Berettas, just to
6 pick a few Luger, the original Luger pistol, Sten, which
7 is -- some of these guns are submachine guns and some are
8 pistols

9 Q Let's just stick with the pistols

10 A A Radium and a Browning That's -- I just picked
11 a few names that people might recognize There are a lot
12 of names on here that are rather obscure. There is a
13 Colt, too I happened to see a Colt in there

14 Q So as a practical matter, if I go to a place
15 that is a conveyer of weapons, the more common names that
16 you've indicated there are most probably present in one of
17 more of those gun stores?

18 A Yeah, some of them can be.

19 Q All right And insofar as the bullets
20 themselves, these are -- and I don't want to use the word
21 generic, but these are kind of mass produced, are they
22 not?

23 A Yes, sir, they are

24 Q As you indicated, there's one variation of the
25 bullet that's probably only sold -- mostly sold in

1 Wal-Mart, right?

2 A It's the only place I've ever bought it I'm
3 not saying it's not sold elsewhere, but it's the only
4 place I've ever seen it offered for sale

5 Q Okay And did you get a good price at Wal-Mart?

6 A Oh, yeah, Wal-Mart, always low prices

7 MR RUNYON Thank you, Mr DeFreese

8 MR BUTLER I don't have any questions

9 THE COURT Any redirect?

10 MR DURANT I ask that Mr DeFreese be excused,
11 Your Honor.

12 THE COURT All right

13 MR RUNYON I have no objection, Judge.

14 MR BUTLER No objection

15 THE COURT All right You may step down. You
16 are excused You can go back to Columbia

17 Call your next witness

18 MR DURANT We would call Dr Erin Presnell
19 May we approach?

20 (WHEREUPON, a bench conference was held in the
21 presence of the jury but outside the hearing of
22 the jury)

23 THE COURT Go ahead

24 ERIN PRESNELL, MD,

25 being first duly sworn, testified as follows.

1 THE CLERK Please have a seat State your full
2 name for the record and spell your last

3 THE WITNESS My name is Susan Erin Presnell,
4 P-R-E-S-N-E-L-L

5 MR DURANT Court's indulgence for just one
6 moment

7 (WHEREUPON, State's Exhibits Nos 79 AND 80 were
8 marked for identification only.)

9 DIRECT EXAMINATION

10 BY MR DURANT

11 Q Good afternoon

12 A Good afternoon

13 Q Could you please tell the jury who you are?

14 A My name is Erin Presnell. I'm a forensic
15 pathologist I work at the -- down the street at the
16 Medical University of South Carolina in the department of
17 pathology I do forensic autopsies for a living.

18 Q You are a licensed physician in the State of
19 South Carolina, is that correct?

20 A Yes, I am

21 Q How long have you been practicing medicine?

22 A Well, I finished medical school in 1993, did my
23 pathology residency, which is a five-year process, and
24 then did a year subspecialty after that in forensics So
25 finished my -- I've been doing forensic autopsies since

1 1995, but finished my fellowship training in '99, at which
2 time, MUSC hired me on as faculty

3 Q And, generally, just tell the jury what the area
4 of pathology consist of?

5 A Most people are familiar with it, like a lot of
6 shows, you see it on TV shows, but pathology -- actually,
7 pathology, in general, is -- forensics is actually a
8 subspecialty of that Pathology is the study of disease
9 So most pathologists actually look at little pieces of
10 tissue or things that are taken out by the surgeon,
11 diagnose cancer or other disease processes Forensics is
12 a subspecialty of that where we look at the whole body
13 instead of just a piece of tissue But we do look for
14 disease, but we also look at and evaluate trauma and try
15 to come up with the cause and manner of death in our
16 cases

17 Q And that's what you do principally, is that
18 correct, forensic pathology at this point?

19 A Yes.

20 Q I believe you are certified in clinical and
21 anatomical pathology as well?

22 A Right You have to be Board certified in
23 general pathology before you can be Board certified in the
24 subspecialty of forensics, which I'm Board certified in
25 both of those

E PRESNELL - DIRECT EX BY MR DURANT

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1 Q How long have you been affiliated with the
2 Medical University now?

3 A Well, I moved down here and started medical
4 school here in 1989, Hurricane Hugo, and have not left,
5 but I have been on faculty at MUSC since 1999.

6 Q And how many autopsies have you performed in
7 your career here?

8 A Over 1500

9 Q And you're Board certified in the area of
10 forensic pathology?

11 A Yes, I am

12 Q What are the requirements of certification,
13 Board certification?

14 A Board certification, well, you need an M.D.,
15 medical degree, and you need to finish an accredited
16 residency program in pathology, which is now four years,
17 it used to be five years And then for forensic
18 pathology, you now have to finish an accredited fellowship
19 in forensic pathology to sit for the national Boards.

20 Q That is a national certification?

21 A Exactly

22 Q Have you previously been qualified as an expert
23 witness in here in forensic pathology?

24 A Yes, I have

25 Q How many times?

E PRESNELL - DIRECT EX BY MR DURANT

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1 A Over 50

2 Q And in what courts?

3 A Charleston, a lot of the Lowcountry around the
4 coastal areas of Charleston where the coroners refer us
5 their cases, Williamsburg, Beaufort, Colleton, Marion, all
6 up and down this side of South Carolina

7 MR DURANT Your Honor, we would offer Dr.
8 Presnell as an expert in the area of forensic pathology at
9 this time

10 MR RUNYON No objection from Defendant
11 Washington

12 MR BUTLER: No questions, no objection

13 THE COURT: Ladies and gentlemen, same charge
14 that I gave you earlier about expert witnesses would also
15 apply to this witness who has been qualified as an expert
16 in the field of forensic pathology

17 Go ahead.

18 MR. DURANT Thank you, Your Honor

19 BY MR DURANT.

20 Q While affiliated with the Medical University,
21 did you have an opportunity to perform an autopsy on Jamie
22 Simmons on May the 11th of 2003?

23 A Yes, we did

24 Q Do you know when Mr Simmons was pronounced
25 dead?

E PRESNELL - DIRECT EX BY MR DURANT

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1 A 3 59 a m on May 11th, 2003

2 Q What was Mr Simmons' age?

3 A Mr Simmons was described to us as a 20-year-old
4 male

5 Q Did you record his height and weight?

6 A We have his weight as approximately 150 pounds
7 and he's 70 5 inches in length, which 72 inches is
8 six feet, so not quite six feet tall

9 Q Now, you performed an external examination of
10 the body, is that correct?

11 A Yes All of our forensic autopsies are complete
12 autopsies where we do the external exam and document
13 injuries, diseases with diagrams and with photographs.
14 And then we do the internal exam where we look at all of
15 the organs, sample the organ tissues We also do
16 toxicology testing for drugs and alcohol in the body.

17 Q And beginning with your external exam, what did
18 you find upon your external examination of Mr Simmons?

19 A Well, Mr. Simmons had a gunshot wound and --
20 when we approach autopsy, clearly, we look at the external
21 exam first, but you go through the whole thing and then
22 put it together If I was going to describe the finding
23 of autopsy, the major one being a fatal gunshot wound He
24 had a gunshot wound that entered into the side, the left
25 back side of the left arm, exited -- actually, went

1 through the humerus or the large bone in your upper arm,
2 exited that arm, went into the chest cavity, kind of on
3 the back side, left back side, went through the left lung,
4 the aorta, the heart, the esophagus, the right lung and
5 actually exited the right chest cavity, but the bullet
6 stopped there in the muscle, the pectoralis muscle, the
7 muscle over the chest wall in the front

8 Along the way, the bullet fragmented somewhat,
9 the jacket or the external coating kind of like of the
10 bullet was stripped off And we got that from the tissues
11 in the middle of the body where the heart is, that area,
12 and another little fragment was recovered in the left
13 chest cavity

14 Q Did you note any other injuries on the back of
15 the deceased?

16 A He also -- Mr Simmons also had what we call an
17 abrasion An abrasion is a scraping of skin It was a
18 horizontal linear abrasion on the right mid back. So
19 right in the middle of the back on the right side. That,
20 coupled with holes in his clothing, led us to conclude
21 this was most likely a graze wound, meaning a wound that
22 was caused by a bullet, but it did not actually enter into
23 the body, it just scraped the outside of the skin.

24 Q I hand you what's been marked as State's Exhibit
25 Nos. 80 and -- 79 and 80 and ask if you recognize those

E PRESNELL - DIRECT EX BY MR DURANT

605

1 photographs?

2 A These are photographs taken at the time of
3 autopsy with our autopsy level and they demonstrate the
4 graze wound

5 Q Do they fairly and accurately depict the graze
6 wound that you observed on the back of the decedent, Jamie
7 Simmons?

8 A Yes, they do

9 MR. DURANT Your Honor, we would offer State's
10 79 and 80 into evidence at this time

11 MR RUNYON. Subject to the bench conference,
12 Judge, objection.

13 MR BUTLER Objection 403

14 THE COURT Admitted

15 (WHEREUPON, State's Exhibits Nos 79 and 80 were
16 admitted into evidence)

17 BY MR DURANT.

18 Q So from what I'm understanding from you, he was
19 grazed by a bullet in the back, correct?

20 A Injury in the back is consistent with a graze
21 wound

22 Q Then he had another single gunshot wound that
23 went through his arm and into his body and remained in his
24 body?

25 A Yes, he had three holes, two in the left arm and

1 one in the chest cavity that all lined up consistent where
2 they seemed that particular one being a single gunshot
3 wound The bullet did not exit the body We recovered it
4 in the chest wall in the chest cavity

5 Q So the fragment and the bullet core you
6 recovered from the body were all from the same bullet?

7 A Yes, they appeared to be all from the same
8 bullet

9 Q And was this considered a closer distant gunshot
10 wound? And for forensic purposes, I guess you should
11 explain what a distant gunshot wound is

12 A One of the things that we do when we look at
13 gunshot wounds, sometimes it's obvious it's a gunshot
14 wound, but we can gather other information as well. One
15 of those things is range of fire, how far away is the gun
16 from the person at the time of the shooting. And we, as
17 forensic pathologists being isolated in the autopsy room,
18 there are three general categories we can call a gunshot
19 wound Either it's a contact wound where the muzzle is up
20 against the skin and it leaves a soot deposit there Or
21 it's a close range gunshot wound, which happens as you
22 pull the muzzle away from the target Not only do you
23 have soot coming out, but little pieces of gun particles
24 that come out and scrape the skin and actually cause
25 little abrasions or little dots and it's called stippling

E PRESNELL - DIRECT EX BY MR DURANT

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1 or tattooing As you get about a yard to 36 inches to
2 42 inches away from most handguns, that soot and that
3 gunpowder particles, those will no longer reach the skin
4 surface There will be no soot deposits There will be
5 no scratches or stippling left by gunpowder particles
6 because it can't reach it And at that point, it's then
7 considered a distant gunshot wound So for most guns,
8 about 36 to 42 inches So from that point as far back as
9 you can go, it's considered a distant gunshot wound.

10 In this particular case, his gunshot wound to
11 the left arm showed neither soot nor stippling The only
12 thing we put in there -- and we classified it as probable
13 distant gunshot wound And that's because he had on dark
14 clothing that was very blood stained, so sometimes, it can
15 be difficult to assess whether there is a little bit of
16 discoloration from soot or stippling We didn't see any
17 and we didn't see anything in the wound track either. So,
18 like I said, we classified this as a probable distant
19 gunshot wound

20 Q And you touched on this earlier, but the
21 internal injuries you observed from the path of the
22 bullet?

23 - A - The bullet went through both lungs, the heart,
24 the aorta, the esophagus

25 Q The aorta being what?

1 A The aorta is the major blood vessel in the body
2 It leaves the heart and takes the blood to the rest of the
3 body

4 Q Did it perforate the encave as well?

5 A It did go through the interior of the encave,
6 which is kind of situated right next to the aorta It's
7 one of the major veins in the body that brings the blood
8 back to the heart

9 Q Okay Did it pierce the heart as well?

10 A Yes, it went through the heart and both lungs

11 Q And the esophagus?

12 A And the esophagus

13 Q Pretty much hit everything bad in there that it
14 could have hit?

15 A It hit most of the major organs in the chest
16 cavity

17 Q What was the trajectory of the bullet path?

18 A When we examine a decedent like we were doing
19 with range of fire, we also try to estimate the angle of
20 the bullet pathway in the body In this particular case,
21 the angle of the bullet in his body was going upward. It
22 was going from down up on him It was going to the right,
23 obviously, from his left to his right, and it was going
24 forward It went in back -- in the side of the back here
25 and ended up in the muscle, pectoralis muscle on the

1 right So it was going forward, backward -- excuse me,
2 forward, upward and to the right.

3 Q Okay And so it was going from the left side to
4 the right side and a little from the back and a little
5 forward, correct?

6 A Yes

7 Q And then a little upward?

8 A Yes

9 Q Is that correct?

10 A Yes

11 Q And could you just -- if you would demonstrate
12 on me to the jury roughly where the entrance wound would
13 have been to the chest cavity? If you can step down?

14 A We had the bullet going in the side -- usually,
15 when we examine a body, we're also examining the body with
16 the person in the anatomical position We assume that
17 they're standing like this, which, of course, is not a
18 normal stance in everyday life, but that's just a
19 reference point So with that reference point, the bullet
20 went in this side of the arm, in here, out the inside of
21 the arm, inside the back right here and was found
22 approximately right there

23 Q So about that angle would be the upward angle
24 you're talking about?

25 A Right, yes.

1 Q And, of course, that trajectory or that bullet
2 pathway basically depends on what his orientation was at
3 the time of the shooting, correct?

4 A Yes, it does.

5 Q In other words, if he's standing straight up,
6 like you say, in a straight anatomical position, that
7 would be -- and you observe that bullet pathway, it means
8 somebody kind of behind me and below me would have to have
9 fired the shot, correct?

10 A Yes

11 Q But that wouldn't necessarily be true if I was
12 bent over like that, would it?

13 A No, if you keep the angle --

14 Q Or that, or that, or that, or any other angle
15 besides strictly anatomically correct?

16 A Right It depends on the position of the person
17 to determine which way the bullet actually came from

18 Q And the graze mark that you observed in State's
19 Exhibit No. 79 indicates a fairly straight or level shot
20 at that point, does it not?

21 A It was horizontal

22 Q There are two other pictures I wanted to put
23 into evidence if there's no objection Would you take a
24 look at State's Exhibits 73 and 74 and tell me if you
25 recognize those?

E PRESNELL - DIRECT EX. BY MR DURANT

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1 A These are a photograph of the bullet and the
2 jacket and the jacket fragment that I recovered from the
3 autopsy -- or from the body

4 Q And those are the same bullet and jacket
5 fragments that are indicated in State's Exhibit No 65
6 here?

7 A They're labeled with -- they're in our container
8 and labeled with our autopsy label They have my
9 handwriting and they do appear to match the ones in the
10 pictures

11 MR DURANT Your Honor, we would offer State's
12 74 -- 73 and 74 into evidence at this time

13 MR RUNYON I have no objection.

14 MR BUTLER No objection

15 THE COURT. Admitted

16 (WHEREUPON, State's Exhibits Nos 73 and 74 were
17 admitted into evidence)

18 BY MR DURANT:

19 Q Was the toxicology screen for alcohol and drugs
20 performed as part of the autopsy in this case?

21 A Yes, and the toxicology report, the drugs and
22 alcohol was negative on blood and urine

23 -Q And that is for drugs and alcohol?

24 A For drugs and alcohol

25 Q Based upon the history that you obtained, your

E PRESNELL - DIRECT EX BY MR DURANT

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1 physical examination of the deceased, do you have an
2 opinion based upon a reasonable degree of medical
3 certainty as to the cause and manner of death in this
4 case?

5 A We classified his cause of death as the single
6 penetrating gunshot wound to the arm, slash, chest and the
7 manner of death is homicide

8 Q And do you know what really caused his decease
9 in the case, was it loss of blood or damage to the heart
10 or do you know?

11 A Well, in this particular case, it went through
12 the heart and the aorta, therefore loss of blood,
13 particularly, inside the body He had a lot of blood in
14 the chest cavity Also, through both lungs would
15 compromise his ability to breath. It was a combination of
16 everything together

17 MR DURANT: Thank you very much, Doctor. Could
18 you please answer any questions that defense counsel may
19 have for you

20 CROSS-EXAMINATION

21 BY MR RUNYON

22 Q Dr. Presnell, as a practical matter, y'all don't
23 make rash judgments when you approach an autopsy; do you?

24 A We try not to make rash judgments, yes.

25 Q Let me just give you an example, it has nothing

1 to do with this case If you come in and there's someone
2 there who's deceased who appears to be traumatized, for
3 example, you would not just say oh, they died from the
4 auto accident or what have you? You would do a complete
5 autopsy and you might find that they had a heart attack
6 and find that they died before the car hit the tree,
7 right?

8 A Yes

9 Q And part of your trying to reach reasonable and
10 scientific conclusions deals with the information from the
11 evidence that you're given, correct?

12 A Yes

13 Q Let's talk about some of the things that we do
14 know from the report that you did Number one, the
15 deceased was 70-point -- and you can refer to your report
16 I think it was 70 2 inches tall?

17 A 70 5.

18 Q 70 5, I'm sorry I didn't have it right here
19 What does that mean, about 5-foot eight, 5-foot nine?

20 A Yes, on the spot, let's see, 72 is actually six
21 feet, so minus two inches would be 5-10, 5-9 1/2

22 Q So about 5-9, 5-10, somewhere along those lines,
23 correct?

24 A Yes

25 Q And the bullet wound, the fatal bullet wound,

1 for lack of a better expression, did a lot of damage, but
2 for lack of a better expression, the fatal wound was
3 11-point -- and you thought it important enough to note,
4 it was 11.2 inches from the shoulder, is that correct?
5 It's on page --

6 A We usually measure gunshot wounds to the
7 extremities from the distance from their shoulder So we
8 have the entrance gunshot wound to the back side of the
9 left arm, 11 2 inches from the top of the shoulder.

10 Q Okay. So if you've got somebody that's about
11 5-9, 5-10, somewhere in there -- let's just round it off
12 to about 5-10 because I'm not good at math

13 A All right.

14 Q And 11 5 inches from the shoulder, that doesn't
15 mean -- can you give us an estimation of how big his head
16 was or tall his head was?

17 A Not from my report, but, however, if you wanted
18 to look at the autopsy pictures, we have a scale, a
19 measure scale on each one of them and we could come up
20 with an estimate

21 Q Okay But it was 11 2 inches from the top of
22 the shoulder, the fatal wound?

23 A Right

24 Q And the wound on the back was actually
25 20-some-odd -- 20 2 inches from the top of the head?

E PRESNELL - CROSS-EX. BY MR RUNYON

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1 A Yes

2 Q Down here on the back?

3 A Correct

4 Q Now, you presume -- strike that Because you
5 presume nothing, but you use certain benchmarks and you
6 have to start from somewhere, correct?

7 A Right

8 Q So you -- when I use the word presume, I'm not
9 questioning your scientific investigation, all right?

10 A All right

11 Q So you presume, unless you're told otherwise, an
12 anatomically -- an anatomical position such as my standing
13 here in front of the jury?

14 A Right, with your palms forward would be the
15 proper anatomical position, yes

16 Q Most people complain lawyers have their palms
17 out But palms forward and the wound was some 11 inches
18 down from the shoulder?

19 A Yes

20 Q The graze was 20.2 inches down from the top of
21 the head?

22 A Yes

23 Q Now, unless someone gave you where the person
24 was standing or any statements of whether or not the
25 deceased was standing, crouching or what have you, it's

1 almost impossible for you to make a true determination of
2 trajectory, isn't that correct?

3 A Yes

4 Q Other than the fact that the wound to the back
5 is horizontal?

6 A Yes

7 Q Okay And just for example, if this gentleman
8 were laying on the ground and that shot -- and he was
9 laying face down on the ground, then that shot was just
10 perfectly parallel to the ground, so to speak, correct?

11 A For the graze wound, yes

12 Q And you would have to know -- strike that.

13 Has anyone ever given you any facts to make a
14 determination as to trajectory in this case?

15 A No, I'm not familiar with the crime scene.

16 Q Okay But, certainly, that's one thing which
17 usually helps you, that is detailed crime scene
18 information?

19 A Detailed crime scene information in conjunction
20 with the crime scene personnel can help put some of the
21 material together. My autopsy finding stands regardless
22 of whether the crime scene information is involved. But
23 it is certainly -- that would be helpful in trying to put
24 things back together

25 Q I mean -- certainly, I mean, your autopsy, it

E PRESNELL - CROSS-EX BY MR RUNYON

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1 doesn't matter where he was found, he died as a result of
2 a gunshot wound that went through his arm and went through
3 his chest and just did major damage up there, right?

4 A Correct

5 Q So the crime scene, in this case, information
6 would just merely assist you in making a determination as
7 to whether or not he may or may not have been standing and
8 from whence a projectile was fired, correct?

9 A The whole investigation, I assume, would help
10 with the witness statements and the measurements and the
11 crime scene, yes

12 Q Okay So assuming that Mr Simmons was standing
13 at his automobile relatively -- maybe not his palms
14 forward, but in a relative anatomic position, the gunshot
15 wound, fatal gunshot wounds broke his humerus?

16 A Yes.

17 Q 11 5 inches from the shoulder and the horizontal
18 grazing was 20.2 inches from the top of his head across
19 his back?

20 A Yes

21 MR RUNYON I have no further questions of this
22 witness at this time, Your Honor

23 CROSS-EXAMINATION

24 BY MR BUTLER

25 Q Good afternoon, Doctor How are you?

1 A H1

2 Q You take fairly precise measurements of -- like
3 you had already described the length of the body, which
4 would be the height, the point of entry, the point of
5 exit, if there's one, the measurement from midline. What
6 is midline?

7 A The middle of the body The line right straight
8 down the middle

9 Q For example, where the abrasion is Do you have
10 those in your report?

11 A Yes, I do

12 Q Can you tell me where on Mr Simmons,
13 specifically, your measurement was for the point of entry
14 into his left arm?

15 A In the left arm -- well, when we do measurements
16 for injuries or wounds on the body, we usually do from top
17 of head and we do right and left the midline When you
18 start to involve the upper extremities because it's kind
19 of hard to say what is a midline of the arm, what we do is
20 say the location

21 For instance, in his, it was posterior lateral,
22 which means posterior is behind and lateral is to the
23 side So an anatomic position, it means back here. So we
24 have described as posterior lateral, in this location, and
25 actually going to be down further towards the elbow

E PRESNELL - CROSS-EX BY MR BUTLER

619

1 because it was 11 2 inches from the top of the head So
2 that's the description that we did

3 Q And then the point of exit on the other side of
4 the arm?

5 A And the point of exit, which we labeled exit
6 gunshot wound B, is 10 5 inches from the top of the
7 shoulder, so up a little bit higher And --

8 Q So let me interrupt you for just a second. So
9 from the point that the bullet is going into Mr Simmons's
10 arm, it's going up, it's traveling upwards?

11 A Yes.

12 Q Then from -- those are all of the measurements
13 from the point of exit?

14 A So the exit is 10 2 inches from the top of the
15 shoulder on the medial aspect of the arm, which is the
16 inside part of the arm

17 Q And then the next point of entry into his torso?

18 A Then we have the range of the gunshot wound C on
19 the posterior lateral -- and remember, posterior is back
20 and lateral is side So posterior lateral and it's about
21 9 inches from the top of the left shoulder.

22 Q And then this next measurement where the round
23 ended up, do you have a measurement for that?

24 A I don't believe we have a measurement for where
25 we recovered the bullet We usually only get entrance and

1 the exit wounds, but let me check We have it going in
2 11.2 inches from the shoulder, exiting arm, 10 5 inches
3 from top shoulder and going back into the body 9 inches
4 from the top of the shoulder And that's the last
5 measurement that we did The rest of it is decrypting the
6 pathway through the organs

7 Q And measurement for the abrasion on his back?

8 A The abrasion on the back is, as you heard
9 before, 20 2 inches from the top of the head And since
10 it's horizontal, what we do is measure to the middle of
11 the wound So the graze wound is about like that Then
12 we measure to the middle of that And it's 4 3 inches to
13 the right of his midline back

14 Q And in addition to being horizontal, it appears
15 to be -- let me see if I can say this correctly --
16 perpendicular to his midline?

17 A Yes, if midline is going this way, the graze
18 wound is perpendicular to that in this location or this
19 orientation

20 Q So if I use this rod to -- this would be my
21 midline, right?

22 A Yes, it is

23 Q And to say that the abrasion was perpendicular
24 to Mr Simmons' midline is to say it was traveling like
25 this?

1 A Yes Although we don't know right to left or
2 left to right from looking at the wound

3 Q Right Mr Durant's point was just because you
4 know that the pathway across Mr Simmons' body was
5 horizontal and perpendicular to midline, you don't know
6 whether he was leaning like this or leaning like this?

7 A Exactly

8 Q All right Now, with respect to -- let me ask
9 you this If he is standing straight up more or less,
10 then you can get an idea of the trajectory of the bullet
11 before it even hit him, right?

12 A If we know his position at the time that he's
13 shot, then we could kind of backtrack from the anatomical

14 Q And with respect to the fatal wound, with those
15 measurements, you can determine an angle, can you not?

16 A We didn't actually -- a lot of times we give
17 specific angles, like say it's 45 degrees up or 30 degrees
18 upward or 80 degrees upward The problem with doing that
19 is that it implies it's pretty specific, you know, that
20 I'm giving, acts like I'm taking out a protractor The
21 other thing is that something that happens after death,
22 especially once you put holes in the organs, is your
23 tissues collapse, so the body settles So when you're
24 trying to get something that specific, sometimes we just
25 can't do that

1 The other issue with this one is that the bullet
2 hit the humerus and that might have thrown it off track a
3 little bit, too. So instead of trying to put specific
4 numbers on to it, we left it as a general upward, forward
5 and to the right

6 Q General upward forward to the right and you're
7 comfortable with that?

8 A Yes

9 Q Would you mind stepping down, please?

10 A (Witness complied)

11 Q If you would, using this rod, basically show me
12 the path of the bullet on me?

13 A The fatal bullet?

14 Q Yes, please

15 A So we have his arm back like this a little bit
16 and so the bullet would be going in the posterior lateral
17 The posterior lateral going upward, so it goes out here,
18 in here and forward to where the bullet was recovered
19 there So approximately, in this general direction

20 Q Approximately like this?

21 A Approximately

22 Q Okay Could you resume your seat, please?

23 A Yes

24 Q Now, if it's approximately like this, as

25 Mr Durant pointed out, if somebody is standing straight

1 up and down, you would have to say that the person was
2 almost on the ground?

3 A Yes

4 Q We don't know whether or not Mr Simmons was
5 like this or like that, right?

6 A Right

7 Q If you would, would you mind standing where you
8 are. What position would he have to almost be in if the
9 shooter were above him almost where you are? He would
10 have to be almost like this, right?

11 A Yeah, or twisting away

12 Q Twisting away and turning down, bending down,
13 right?

14 A Or parallel Do you want me to come position
15 you?

16 Q No, I think that's all right I would have to
17 be fairly contorted?

18 A You would have to be twisted, but, yes.

19 Q You can resume your seat

20 MR BUTLER Beg the Court's indulgence

21 That's all I have Thank you, Doctor

22 THE COURT Redirect?

23 MR DURANT Very briefly, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR DURANT:

1 Q You're shooting at me, ma'am, and I'm here and
2 you shoot at me one time and graze me across my back, what
3 am I likely to do?

4 A Well, just personally, I would --

5 Q If I hear shooting that's coming from over here,
6 okay, I feel a bullet zip across my back, I'm going to get
7 the out of dodge, aren't I? Isn't that true?

8 A Me personally yes, I would

9 Q Just about anybody would, going to run away from
10 a shooting, especially if they've been grazed, correct?

11 A I imagine they would.

12 Q And wouldn't that put that bullet trajectory
13 exactly like you found it?

14 A If you -- of course, I thought about this
15 case --

16 Q Like this, left arm back?

17 A And I've thought about it and --

18 Q Back to me, body bent forward?

19 A It would be consistent with that

20 MR. DURANT Thank you very much

21 THE COURT Recross, Mr. Runyon?

22 RECROSS-EXAMINATION

23 BY MR RUNYON

24 Q Based on that, Doctor, that's where
25 measurements -- Mr. Durant was unable to give you any

E PRESNELL - RECROSS-EX BY MR RUNYON

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1 measurements from the crime scene, so it's not really
2 possible for you to -- other than conjecture about what a
3 person might do

4 A Right

5 Q Is that correct?

6 A Yes

7 MR RUNYON No further questions

8 MR BUTLER. Just briefly

9 RECROSS-EXAMINATION

10 BY MR. BUTLER

11 Q Help me with this again You don't need to get

12 up But like this?

13 A The other way

14 Q Like this?

15 A Yeah.

16 Q Like this okay?

17 A Uh-huh

18 Q Stand up, please I'm running, but I would have
19 to be like this, right?

20 MR DURANT No, you're pointing at the ground

21 BY MR BUTLER

22 Q I would have to be like this, right?

23 A I'm up above you right now, so you don't have to
24 go quite that far down.

25 Q But I'd have to be bent over?

1 A See, now, I'd have to shoot from up here.

2 Q You would need to know exactly how high you
3 were, right?

4 A Yes

5 Q From where you are now even, from where you are
6 now, given the angle, if I just turn and run -- first of
7 all, if I turn and run, what happens to my shoulder?

8 A Your angle is off a little It's supposed to be
9 going up

10 Q (Indicating)?

11 A Yeah, there you go

12 Q It's like this?

13 A Yes

14 Q If I turn and run -- and my shoulder is facing
15 you now, right?

16 A Yes

17 Q If I turn and run, what happens to my shoulder?

18 A Your shoulder moves.

19 Q Okay. You're over there now if I'm shooting
20 you, right?

21 A If that's his position, yes

22 Q Okay You got me?

23 A I understand

24 MR BUTLER Thank you

25 THE COURT All right You may step down.

1 THE WITNESS Thank you

2 MR DURANT I ask that Dr Presnell be excused

3 MR RUNYON I have no objection, Judge.

4 MR BUTLER No objection

5 THE WITNESS Thank you

6 THE COURT You're excused, ma'am Are you at a
7 stopping point, Mr Durant?

8 MR DURANT I am, Your Honor

9 THE COURT. All right, sir Ladies and
10 gentlemen, we are going to then recess for the evening I
11 will again send you home with the admonition do not begin
12 deliberation or discussions on the case. Again, I haven't
13 seen any television cameras today, but if there's any
14 press coverage of any sort, please ignore that There's
15 plenty of time to hear about the case or watch anything on
16 TV that shows up in the case All of the evidence you
17 need, you have seen in the courtroom, so it isn't proper
18 to read about the case outside the presence of the
19 courtroom

20 We will see you in the morning. I think because
21 we came in early today, we were able to do everything that
22 we had hoped to get, so I think tomorrow if you show up at
23 9 30 that will give us plenty of time to get finished what
24 we need to do tomorrow I'm going to have the lawyers in
25 a little bit earlier than that so we can work on the legal

1 things that we need to get it ready and going, but I think
2 we can resume testimony tomorrow morning at 9 30

3 Thank you for your patience throughout the day
4 We'll see you in the morning

5 (WHEREUPON, the jury was excused for the day)

6 THE COURT For the record, let me put on the
7 record during the bench conference prior to that witness,
8 Mr Butler made an objection which Mr. Runyon joined into
9 about the admission of two photographs The numbers on
10 them were?

11 MR DURANT I think 79 and 80

12 THE COURT We'll verify that

13 MR RUNYON They are, in fact, State's
14 Exhibits 79 and 80

15 THE COURT Mr Butler and Mr Runyon objected
16 to the introduction of those two photographs on the
17 grounds that they were unduly graphic I overruled that
18 on the grounds that they were -- because Mr Durant argued
19 that the graze, which is shown on both of these -- the
20 graze injury which was shown on both of these was
21 necessary to rebut Mr Runyon's and Mr Butler's arguments
22 about the angle of the shot and the photographs of the
23 grazing were necessary I find that the probative value
24 substantially outweighs the prejudicial value and they
25 were admitted All right

1 Now, do you have any other witnesses that you're
2 going to call or do you rest?

3 MR DURANT Can I think about it overnight?

4 THE COURT Sure Y'all come in at
5 9 00 tomorrow

6 MR DURANT: As of right now, I'm intending to
7 rest, but I'm going to consult with my folks.

8 THE COURT Y'all come in and we'll start at
9 9.00 If you rest, we'll take up any motions that we need
10 to take up at that time

11 How many witnesses do y'all anticipate calling,
12 have y'all narrowed that down?

13 MR BUTLER Two, perhaps three, but I'm
14 thinking two We have to have a discussion with Mr Ward
15 about that, but I'm thinking right now two One is a very
16 brief officer that was called in the State's case the
17 first time, that is to impeach the testimony of -- I'm
18 sorry, I have to talk with Mr Ward I'm losing my mind
19 To impeach Mr Washington that the State did not call that
20 would take two minutes, I think. Then we have our expert
21 on the graphic computer animation that we've contemplated
22 using

23 THE COURT Okay Have y'all shared that with
24 the State yet or is it a work in progress?

25 MR BUTLER It's kind of a work in progress

1 We asked Mr Durant if he wanted to look at them, but even
2 now, it's not finalized And if the Court allows it to go
3 forward, it will be demonstrative It's nothing that will
4 go back to the jury.

5 THE COURT I would like him to look at it --

6 MR DURANT. I would ask that we be able to at
7 least do it in camera before it's showed to the jury.

8 MR BUTLER: Sure

9 THE COURT: Certainly, I would like you to see
10 it first.

11 MR DURANT Quite frankly, I was a bit
12 disturbed by some of the stuff that he had on there that
13 didn't show up on any of the videos

14 MR BUTLER. You can tell us what to take out
15 and we'll take it out That's the beauty of the computer

16 THE COURT: All right Well, we'll see y'all
17 tomorrow morning at 9 00 then

18 MR DURANT Thank you very much, Your Honor

19 THE COURT Thank you

20 (WHEREUPON, the court was in recess for the day
21 of Wednesday, June 9, 2005)

22

23

24

25

1 (WHEREUPON, the following proceedings were held
2 before the Court on Thursday, June 9, 2005,
3 outside the presence of the jury)

4 THE COURT Okay

5 MR BUTLER. I have spoken to Mr Durant about
6 sort of general areas that we plan to go into with
7 Mr Cantrell We're prepared to present as much or as
8 little as the Court and/or the State needs to see at this
9 point

10 THE COURT This is about your animation?

11 MR BUTLER Yes, sir

12 THE COURT Let's take first things first. Does
13 the State plan on calling any further witnesses or do you
14 rest?

15 MR DURANT Your Honor, I believe the State
16 would rest at this point And I guess we probably should
17 resolve all issues regarding that at this point

18 THE COURT Okay

19 All right Who wants to go first?

20 MR RUNYON I guess since I've been the
21 lead-off guy, I will go first unless Mr. Butler
22 strenuously objects

23 Your Honor, at this point in time, in a
24 substantial number of criminal cases, the defendant will
25 make a motion for directed verdict and that is lots of

1 time a pro forma motion However, this -- I would
2 respectfully submit to the Court this is not one of those
3 cases If the Court would refer to the -- I know the
4 Court has read the indictments, 94 and 95 Essentially,
5 they are mirror indictments

6 One of them says that this gentleman,
7 codefendant, did certain things brought about the death
8 and acting in concert with one another, with others.

9 And Mr -- my client's position,
10 Mr Washington's case, says precisely the same thing. All
11 of the evidence to this date, taken in the light most
12 favorable to the State, presented by the State places --
13 even circumstantially places the weapon into Mr Ward's
14 hand I'm not suggesting he did that, I'm just simply
15 saying what the evidence was

16 Now, Judge, the State will argue it's
17 circumstantial evidence The problem with that is if you
18 look at the history of directed verdicts in this state on
19 circumstantial evidence, you go back to State V Schrock,
20 which was the Orangeburg case, and they had some pretty
21 good circumstantial evidence at that point in time, the
22 footprint, the DNA on the cigarette and things at the
23 scene of this murder And the Supreme Court ruled that
24 there should have been a directed verdict in that case

25 And then historically -- or, actually, I guess,

1 I'm not trying to get into the minds of the Supreme Court,
2 but after that, there was almost a withdrawal from
3 Schrock They didn't overrule Schrock, but they kind of
4 withdrew After that, there weren't a whole lot of
5 circumstantial evidence cases where there was a directed
6 verdict

7 Then last year, there was several cases, one of
8 which was the interesting case, which was a homicide case,
9 was State V Arnold out of the Murdock circuit, as I call
10 it, and that's the case where a gentleman was found in
11 Tennessee with the good doctor's automobile and all sorts
12 of other circumstantial evidence And the Court ruled at
13 that point and time that he should have been granted a
14 directed verdict. And that's State V Arnold at 605
15 S.E 2nd 529.

16 I would also ask the Court to consider this
17 motion for directed verdict, a motion to require the State
18 to elect, also, because they've got these two indictments
19 Now, at this point in time -- and I understand all court
20 administration requires them to do it separately and all
21 that administrative stuff The simple fact of the matter
22 is they have said either Mr Washington or Mr Ward did
23 the shooting They haven't charged each as accessory to
24 the other They have this vague language about acting in
25 concert with others So accordingly, Your Honor, I think

1 that this is -- I shouldn't say purely circumstantial case
2 because there is some direct evidence as associated with a
3 codefendant But in this case, the State is going to be
4 arguing that circumstantial evidence upon which you, the
5 jury, can conclude that Mr Washington was the shooter

6 Now, the Arnold case had far stronger
7 circumstantial evidence than would be found in this case
8 And the Supreme Court said the court was duty bound to
9 direct a verdict of acquittal -- or not -- direct a
10 verdict in favor of the defendant in that case And I
11 think that's where we are with regards to Mr Washington
12 at this time Totally circumstantial case.

13 There was -- and I have to be candid with the
14 Court There was an attempt to elicit testimony from some
15 witnesses as to where did the shots come from, the
16 passenger side, front, back, that sort of thing, but it
17 really wasn't specific I mean, most of them said I don't
18 know, it just came out of the gray truck

19 This is also a circumstantial evidence case as
20 to whether or not the shot that killed the deceased could
21 have come from that truck and that was waived in the
22 State's case in chief But as a practical matter, Judge,
23 in State V Arnold, which I think is pretty strong
24 circumstances, the Supreme Court denied a rehearing and
25 they affirmed the court of appeals reversing the denial of

1 a directed verdict And they have a fairly extensive
2 factual decision I've got the case here I know the
3 Court is probably familiar with it or have it sitting in
4 front of it by virtue of the Westbound I think at this
5 stage of the game, Mr Washington is entitled to a
6 directed verdict of acquittal or, alternatively, Judge,
7 the way the State has the indictments constructed, and
8 they draw them, I think they are required to elect as to
9 who they're going forward on, Mr Washington or Mr Ward,
10 as being the person who committed the murder

11 THE COURT Mr Butler, do you have a motion?

12 MR BUTLER I do, Judge The first would be a
13 motion for a directed verdict in the sort of routine
14 fashion that Mr Runyon spoke of We have to do it every
15 time, rule 19A of the rules of criminal procedure

16 Aside from that, I would join in Mr. Runyon's
17 motion as it concerns the indictments and the manner in
18 which the indictments contemplate a theory of criminal
19 responsibility on accomplice liability Indictment for
20 Mr John Ward while acting in concert with another did in
21 Charleston County with malice aforethought, et cetera and
22 so forth

23 The case law allows for the opposite situation,
24 which is a person can be charged as a principal and then
25 if at trial the State only proves that he was an

1 accomplice, then the case can go forward That's the
2 State versus Dickman, which is the case that Mr Durant
3 relied upon at some point in his hand of one, hand of all
4 charge However, I don't know of any and I couldn't find
5 any case law in South Carolina allowing for the opposite,
6 allowing for a person to be indicted as an accomplice, but
7 proven guilty as a principal

8 The only evidence against Mr. Ward, if believed,
9 is that he was the shooter, meaning that he would be the
10 principal first, the perpetrator I appeal to the case of
11 the State versus Kelvin Jones, I'm sorry, I don't have a
12 cite It's Kelvin, K-E-L-V-I-N, Jones, where the State
13 indicted somebody for armed robbery based upon them
14 actually having a gun, but at trial proved that he
15 pretended to have a gun

16 And what the Supreme Court said in that case --
17 it was either the Supreme Court or the court of appeals,
18 I'm sorry, I can't remember which one, said that he was
19 entitled to a directed verdict because the manner of proof
20 varied from what was laid out in the indictment Yes,
21 they proved that he was guilty -- or the case could go
22 forward to the jury on armed robbery, but on one theory,
23 which was that he pretended he had a gun when he was
24 indicted for actually having presented a gun I believe
25 that's characterized as proof at variance with the

1 allegations in the indictment

2 I submit what we have here with respect to
3 Mr. Ward is proof at variance with allegations in the
4 indictment I understand why the State has done it
5 because they don't know who was shooting They have had
6 to sort of cast a broad net and leave it for the jury to
7 decide

8 I would also appeal to the notion of judicial
9 estoppel which prevents the State from taking different
10 positions or parties from taking different positions in
11 different trials We have the transcript, I think we'll
12 have to find it You will recall that Mr Durant called
13 Tremayne Heyward to the stand to testify that
14 Mr. Washington was washing his hands with bleach Well,
15 we presented that in the first trial We presented that
16 in the first trial to try to exculpate Mr Ward When we
17 did, it was ridiculed I understand that Mr Durant has a
18 job to do and I don't blame him for it He's got a tough
19 case

20 But he took one position and in closing argument
21 ridiculed the allegation that we made that Mr Washington
22 would have been washing his hands with bleach He argued
23 truly someone would have smelled the bleach, how could law
24 enforcement have interrogated him without noticing the
25 bleach And in this case, he puts up the same evidence

1 that we did in and of itself I'm not saying there's
2 anything wrong with that, however, it precludes them from
3 going forward in a certain manner And it's our position
4 that, consistent with Mr Runyon, they need to decide.
5 They need to decide who was the shooter And for all of
6 these reasons, we move for a directed verdict and we would
7 join Mr Runyon's motion to elect

8 THE COURT· Mr Durant

9 MR DURANT Thank you, Your Honor First of
10 all, let me begin with Mr Runyon's argument
11 Mr Runyon's argument in regards to State V Arnold
12 misapprehends the case in that State V Arnold was not a
13 codefendant in the case State V Arnold was not a hand of
14 one, hand of all case State V Arnold involved a single
15 defendant and whether there was sufficient circumstantial
16 evidence to present that case to a jury That's not the
17 situation we have here

18 It is the State's position this is an accomplice
19 liability case. A case that the hand of one is the hand
20 of all In which case, not only does the evidence against
21 what his client did, but also the evidence of what his
22 client did should be considered by the Court and the jury
23 in assessing who is responsible for the death of Jamie
24 Simmons

25 And in the State's position, it's the State's

1 position this case is now and has always been a hand of
2 one, hand of all case That is why the indictments read
3 as they do And there is no requirement, as Mr Butler
4 pointed out, I could indict -- I could indictment them
5 both as principals and if the jury found as a matter of
6 facts that they were present, aiding and abetting, they
7 could be guilty of the principal without any change in the
8 indictment at all So, certainly, if that's the case,
9 then the converse is not going to be any different That
10 is just verbiage in the indictment

11 The fact of the matter is they're both
12 principals And it's the State's position and the State's
13 position probably at argument they were both into it up to
14 here as well as Catrell Douglas for that matter

15 And the evidence I rely on -- let's face it,
16 Your Honor, the evidence -- my threshold that I have to
17 reach to get a hand of one is any evidence, is there any
18 evidence to support that theory of the case

19 And in that regard, I would just point out to
20 the Court that Tremayne Washington, although he is not
21 from the Petersfield area, there is plenty of testimony
22 that he is good friends with the crowd from Petersfield
23 He has been good friends with John Ward for ten years and
24 he hangs out with the Petersfield crowd all the time
25 There's testimony they were hanging out in the club

1 together that night There's testimony that Keith
2 Richards, a guy from Petersfield, got into a fight with
3 his girlfriend in the club who was dancing with a guy from
4 Cherry Hill The guy from Cherry Hill sucker punches the
5 Petersfield guy in the club and a fight ensues

6 There's testimony in the record that there is
7 animosity between the Petersfield crowd and the Cherry
8 Hill crowd from Deputy Frichtl that was stationed out in
9 that area for five or six years Outside, a fight
10 develops between the Petersfield crowd and the Cherry Hill
11 crowd around Kevin Dunmeyer's suburban Kevin Dunmeyer is
12 a Cherry Hill guy trying to steer Raulo away from the
13 scene while the Petersfield crowd is out there shaking his
14 truck, which he has identified being one of the ones out
15 there shaking the truck and trying to get at Raulo in the
16 truck.

17 As he's coming back across the road,
18 Mr Washington, he is heard by one of the witnesses saying
19 some bitch is going to die out here tonight, and by
20 another witness saying, we'll take care of that There's
21 testimony that Ton-Ton's Cadillac, the -- another guy from
22 Cherry Hill goes down the road to save Dunmeyer, another
23 Cherry Hill guy, and as he's going down there and coming
24 back, he's trying to run over the Petersfield people out
25 in the middle of the road

1 There's testimony that when he comes back, he
2 stops his car in the middle of the road, gets out of the
3 car, starts making obscene gestures and yelling at the
4 Petersfield crowd, at which point, Ken Sanders comes at
5 him again and the Petersfield crowd comes at him again.
6 He speeds away, knocks Kenneth Sanders down with his car
7 Stops again in front of the defendant's truck occupied by
8 these two gentlemen and they start throwing bottles at the
9 Petersfield crowd At which point, a truck occupied by
10 this defendant, this defendant and Catrell Douglas pull
11 out of the parking lot right there at the parking lot of
12 Toogoodoo Road while he extends a pistol out the window
13 and shoots in the direction of the Cadillac fleeing down
14 the road.

15 In addition to that, you have testimony of a
16 running gun battle between those two vehicles going down
17 Toogoodoo Road. You have evidence that they stayed
18 together after the fact They ditched the truck over on
19 Brewer Road together and end up coming back to the scene
20 of the crime together 10 or 15 minutes after the shooting
21 Now, Mr Washington or Catrell Douglas can get up there
22 and play ignorant all they want, but if they were
23 ignorant, Judge, they would have gotten out of that truck
24 as soon as they could have gotten out

25 THE COURT All right I find that there is

1 some direct and substantial circumstantial -- some direct
2 evidence and substantial circumstantial evidence that the
3 defendants are guilty of the charges as set forth in the
4 indictment Both motions are denied

5 All right What do you want to take up on this
6 animation?

7 MR BUTLER I'm prepared to do whatever
8 Mr Durant would like

9 THE COURT Do you have an objection to it per
10 se or parts of it?

11 MR DURANT I still haven't seen it, Your
12 Honor, and based upon what I see, yes, I would object to
13 it

14 THE COURT Let's see it

15 MR BUTLER Do you want me to call Mr Catrell
16 to the stand?

17 THE COURT Let's preliminarily see -- look at
18 it and see what he objects to and see if we can't work it
19 out

20 MR BUTLER Judge, I guess we could categorize
21 it as three different areas of testimony that we would
22 seek to put in front of the jury through Mr Cantrell
23 Let's start off with this diagram as a starting point

24 Roy, for the record, what is it that we're
25 looking at there?

1 THE WITNESS This would be the scene and --

2 MR DURANT Court's indulgence

3 MR BUTLER Judge, could we ask that he be
4 sworn so it's a valid process

5 THE COURT Go ahead

6 ROY CANTRELL,
7 being first duly sworn, testified as follows

8 THE CLERK Please state your full name to the
9 Court and spell your last

10 THE WITNESS Roy Cantrell, C-A-N-T-R-E-L-L.

11 DIRECT EXAMINATION

12 BY MR BUTLER

13 Q And just briefly, we will go into it in more
14 detail in front of the jury What are your qualifications
15 in this area and what do you call this area that we're
16 going to talk about today?

17 A I do accident reconstruction, that's one of my
18 business aspects I operate Cantrell Investigations I'm
19 a licensed private investigator by the South Carolina Law
20 Enforcement Division

21 Q What is accident reconstruction?

22 A It is the taking of a scene where some type of
23 incident has happened and trying to reconstruct to
24 anticipate what would have happened, try to come to some
25 opinions as to who may or may not be at fault Sometimes

1 you have speed, you have fatalities, you have height
2 variances, distance variances, curve, daylight, dark,
3 lights, sun, moon, barriers, animals, any of those kind of
4 things could have been out there What may have caused
5 someone to have this accident and come to some conclusion

6 Q What tools do you use in accident
7 reconstruction, specifically, with respect to computer
8 programs?

9 A Typically, computer programs, you're using some
10 type of measuring devices to come up with points at the
11 scene where you're going to measure width of roadway, the
12 ditches, edge of the roadway, fog lights, center of the
13 roadway, any grades, it could be rolling tapes, it can be
14 lasers, it can be mapping devices And in this case, I
15 used a surveyor's mapping through an outside contractor
16 Kemp Aarons, who is a professional, and his clientele is
17 through the State of South Carolina, the County of
18 Charleston, City of Charleston You go to the scene --

19 Q Hold on a second, Roy. What kind of training do
20 you have in using these programs and these other tools in
21 accident reconstruction, just briefly? How many hours of
22 training do you have?

23 A Hours of training in accident reconstruction is
24 probably in excess of 3,000

25 Q Okay And you've been qualified in various

R CANTRELL - DIRECT EX BY MR BUTLER

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1 courts in this state as an expert in the area of accident
2 reconstruction?

3 A Yes, sir, many times within the County of
4 Charleston court

5 Q How many times?

6 A County of Charleston, probably in excess of 100

7 Q Okay I want to show you Defendant's Exhibit 1
8 You generated this diagram, did you not?

9 A Yes, sir, that's generated from that same scene
10 and then blown up

11 MR. DURANT Your Honor, with regard to his
12 qualifications, would I be allowed to inquire --

13 Are you through?

14 MR BUTLER You can

15 THE COURT. You can voir dire if you want.

16 BY MR DURANT.

17 Q Have you ever been qualified as an expert in a
18 shooting reconstruction?

19 A Not that I recall

20 MR DURANT: Thank you

21 BY MR BUTLER

22 Q Do you have any special training in firearms?

23 A Yes, sir. I'm a trained instructor authorized
24 and certified by SLED to do firearms training, both at
25 ranges and I'm also an instructor of the National Rifle

1 Association of Handguns and all guns

2 Q Are the law of physics any different for
3 projectiles than vehicles?

4 A No.

5 Q Are the laws of geometry any different with
6 respect to the measurements of angles from projectiles or
7 any different than vehicles or anything else doing
8 accident reconstruction?

9 A No

10 Q Okay Referring to what is on the screen now,
11 what is this diagram of?

12 A This is a diagram of the scene at Club Diamante
13 with the club being outlined here in this green area. And
14 those red points that you see there -- and I will turn
15 them on and off to make them easier to see Those points
16 that you see is where we actually put the measurements
17 with a laser to determine the actual locations and what
18 would be X and Y Z coordinates So you have 90, 180 as
19 well as height off of the baseboard

20 Q Let me interrupt you because the record will
21 show what's up there, but that is a more detailed version
22 of Defendant's 1, right?

23 A Yes, it is

24 Q What did you use to generate this diagram? How
25 did you do this?

R CANTRELL - DIRECT EX BY MR BUTLER

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1 A I generated this diagram with a program called
2 Visual Statement Vista FX

3 Q You went to the scene?

4 A I went to the scene We made the drawings
5 Then I came back with the points that you see outlined in
6 red, such as here or here, this is the actual drain This
7 is the area around the drain so we were where the drain is
8 located at on the property

9 Q You went to the property How did you determine
10 where to put these vehicles?

11 A I used a video that had been provided to me.

12 Q Deputy Frichtl's video?

13 A Yes And to that, this represents the vehicle
14 that Kevin Dunmeyer said he was standing beside at the
15 time he would have been a witness This is another Jeep
16 Cherokee that was identified This is another vehicle
17 that was identified where it was placed

18 Q And you can take those off or put them back on
19 at any time that you need to, right?

20 A Actually, all you do is click on them and hit
21 erase, delete

22 Q The area that is marked ditch where I'm pointing
23 at with the pointer here? --

24 A Yes

25 Q This is the area where -- this purple car would

1 be the victim's car, right?

2 A Yes

3 Q And this would be the area where the victim is
4 found based upon testimony and the defendant in State's --
5 using State's 6, is that right?

6 A Yes

7 Q Okay. Now, what can you tell me about -- using
8 the results from the survey that were done, you can
9 basically tell us what the elevation is at different
10 points on this diagram, right?

11 A Correct

12 Q What can you tell us about the difference in
13 elevation from this area here -- which would be the
14 highest point in this area, isn't that right?

15 A The height?

16 Q In other words, there's a ditch here that gets
17 lower?

18 A Yes, sir

19 Q In between the victim's car and this car on the
20 other side of the ditch where the victim is is the highest
21 point?

22 A Yes.

23 Q What can you tell us about the difference in
24 elevation from that area there, which would be where the
25 victim is on State's 6, and the elevation on State's 6 at

R CANTRELL - DIRECT EX BY MR BUTLER

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1 point D and E where the 9-millimeter shell casings are and
2 where would that be on your diagram, if you can pan out?

3 A Here versus here?

4 Q Yes

5 A There is approximately a 4-foot difference
6 between this height in the roadway and this height. And
7 we're saying -- let me back up here If we're saying in
8 terms of what he's familiar with, we'll call the flat road
9 grade, the grade.

10 MR DURANT We're talking about -- excuse me, I
11 don't want to interrupt

12 MR BUTLER: Go ahead Ask him

13 BY MR DURANT

14 Q Are you using as your base on this elevation the
15 high point of the road?

16 A Correct, we use the high point of the road at
17 this point, high point of the road, base grade, zero We
18 come to this point and then we come to a point over here
19 which is going to be lower than the grade

20 Now, the difference between the two, if I went
21 to -- there's approximately -- from that point here, 106,
22 to the point where the truck would have been sitting at
23 the same grade, there's only an approximation of less than
24 a foot difference in height from roadway to the base where
25 someone would be standing versus the wheels of the

1 vehicle

2 BY MR BUTLER

3 Q Roy, what is the difference in elevation -- I'm
4 trying to make this as simple as possible What is the
5 difference in elevation from this point here to the point
6 where the rounds were found according to State's 6?

7 (Witness and Mr Butler confer off the record)

8 Roy, come here for a second.

9 (Witness confers off the record with
10 Mr Butler)

11 BY MR BUTLER.

12 Q What is the difference -- oh, wait I'm sorry
13 What is the difference in elevation between those two
14 points, the point where the victim was found and where the
15 rounds were found?

16 A His head versus theirs is only going to be
17 approximately less than one foot distance

18 Q Less than one foot or 11 inches?

19 A Closer to 12 inches

20 Q So roughly a foot difference?

21 A A foot difference.

22 Q Okay And you base that on what?

23 A The height of the measurement done here and the
24 height of the measurement done here and going backward
25 So we're going down based on the diagram of the slope

R CANTRELL - DIRECT EX BY MR. BUTLER

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1 angle

2 Q And taking into consideration his height as
3 testified to by the pathologist?

4 A His height 70 5 inches without shoes

5 MR DURANT Excuse me, just a question

6 MR BUTLER Go ahead

7 BY MR DURANT

8 Q That slope diagram that you gave us, where is
9 that slope diagram taken? Did you do the slope all along
10 the roadway?

11 (The witness provides Mr Durant with a copy of
12 the diagram)

13 A Being this point as the far right lane

14 Q Okay

15 A That is the center point

16 Q Okay

17 A Here is the opposite side of the left lane.

18 Q Okay

19 A Here is the edge of the car, here is the victim,
20 height Then we come down to this point, then we come
21 down to this point --

22 Q I understand that, but how about down here in
23 this area? Did you measure the slope there?

24 A Did I do another one for this particular area?

25 Q Yeah

1 A No, I did not because I have what would be
2 considered the measurement points to here if I wanted to
3 come and do a comparison --

4 Q We're talking about elevation differences, sir

5 A Yes, we are

6 Q So how can you relate the elevation difference
7 here to this area up here?

8 A If I go to 150, which was adjacent to the --
9 which is adjacent here This would be this point here,
10 150

11 Q Where is 150?

12 A Right here If I go to 150 there, which the
13 elevation is this 99 976, and I get over here to 103 --

14 Q What is the significance of 103?

15 A 103 or 104, they're just a point

16 Q What if I wanted to chose a point right there?

17 A I did not make a point there

18 Q There's testimony that's where the rounds were
19 found, the truck was?

20 MR BUTLER You can use the numbers that you
21 have to figure out the elevation at any point on there

22 THE WITNESS I can go to this point to the
23 direction of this point to see what the difference is in
24 height

25 BY MR DURANT

R CANTRELL - DIRECT EX BY MR BUTLER

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1 Q Assuming that there's a straight grade
2 difference, correct, and that it doesn't go like that
3 (indicating)

4 A Correct

5 Q In other words, this is a bunch of guesswork

6 A Well, the difference is approximately 6 inches

7 Q Approximately 6 inches if we're talking about
8 here

9 A Yes

10 Q What if I'm talking about right there?

11 A We would have to go 149 to 102.

12 Q Right And where did this vehicle come from? I
13 didn't see it on my video?

14 A When you go to the -- when Officer Frichtl
15 returned back to the scene from his front view of his
16 camera and his vehicle, that vehicle is there

17 Q May I switch views please, sir?

18 Scott, could you switch to my computer?

19 THE CLERK. Sure.

20 BY MR DURANT

21 Q Okay Right there, we've got a car coming out,
22 hits the lights on, appears to be leaving?

23 A Correct

24 Q This is almost a minute after the shooting, no
25 guarantee that car appears to be leaving and is waiting

1 for Deputy Frichtl to get by, is that correct?

2 A Yes

3 MR. DURANT Okay Can you dim the lights,

4 Scott

5 BY MR DURANT

6 Q You can hardly see it, there's a little bit of
7 blurb right over there, is that what you're talking about?

8 A No, return after being in the Harry Street area,
9 he makes his return back

10 Q Sir, I don't care who's there That's five
11 minutes later But we have a right here -- okay Let
12 me --

13 A The vehicle can be removed if he so desires
14 It's just a matter --

15 Q I'm not disputing there's a vehicle in that
16 general area, sir, but you have it butted up against this
17 GEO Tracker

18 MR BUTLER Judge, at this point, we're not
19 talking the relation to the vehicle, I'm asking about
20 elevation If at some point that vehicle becomes
21 relevant --

22 MR DURANT Okay Take that car out then, I
23 would feel a lot better

24 MR BUTLER Happy to take it out.

25 MR DURANT Okay

R CANTRELL - DIRECT EX BY MR BUTLER

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1 You can switch back, Scott

2 BY MR BUTLER

3 Q Roy, with the measurements you have, we can pick
4 a point on here and you can determine the elevation and
5 that's assuming a straight line You went out to the
6 scene, you had a survey, if there were a big mound
7 somewhere, you'd document that, right?

8 A We would document that

9 Q Okay The number that you gave earlier was
10 based on State's 6, right, points D and E?

11 A Correct

12 Q Translating that to your diagram and you found
13 the elevation difference between this point and where the
14 victim is?

15 A Correct

16 Q Roughly a foot?

17 A Correct

18 MR DURANT: And that's from 103, correct?

19 MR BUTLER No, that's using 103 --

20 Explain to him how you did that

21 THE WITNESS If you're using 104 is the
22 closest to where the casings were and then using up here,
23 placing this body here and lying the body down at an
24 angle

25 BY MR BUTLER

1 Q Here's what he's asking you, Roy If we're
2 talking about points D and E on State's 6, where the
3 casings were --

4 A Yes

5 Q Where would that be on your diagram, in here?

6 A In that general area between that number nine
7 and 104

8 Q And you don't have a red mark there?

9 A No, I do not

10 Q So how did you come up with the elevation for
11 this point here, points D and E, on State's 6 if you don't
12 have a red mark?

13 A Using a combination of what is at 150, 559 and
14 104

15 Q And those numbers are points that are on the
16 diagram where you have precise measurements?

17 A Yes, this is being a level -- this appears to be
18 level coming across the parking lot This would be the
19 outer point of the drain This being a fog line. This
20 being the edge of the roadway and this being a point where
21 the ditch first begins to be at an edge where people would
22 not want to get out of the car and make a step to the
23 right

24 MR DURANT And your testimony is if you moved
25 it back halfway in between that drain and your .103, it

R CANTRELL - DIRECT EX BY MR BUTLER

657

1 would be a difference of less than six inches, is that
2 correct?

3 THE WITNESS Yes

4 BY MR BUTLER

5 Q The point we have chosen to talk about where the
6 victim is, you understand you could have put it even
7 lower, right? If he were here, he would have been lower,
8 right?

9 A Yes.

10 Q Here, lower?

11 A Yes

12 Q Giving the State the benefit of the doubt, we
13 put him at the highest point, right?

14 A A place for him to stand adjacent to the
15 vehicle.

16 MR DURANT Well --

17 MR BUTLER That's all I seek to get from him
18 with respect to this

19 BY MR. DURANT.

20 Q The highest point you had measured, is that
21 correct, because you've got it against -- once again, had
22 the victim -- because we had testimony, I believe, from
23 Mr. Holmes that the victim was standing here at the front
24 corner of his car facing Toogoodoo Road So to get an
25 estimated elevation there, what would you do, go to this

1 point, to this point and did an average or something?

2 A You would have to go from 54 to 106 and put him
3 on the elevation based on the lengths of the car based on
4 the slope, down grade that you've got.

5 Q Could you give me an elevation difference if he
6 were in this area at the time of the shooting?

7 A It would take awhile

8 MR DURANT See, that's my whole point, Judge

9 THE WITNESS The victim was placed where the
10 drawing indicates --

11 MR DURANT That's where he ended up, but the
12 testimony was he was not in the ditch, he was in the right
13 front corner of his car He was shot and fell into the
14 ditch, went face down, turned himself over and died.

15 BY MR BUTLER

16 Q Roy, if there would have been a noticeable --
17 when you're out there surveying the land with the
18 surveyor, if there had been a noticeable significant raise
19 in the ground there, you'd mark it, right?

20 A Yes

21 MR BUTLER Do have you any more questions
22 about this, Bruce?

23 MR DURANT Well, just let me put on my --
24 right now, just this far, I definitely object on his
25 qualifications as a shooting reconstructionist I

1 definitely object on the accuracy of this diagram I
2 can -- you know, if he wants to testify what the elevation
3 of that ditch was and the elevation that drain was and all
4 that, but everything else there depends precisely on where
5 people say they were And just like any computer program,
6 it can be manipulated to put people anywhere they want to
7 And to make -- it's like statistics, Your Honor, they can
8 show them anything you want them to if you manipulate
9 them And that's basically what's going on here

10 MR BUTLER: I'm just using this graphic to
11 allow him to testify to the elevation He doesn't have to
12 be a firearms expert to talk about the distance in
13 elevation We haven't gotten to the computer animation
14 part I'm just using the graphics --

15 THE COURT So far he's just doing data points
16 Data points are data points So as far as data points go,
17 I don't find anything objectionable Move on

18 BY MR BUTLER:

19 Q Next, I want to talk about the angle -- the
20 angle at which -- let me ask you this You --

21 MR BUTLER Can I have this marked, please?

22 THE COURT Statement 15A

23 BY MR BUTLER

24 Q You took that photograph?

25 A Yes, I did

1 Q What does that depict?

2 A That depicts a white Dodge 2003 Ram 1500 quad
3 cab, four door

4 Q Why did you use that vehicle?

5 A I attempted through all of the local new and
6 used car agencies that I could find as well as the local
7 web to try to find the same type vehicle that was driven
8 I was unaware that the exact vehicle was still in anyone's
9 hands.

10 Q This is the same make and model?

11 A So I found something that was roughly a close
12 make and model to assist --

13 Q Right. Right. Is this the same make and model?

14 A Same make and model

15 Q What were your conclusions as to the
16 measurements of -- the placement of the window in that
17 truck from the passenger side?

18 A It's approximately 51 inches high

19 Q That's the bottom of the window?

20 A From the bottom of the window up from the
21 ground

22 Q 51 inches, okay And in making your
23 measurements, did you take into consideration a person's
24 arm?

25 A Yes, I went basically to like a center bone

1 being approximately two inches above where that would be
2 using my arm or someone about my size

3 Q Giving you 53 inches?

4 A Giving me approximately 53 inches

5 Q Were you able to come to any conclusions
6 about --

7 If you will blow that up for me, please?

8 If you placed the vehicle in the area of D and E
9 on State's 6?

10 A Yes

11 Q The angle that a bullet would enter the victim
12 at the point where he is on State's 6 Were you able to
13 generate a graphic that would illustrate that?

14 A The vehicle is approximately 10 inches higher at
15 that distance to where it would enter the victim where he
16 was placed on my diagram, so it would be at a downward
17 angle

18 Q Did you generate a graphic that shows the angle?

19 A Yes

20 Q Okay What does that depict?

21 A This depicts at this point this is the height
22 coming from the ground up to 53 inches This would be
23 coming, taking into consideration the height of the
24 victim, from the ground up to the entry point of where the
25 bullet entered And this would then be an angle, if I can

1 click on that angle, it says 179-degree

2 Q Okay And what information did you use to
3 generate that graphic?

4 A Used the height of the vehicle window as if you
5 were pointing the gun as demonstrated during the testimony
6 like this (indicating) We took the information coming
7 from the ME to obtain the height there. We took the grade
8 into consideration, being lower from the grade, placed the
9 vehicle, then moved over to a number to give him space to
10 stand and took it from where he was standing compared to
11 the falling position, came up to the body point where we
12 have an entry point on both shoulders and entering the
13 body on the shoulder

14 MR DURANT Can he manipulate those based upon
15 assumptions?

16 MR BUTLER Ask him

17 MR. DURANT Okay

18 BY MR DURANT

19 Q For example, could you move that point back?

20 A Which point?

21 Q That side back that way, make it 50 feet? The
22 other side I'm talking about Okay Now, the other side
23 I believe -- does this represent -- now, does this
24 represent also the difference in grade that that extra
25 10 feet would entail? Because you said before if it was

1 at this point, it would be about 12 inches If it was at
2 this point, it would be about 6 inches. Does this take
3 into consideration that?

4 A No, this is based on approximately 40 feet
5 coming forward It was anticipated the victim was lying
6 on your diagram to the point where the shell casings were

7 Q So that wouldn't take into consideration,
8 apparently, based upon your calculations 10 feet further
9 back that way would be a smaller difference in elevation
10 as opposed to 10 feet?

11 A This particular point right here could
12 potentially be changed, which is the height of the vehicle
13 based on -- exactly moving it to the left

14 Q What you just testified to would be six inches
15 lower?

16 A Could be at much as six inches lower.

17 Q So it would be six inches lower, right So put
18 that line back at the end there and make it six inches
19 lower

20 A (Witness complies)

21 Q That's starting to look pretty straight up
22 there, isn't it? I want it all of the way up to the top
23 of that line And while we're on that side, let's
24 manipulate that one, too, because you have a victim that's
25 70 5 inches high?

1 A I put him at 71

2 Q Seventy-one And now, the graze wound on him
3 was, what, 20 inches from the top of the head?

4 A 20 2

5 Q 20 2 from the top of the head So can you
6 subtract 21 2 from 71 and put a line that way?

7 A (Witness complies)

8 Q And that's assuming that he's right there at the
9 point that you measured on your other diagram, is that
10 correct?

11 A Yeah.

12 Q And if he's back this way a little bit, he could
13 be, heck, maybe four or five inches higher, right?

14 A That's a 180

15 MR BUTLER Judge, I'm happy for Mr Durant to
16 ask all of these questions, but I think it would go to the
17 weight

18 THE COURT· I was going to say on cross, you can
19 have him change all of the numbers that you want. That's
20 something that goes to the weight of the evidence and is
21 certainly a matter on cross But just putting the figures
22 up there -- it's their numbers, your numbers are
23 different.

24 MR BUTLER Judge, the next area would be the
25 actual animation

1 BY MR BUTLER

2 Q Let's talk about it first Is that the one
3 where I can point to the camera?

4 A You can point to the camera

5 Q Using Defendant's 1 as a reference and pointing
6 to this red dot marked with the initials -- actually, I
7 don't know whose those are That's KD? KD, can you put a
8 camera there. And by camera, we mean something to show
9 the view point of the person standing there, right?

10 A Yeah What do you want them to view, what
11 direction?

12 Q Viewing from there to this area here where the
13 ditch is Now, again, what you're getting ready to show
14 is based on all of the same imperial information that you
15 gathered to create this initial graphic that we're looking
16 at in State's -- I mean, Defendant's 1, right?

17 A Correct

18 Q Show what the perspective would be from that
19 angle in the daylight?

20 THE COURT Is the computer locked up or does it
21 always take this long?

22 THE WITNESS. It has to load all of the points
23 that we do, all of the elevations, all of the dimensions
24 on each vehicle, everything we put in there, the height of
25 the business.

1 BY MR BUTLER

2 Q But it only has to do that once, right?

3 A Basically, once I put it up, yes

4 Q Okay What would that depict?

5 A We have placed a camera at a certain point
6 that's already in the prior view I've only got camera
7 four up

8 Q So on Defendant's Exhibit 1, this point here
9 marked KD?

10 A We're preparing to show that point We're over
11 here in front of this, being the -- in that diagram we had
12 placed here, we have what is considered up here a CPS pump
13 station That camera is placed there Here, would have
14 been the vehicle that -- that same vehicle right here.

15 Q Whose vehicle is that?

16 A That would have been Mr Dunmeyer's

17 Q Okay And if you took the truck pulling out of
18 the parking lot and going down Toogoodoo Road, is that
19 what we're looking at there?

20 A That's what you're looking at there

21 At any point, we can stop that and pause it.

22 MR DURANT May I just interject at this point,
23 but who says that's where the truck pulled out on
24 Toogoodoo Road? I mean, he's got that truck pulling out
25 right around the back end of that GEO and that's not what

1 the testimony is in this case

2 MR BUTLER: What is the testimony?

3 MR. DURANT The testimony is that this truck
4 pulled out of the parking lot, this is all over there on
5 the grass area in the paved area way back here, almost
6 adjacent to the corner of the building If you go back to
7 his diagram, we're talking about pulling out up here as
8 opposed to pulling out right there

9 MR BUTLER That's not what Catrell Douglas
10 testifies to

11 MR DURANT Everyone was referring to this
12 thing, everyone said that the truck pulled out and
13 relative -- and we've got pictures of where the truck
14 pulled out and, believe me, it ain't right behind that
15 Tracker We've got where the shell casings are on
16 pictures

17 BY MR BUTLER

18 Q Roy, is where the truck pulling out on that
19 diagram right behind the Tracker?

20 A No, it's not It's not adjacent to the Tracker

21 Q How far back from the Tracker is it?

22 A We're probably 12, 15 feet away from the
23 Tracker

24 BY MR DURANT

25 Q Can you manipulate this to where that white car

1 is? What if that truck was coming out where that white
2 car was pulling out at the -- because that white car,
3 number one, doesn't even need to be there because there's
4 no proof that it was there at the time of the shooting to
5 begin with And what if the truck is pulling out there?
6 That's the driveway That's where the car was pulling out
7 when the police officer went by

8 BY MR BUTLER.

9 Q You can't adjust for that?

10 A No

11 Q Based on the information you have, that would be
12 from the perspective -- you can make the truck not come
13 out at all, though, right?

14 A Correct

15 Q Okay You can show that without having the
16 truck come out at all, right?

17 A Yes

18 Q If you place a camera looking at Defendant's 1,
19 at this point where it says JD, show me the perspective
20 there?

21 A (Witness complies)

22 Q This is a perspective from the front of the Club
23 Diamante And you can use the same, run the truck or not
24 run the truck?

25 A Yes

1 Q Okay This is all daylight?

2 A This is all daylight

3 Q You have one other camera set up?

4 A Yes, I do

5 Q And that's from on Defendant's 1, the red dot

6 marked JM Show that perspective

7 MR. DURANT. Who is JM?

8 BY MR BUTLER

9 Q All right That would be the Tracker there on
10 the right?

11 A Yes

12 Q Club Diamante and the green building on the
13 left?

14 A Yes

15 Q And the truck going through?

16 A Yes

17 Q All of this is daytime, right?

18 A Yes

19 Q Did you make some attempt to determine what the
20 lighting conditions would be like out there and how did
21 you do that on the night of the incident?

22 A Well, at the scene, during my examination, the
23 property owner was there I interviewed him relevant to
24 what lights were on and available at the time. He
25 indicated that the -- this light was there and would have

1 been on. He thought that there was potentially one,
2 perhaps, two lights on this side of the building And on
3 the adjacent side of the building where the security
4 guard's vehicle was parked, he has a 100-watt bulb

5 Q You also looked at video, did you not?

6 A I looked at the video of Officer Frichtl and
7 also determined that that light was on -- those -- there
8 appeared to be two lights on there, the opposing one light
9 on the opposite side of the building and this street light
10 was up

11 Q Did you make a determination as to what the sky
12 was like that night with respect to the stars and the
13 moon?

14 A Yes, I did I used the internet and went to see
15 what both NALA (phonetical) and the naval observatory said
16 were the weather conditions and the amount of stars that
17 night?

18 Q And they were what?

19 A It was a very dark night We had a .79 moon,
20 which is like total darkness

21 BY MR DURANT:

22 Q And, of course, you took into consideration all
23 of those hundreds of people that were leaving that club
24 with their headlights on, too, right?

25 A In looking at the overhead

1 Q I'm saying you took into consideration this was
2 a club emptying out and lots of people leaving with their
3 headlights and things of that nature? You figured that
4 into your calculations, too, sir?

5 A I measured the lighting at the scene on two
6 occasions just using a light meter or what light sources
7 were on --

8 Q Sir, answer my question Did you take into
9 consideration headlights?

10 A I can do that with this program

11 Q You know, once again --

12 MR DURANT Your Honor, I really -- from what
13 I've seen so far, if he moves that car right there to
14 where there's no testimony it was there at the time of the
15 shooting and if he's showing the different perspectives, I
16 don't have any problem And I also object to where he has
17 the truck because I think there is varying testimony as to
18 where that is I think the testimony was that the truck
19 was over there closer to where he has the white car

20 MR BUTLER We're not going to offer this.

21 MR DURANT If he wants to change the different
22 perspectives, I have no problem with that. I do have a
23 real problem with him using a computer program to try to
24 show a jury what the lighting conditions were

25 MR BUTLER We're not going to offer it It's

1 done. We're not going to offer it

2 MR DURANT Okay

3 THE COURT Remove the white car And I'm not
4 sure what the purpose is of having the animation showing
5 the truck pulling out at any particular point, at any
6 rate I mean, is there something more to this animation?

7 MR. BUTLER We're not going to do the animation
8 at all It takes too long and I think it's too confusing
9 I'm just going to go up to everything until there.

10 THE COURT The thing we saw earlier with the
11 data where the angles were?

12 MR BUTLER Yes The main point was going to
13 be the nighttime I think that's what Mr Durant's
14 strongest and probably most major objection would be. We
15 can make it so that it's nighttime and that was really the
16 point of the whole animation.

17 THE COURT. So we're just going to have the
18 chart up there that showed the various date points?

19 MR BUTLER Yes And --

20 MR DURANT That, I don't have any problem
21 with And, once again, I don't care if he keeps the white
22 car on there as long as --

23 THE COURT He doesn't want to do the animation
24 at all is what I'm hearing

25 MR DURANT But the white car is on the chart

1 part of the evidence, too

2 MR BUTLER Take that off

3 MR DURANT Only if that's acknowledged that's
4 where that car was at the time Deputy Frichtl went by.
5 There's no testimony that car was there at the time of the
6 shooting. It looks to me that it was pulling out of the
7 parking lot

8 MR BUTLER The car is meaningless, but I will
9 take off what you want

10 MR DURANT That diagram I have no problem with
11 it with the exception is that supposed to be the truck
12 coming out, though?

13 THE WITNESS Yes

14 MR BUTLER Take the truck off.

15 MR DURANT. Okay.

16 THE COURT Okay All right Anything else
17 that we need to take up?

18 Mr. Runyon?

19 MR RUNYON I hate to be a fly in the window
20 here, but if this gentleman is testifying, I have a right
21 to ask him questions, too

22 THE COURT Certainly And I apologize We
23 just knew you weren't going to object

24 MR RUNYON I'm not objecting to it, but I just
25 don't want the obstacles of the State to limit my right to

1 cross-examine a testifying witness about angles and things
2 of that sort

3 THE COURT You will have every opportunity to

4 MR RUNYON. Thank you, Judge

5 THE COURT Before we bring them in, Scott
6 thinks he has a table which may allow him to put his
7 machine over here out of the view and also put him out of
8 the view of the jury and it will put him closer to the
9 court reporter

10 Before we bring the jury back in, I need to talk
11 to the defendants

12 MR BUTLER We have another witness, too, that
13 will be brief. I don't know if you want to do that.
14 Detectives Hawks that we're calling

15 THE COURT. That you're what?

16 MR BUTLER. That we are calling.

17 THE COURT: Anything that we need to take up
18 about him before?

19 MR BUTLER No, sir

20 THE COURT I just want to talk to them about
21 whether or not they're going to testify

22 MR DURANT. You don't --

23 THE COURT We are going to take a break after
24 that

25 Mr Washington and Mr Ward, I would like you to

1 stand and raise your right hand

2 JOHN HENRY WARD AND TREMAYNE R WASHINGTON

3 After having been duly sworn, testified as follows:

4 THE COURT All right I want you gentlemen to
5 understand that we have reached a point in the trial now
6 which you begin to put up your defense And under the
7 laws of the United States of South Carolina, you have the
8 right to testify or not testify The Fifth Amendment of
9 the United States Constitution says that you cannot be
10 compelled to testify and give evidence against yourself in
11 a court of law You have that right to not testify I
12 want you to understand that if you desire to not testify,
13 I will instruct the jury that they are not to hold that
14 against you in any form during their deliberations. They
15 are not to discuss your failure to testify in any manner
16 and not to hold it against you in determining whether or
17 not you are guilty or innocent of these charges Do you
18 understand that?

19 DEFENDANT WARD Yes, sir

20 THE COURT. Mr Washington?

21 DEFENDANT WASHINGTON Yes, sir

22 THE COURT Mr Ward, do you understand that?

23 DEFENDANT WARD Yes, sir

24 THE COURT I want you each to understand if you
25 desire to testify, you may also testify. And that if you

1 testify, you will be treated just the same as any other
2 witness and subject to our rules of evidence, which may
3 require that when you take the stand, it will allow the
4 State to present evidence of any prior convictions that
5 you might have If you have prior convictions which
6 involve dishonesty, then those may be able to be brought
7 or a false statement If you're convicted of a crime in
8 which the punishment was for more than one year in jail,
9 you may be subject to cross-examination about that if I
10 determine that the probative value outweighs the
11 prejudicial effect to you

12 Do you understand that right, Mr. Washington?

13 DEFENDANT WASHINGTON Yes, sir

14 THE COURT Do you understand that right,

15 Mr Ward?

16 DEFENDANT WARD Yes, sir.

17 THE COURT You each have the opportunity to
18 discuss this matter with your lawyer?

19 DEFENDANT WASHINGTON Yes, sir

20 THE COURT Mr Ward, how about you?

21 DEFENDANT WARD Not yet

22 THE COURT Would you like a few minutes to
23 discuss that with your lawyer?

24 DEFENDANT WARD Yes, sir

25 THE COURT You may also discuss it with any

1 friends you might have or any family members that you
2 might have I want you to take a couple of minutes and
3 discuss it with your lawyer, make sure if you decide to
4 testify it is a freely, voluntarily and intelligently made
5 decision We're going to take a break right now When we
6 come back in just a few minutes, I will ask you if you've
7 made the decision and if you understand those rights.

8 Okay. You may be seated

9 We will take a ten-minute break

10 (WHEREUPON, a short break was taken)

11 THE COURT Mr Washington, did you have an
12 opportunity to discuss this matter with your lawyer?

13 DEFENDANT WASHINGTON Yes, sir

14 THE COURT Have you decided that you want to
15 testify or not testify?

16 DEFENDANT WASHINGTON. Not testify

17 THE COURT You do not wish to testify?

18 DEFENDANT WASHINGTON No, sir

19 THE COURT Mr Ward, have you had the
20 opportunity to discuss this matter with your lawyers now?

21 DEFENDANT WARD Yes, sir

22 THE COURT Do you desire to testify or not
23 testify?

24 DEFENDANT WARD Not testify

25 MR BUTLER Judge, could I ask you to explain

1 one thing to him? I think part of the reason we're having
2 a little bit of difficulty explaining some things to him,
3 it's not his fault, he's not familiar with the system.
4 We're trying to explain there are different circumstances
5 that allow the State to put in Mr Washington's testimony
6 that would not extend to Mr Ward, meaning that I got to
7 cross-examine Mr Washington

8 THE COURT Uh-huh

9 MR BUTLER But that Mr Runyon where we
10 replayed his testimony from the last trial, would be in
11 violation of his confrontation right. I think that's what
12 has got us a little hung up

13 THE COURT: All right, sir

14 Let me see if I can explain this to you if it's
15 causing you some confusion

16 The law normally says a person cannot testify --
17 does not require a person to testify against themselves
18 At your first trial back in December, you were on trial by
19 yourself. Mr. Washington was not on trial He was
20 therefore called by the State He did not assert his
21 Fifth Amendment rights at that time and he testified.
22 There was a mistrial and they have now elected to try both
23 of you at the same time However, the law says that under
24 certain circumstances, if somebody makes an out-of-court
25 statement or makes an in-court statement, for that matter,

1 and they make a prior statement, it can be used against
2 them

3 In that case, while the State in this trial
4 cannot force you or Mr Washington to testify against
5 yourself in this trial, his prior statements came back to
6 haunt him, so to speak, that is the testimony that he gave
7 at his trial because he asserted his right to not testify
8 in this trial. Under our rules of evidence, that makes
9 him an unavailable witness

10 Normally, if somebody wants to tell the Court or
11 the jury something, we bring them in, put them on the
12 witness stand, swear them in and let them tell That's
13 why we have rules against hearsay. And hearsay is where
14 somebody comes in and says somebody told me something
15 All right. We want to have that somebody come in here
16 We want the best possible source of information to be the
17 person telling the jury All right So we have rules
18 against what we call hearsay

19 So the State could not force Mr. Washington to
20 come in and testify against himself in this trial
21 However, they could use his prior statements that he made
22 because he is in the eyes of the Court unavailable to
23 testify So his own words came back against him in this
24 trial However, you didn't testify in a prior trial --

25 MR. BUTLER Yes, he did

1 THE COURT Oh, you did

2 MR BUTLER He doesn't understand how come the
3 State can offer Mr Washington's testimony through his
4 prior testimony, but that we can't with him And I was
5 explaining to him that the reason is is because I got to
6 cross-examine Mr Washington But Mr Runyon didn't get
7 to cross-examine Mr Ward because Mr Runyon was not
8 involved in the trial at that point That's the
9 difference Okay I did not understand that you didn't
10 testify at your prior trial because judge Dennis tried
11 that one In this narrow exception to the rule in which
12 we say somebody's prior testimony can come back and be
13 used against them, it has to be in the instance where the
14 lawyer that it's being used against has the right -- had
15 the right to fully cross-examine that witness

16 Now, Mr Butler had the right to fully
17 cross-examine Mr Washington in that prior trial, so they
18 can use Mr Washington's words against him All right
19 But in your previous trial, because Mr Washington was not
20 testifying in that trial, Mr Runyon didn't have the
21 opportunity to cross-examine you So, therefore, that
22 tape was not allowed to come in and be used because
23 Mr Washington didn't have the chance to testify against
24 you So that's --

25 MR BUTLER Didn't have the chance to

1 cross-examine

2 THE COURT Cross-examine you at the prior
3 trial Does that make more sense to you? It's a
4 complicated concept even to lawyers, I will grant you
5 that, but that is the best explanation I can give you as
6 to why his words were able to be played at this trial --
7 his previous testimony was able to be played at this trial
8 and yours were not All right?

9 DEFENDANT WARD Yes, sir

10 THE COURT Does that change in any way your
11 desire to testify or not testify at this trial?

12 DEFENDANT WARD No

13 THE COURT You still do not wish to testify?

14 DEFENDANT WARD Yes, sir

15 THE COURT Okay All right Thank you
16 Mr Runyon?

17 MR RUNYON Judge, after that colloque, I'm
18 trying to obviate what could be a situation that could
19 occur I take the position that we're entitled to the
20 instruction to the jury that if a defendant doesn't get up
21 and testify before them that we're entitled to the
22 instruction they should not hold that against them, which
23 is the instruction --

24 THE COURT Which is the charge that we have
25 prepared

1 MR RUNYON I do not want -- and it may be
2 somewhat a motion in limine as it relates to the State
3 objecting to our being able to argue both sides of that
4 coin We're entitled to the no prejudice by him not
5 testifying, but by the way, you heard testimony from a
6 prior hearing and Mr Washington has told you his story
7 Okay And what I'm trying to avoid is --

8 MR DURANT. I certainly wouldn't have any
9 objection to that, I don't think, Your Honor

10 MR RUNYON. Well, I'm just trying to avoid
11 Mr. Durant being on me like the Century Buick truck
12 monkey, if I can say that

13 THE COURT We'll get to that I want to get
14 the testimony back on The jury has been waiting
15 patiently for an hour

16 All right Are we ready to go then?

17 MR BUTLER Yes, sir And would you prefer
18 that we do Mr Cantrell first or the brief witness,
19 Detective Hawks?

20 THE COURT It's your case, I will let you try
21 it like you want

22 MR BUTLER I'll call Detective Hawks first

23 MR DURANT Do you want me to just rest on the
24 record in front of the jury before he calls his case or
25 does it matter?

1 THE COURT It doesn't matter You've done it
2 on the record, if you would prefer to do it in front of
3 the jury

4 MR. DURANT I would briefly tell the jury -- or
5 you can tell them I don't care.

6 THE COURT Okay Bring the jury in.

7 (WHEREUPON, the following proceedings were held
8 in the presence of the jury)

9 THE COURT All right Welcome back, ladies and
10 gentlemen of the jury I want to apologize for keeping
11 you waiting this morning But, again, it's one of those
12 things where I say trust me, it helps you in the long run
13 that we were able to hash out some of the differences to
14 keep from having to take you back and forth and enables us
15 to streamline that So I thank you for your patience and,
16 hopefully, you were not uncomfortable waiting

17 At this point, the State has rested their case,
18 that means they have presented all of the evidence they
19 are going to present in the direct portion of their trial
20 The defense would call their first witness

21 MR. BUTLER Your Honor, at this time, the
22 defense would call Detective Hawks.

23 BRIAN J HAWKS,
24 being first duly sworn, testified as follows

25 THE CLERK. If you would, please state your full

1 name to the Court and spell your last

2 THE WITNESS Brian J Hawks, H-A-W-K-S.

3 DIRECT EXAMINATION

4 BY MR BUTLER

5 Q Good afternoon, Detective Can you tell us
6 where you're employed, please, and in what capacity?

7 A I work for the Charleston County Sheriff's
8 Office I'm currently assigned to the school resource
9 officer program

10 Q In May of 2003, where were you employed?

11 A Charleston County Sheriff's Office as a
12 detective

13 Q Okay And do you remember being involved in the
14 investigation of a shooting off of Toogoodoo Road in May
15 of 2003 near Club Diamante?

16 A Yes, I do

17 Q Do you remember participating in the
18 interrogation of Tremayne Washington?

19 A Yes, I do

20 Q This gentleman seated here?

21 A Yes

22 Q And you've reviewed your report from that
23 interrogation for your testimony today?

24 A Yes, I have

25 Q You recall that initially when you spoke to

B. HAWKS - DIRECT EX BY MR BUTLER

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1 Mr. Washington, he didn't know anything about anything, is
2 that right?

3 A Correct

4 Q Just a general denial?

5 A Correct

6 Q And you guys pressed him a little bit and you
7 pressed him and he said, Well, I don't know, I was real
8 drunk?

9 A Correct

10 Q And every time you pressed him for an
11 inconsistency or more detail, he would I don't think I was
12 driving, but, you know, I was real intoxicated Do you
13 remember that?

14 A Correct

15 Q At some point, you or one of the officers
16 pointed out -- you asked him if he took a shower and he
17 said no?

18 A Correct

19 Q And you pointed out, well, you don't smell like
20 alcohol, right?

21 A That's correct

22 Q You're trained in law enforcement, you know when
23 somebody has been on a drinking binge, they'll smell like
24 alcohol?

25 A Correct.

1 Q It's a distinct smell?
2 A Yes
3 Q One you're trained to recognize?
4 A Yes.
5 Q You didn't recognize it in talking to him?
6 A Correct
7 Q And if everything he was telling you was true
8 about his drinking so much that he didn't remember and not
9 having a shower, you would have expected him to smell of
10 alcohol, right?
11 A Correct
12 Q And at some point -- in the midst of all of his
13 denials, at some point, it was suggested to him that John
14 Ward was the shooter?
15 A Correct
16 Q Okay And then and only then did he implicate
17 John?
18 A That's correct
19 MR BUTLER Beg the Court's indulgence
20 That's all I have Thank you, Detective.
21 MR DURANT Just a couple, Your Honor

22 CROSS-EXAMINATION

23 BY MR DURANT

24 Q Detective, did you respond to the Club Diamante
25 on the morning of the shooting, May 11th?

B. HAWKS - CROSS-EX BY MR DURANT

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1 A Yes, I did

2 Q Did you have an opportunity to talk to a fellow
3 named Kevin Dunmeyer?

4 A Yes, I did

5 Q And did you have an opportunity to talk to
6 Mr Dunmeyer concerning these two individuals over here?

7 A Yes, I did

8 Q Specifically, with regard to what was happening
9 around Mr Dunmeyer's truck?

10 A Correct

11 Q And what did he tell you?

12 MR BUTLER Objection, hearsay

13 MR. DURANT I'm offering it under 613B, Your
14 Honor

15 MR BUTLER May we approach?

16 (WHEREUPON, a bench conference was held in the
17 presence of the jury but outside the hearing of
18 the jury.)

19 THE COURT All right You may proceed

20 BY MR DURANT.

21 Q Do you recall talking to Kevin Dunmeyer the
22 morning of the shooting?

23 A Yes, I do

24 Q Concerning the incident that went on outside at
25 his truck?

1 A Yes

2 Q What did he tell you regarding these two
3 defendants involved in that incident?

4 A He stated that after the initial fight in the
5 bar, he went outside and two individuals and his cousin
6 had been involved in the fight with followed him out, tore
7 his shirt out A large crowd gathered There were
8 several individuals in the crowd that were taunting him,
9 asking him what he was going to do We asked him if he
10 recognized any of the individuals in the crowd and he
11 stated that one of the individuals was John Heyward Ward
12 and the second individual that he recognized was Tremayne
13 Washington

14 Q Thank you Now, you're aware you -- I believe
15 you also interviewed Mr Buncumb in this case?

16 A Correct

17 Q And you took his weapon?

18 A Yes, I did

19 Q Do you recall a couple weapons being sent to
20 SLED for elimination purposes in this case?

21 A Yes

22 Q Was one of those Mr Buncumb's weapon?

23 A Yes

24 Q Do you know where the other weapon that was sent
25 up there came from, the Ruger?

B HAWKS - CROSS-EX BY MR DURANT

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1 A There was a second weapon that was seized in an
2 unrelated case approximately a month after the case The
3 statements that we took from Tremayne Washington stated
4 that he had a Ruger in the vehicle, so we sent the weapon
5 that we seized in the unrelated case to SLED to have it
6 eliminated and it was

7 Q No gun was ever -- murder weapon was ever
8 recovered in this case, correct?

9 A Correct

10 MR DURANT Thank you

11 THE COURT Mr Runyon?

12 CROSS-EXAMINATION

13 BY MR RUNYON

14 Q Detective Hawks, as a practical matter, you
15 never did look at all of the weapons that were out there
16 that night?

17 A Correct.

18 Q And there were numerous weapons based upon your
19 investigation?

20 A We knew of only the Ruger that was involved and
21 the High Point that I took from Johnny Buncumb

22 Q Well, there was the Ruger, there was a
23 25-caliber indicated by some accounts, wasn't there?

24 A There were casings that were found from other
25 weapons

1 Q There were 40-caliber casings found?

2 A Correct

3 Q So you originally deduced there was more than
4 one weapon that may have been involved in the fray, so to
5 speak?

6 A Correct

7 Q Okay But you never did identify how many
8 weapons were involved in the fray at any time, did you,
9 sir?

10 A Correct

11 MR RUNYON No other questions, Judge

12 THE COURT Mr Butler?

13 MR BUTLER No, sir

14 THE COURT You may step down

15 Call your next witness

16 MR BUTLER Judge, at this time, the defense
17 calls Roy Cantrell

18 ROY CANTRELL,

19 being first duly sworn, testified as follows

20 THE CLERK Please be seated. State your full
21 name to the Court and spell your last

22 THE WITNESS Roy Cantrell, C-A-N-T-R-E-L-L.

23 MR BUTLER. Beg the Court's indulgence for just
24 one moment

25 DIRECT EXAMINATION

R CANTRELL - DIRECT EX BY MR. BUTLER

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1 BY MR BUTLER

2 Q Mr Cantrell, where are you employed and in what
3 capacity?

4 A I operate Cantrell Investigations as the
5 owner/operator It's a licensed investigating company
6 licensed by SLED

7 Q How long have you worked in that capacity?

8 A Close to 30 years

9 Q Do you have any areas of specialization in your
10 business?

11 A Yes, sir, I do

12 Q Specifically, with respect to crime scene or
13 accident reconstruction?

14 A Yes, I have many hours of training through
15 numerous courses at collegiate levels, law enforcement,
16 insurance company training, seminars relevant to accident
17 reconstruction And having done so, I have been qualified
18 as an expert in the State of South Carolina courts as well
19 as federal courts as an expert

20 Q Before we get to that, what is accident
21 reconstruction?

22 A Accident reconstruction is going to any scene
23 and trying to determine based on prior reports done,
24 either by the witnesses or occupants as well as law
25 enforcement interviews, taking a look at that specific

1 scene and any diagrams that are made and trying to reenact
2 or recreate what potentially happened based on all of
3 those persons that are known to have participated or have
4 been interviewed to come to some conclusions or opinions

5 Q And about how many hours do you have per course
6 work in accident reconstruction?

7 A Course work? In excess of 2000, course work

8 Q How many times have you been qualified in the
9 courts of South Carolina as an expert in the field of
10 accident reconstruction?

11 A Just in South Carolina, probably -- well, in
12 excess of 100

13 MR. BUTLER Your Honor, at this time, we would
14 ask that Mr Cantrell be qualified as an expert in the
15 field of accident reconstruction

16 THE COURT Mr Durant, would you like to voir
17 dire?

18 MR DURANT I just have a couple questions

19 VOIR DIRE EXAMINATION

20 BY MR DURANT

21 Q How many times have you been qualified as an
22 expert at the scene of a crime scene in the field of crime
23 scene reconstruction?

24 A Since each --

25 Q I'm not talking about automobile accidents, I'm

R CANTRELL - DIRECT EX BY MR BUTLER

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1 talking at the scene of a crime?

2 A If you consider arson the scene of a crime.
3 That's my response, are you listing arson as a scene of
4 the crime? If that's the case, I've got hundreds of
5 qualifications

6 Q No, I'm talking about how many shooting cases
7 have you reconstructed?

8 A Zero

9 MR DURANT. I have nothing with regard to his
10 qualifications, Your Honor

11 THE COURT Mr. Runyon?

12 MR RUNYON I have no questions, Judge

13 THE COURT Is there any objection?

14 MR DURANT. Your Honor -- no, I will allow it

15 THE COURT Ladies and gentlemen, this witness
16 is now qualified as an expert in accident reconstruction
17 And the earlier instructions that I gave you about expert
18 witnesses for previous witnesses would also apply to this
19 witness You will decide how much weight to give this
20 witness' testimony based on all of the evidence that you
21 have heard and will hear throughout the trial

22 Mr Butler, you may proceed

23 BY MR BUTLER.

24 Q You started to say that you've been qualified in
25 arson cases as well?

1 A Yes, sir

2 Q That's crime scene investigation?

3 A Yes, sir, it is

4 Q And about how many times in that field?

5 A Just in South Carolina or altogether?

6 Q Altogether?

7 A Altogether, well over 400

8 Q And do you have any special experience with
9 firearms?

10 A I am considered by SLED -- I have a training
11 certificate that says I'm an authorized firearms
12 instructor for persons wishing to qualify with a weapon

13 Q And with respect to the field of crime scene
14 reconstruction, what are the tools of that trade?

15 A Basic tools are people going in with measuring
16 devices and trying to determine various points within that
17 specific scene, be it corners, elevations, locations where
18 something is dropped, found, marked, various tools. There
19 may be anything from standing A-frame house, numbers,
20 scales to be attached or affixed to something that is
21 found and/or injuries, showing the angle with depth.

22 Q What instruments do you use to make those
23 determinations?

24 A I use everything from a small ruler to calibers,
25 to yard sticks to map scene mapping done with -- things

1 that you would be familiar with, like surveyor's
2 equipment

3 Q What role does surveyor equipment, particularly,
4 the use of the laser play in your field?

5 A The use of lasers help us get to a more exacting
6 point We can take a level plain at some point -- as if
7 this were demonstrated -- this level were demonstrated as
8 being ground plain, some people refer to it as being a
9 flat plain From that, we can take points going from any
10 direction and something that's normally referred to being
11 at 90, 180 degrees or some point thereof, what's called
12 the X and Y axis You can also determine how far in the
13 air or how far below that specific grade something might
14 be to get an elevation So if someone wants to know and
15 demonstrate that you were 5 feet tall, from this grade, we
16 would be able to measure and say here's where you're
17 standing and then another point that shows exactly how
18 high you are, five feet tall, using a laser and place you
19 where we place that measurement

20 Q Mr Cantrell, what affect has the use of
21 computers had and computer programs had on your field?

22 A It's made life a lot easier because now, you
23 don't have to use as many rolling tapes and you're not out
24 there -- you can do something now with two or three people
25 that before took many, many hours of work. You can go out

1 and shoot the scene and something that would have taken 25
2 or 30 hours, you can now do in three to four And you
3 come back and enter data points and start connecting
4 lines It's saving time And in some cases, if there's
5 an accident on an interstate or some place like that, it
6 can also save lives because you're not put in jeopardy of
7 the officers out there doing the work

8 Q How do you personally make use of computer
9 programs in your work?

10 A I think those diagrams that we're having to
11 generate and place them and connect the points to those
12 And then we take the vehicles or any structures, whatever
13 we may have to have depending on the type of case we're
14 working, and we place those points on there and we can
15 then determine and draw horizontal lines and do the
16 measurement from one point to the another based on what
17 the computer program has to say as the height, distance
18 and so forth.

19 Q What scientific principles with respect to
20 physics and mathematics do those programs make use of?

21 A Well, there's tons of both physics and geometry
22 because these cases are already generated in 3D So we
23 have height, weight, dimensions, you know, tire width,
24 height, weight, the length of the vehicle We're also
25 looking at mathematics in terms of speed, how fast can one

1 go, how fast can one stop, what is the braking distance
2 once you apply something with what's happening You're
3 also looking to trajectory from bullets or whatever range
4 something may be A bullet might fall at a certain
5 distance, you may be able to anticipate that as
6 1000 yards, 500 yards, 100 feet, 20 feet, you know

7 Q Mr Cantrell, are the principles of physics and
8 geometry, any different -- the programs any different
9 whether you're investigating an accident or a shooting?

10 A No, sir

11 Q Okay. As part of your work on this case, did
12 you make some measurements of some vehicles?

13 A Yes, sir, I did

14 Q All right Let me ask you if you recognize this
15 photograph?

16 A Yes, sir, it's a photograph that I took
17 (WHEREUPON, Defendant's Exhibit No. 5 was marked
18 for identification only)

19 BY MR BUTLER

20 Q Defendant's 5, what does that depict?

21 A This depicts a like make and model vehicle that
22 Mr Washington was supposed to have owned

23 Q What kind of vehicle is in the picture?

24 A There is a Dodge Ram 1500 quad cab pickup truck.

25 Q Same make and model that was supposed to be

1 involved in this incident that we've been discussing this
2 week?

3 A Yes, it is

4 Q What measurements did you make?

5 A I wanted to know the height and the distance
6 from the ground to what would be considered where you
7 would place your arm if you rolled down the window. I
8 wanted to know the height from the ground up to that
9 distance

10 Q What is that distance?

11 A It's approximately 51 inches

12 MR BUTLER Your Honor, may I publish this to
13 the jury?

14 THE COURT. You may -- no objection, is it?

15 MR DURANT Do you want to admit it?

16 MR BUTLER It's admitted

17 MR. DURANT I have no objection if he would
18 like to admit it.

19 MR BUTLER I will admit it

20 THE COURT: Okay

21 BY MR BUTLER

22 Q Did you make measurements for the GEO Tracker?

23 A Yes, sir, I did

24 Q To make that measurement, were you able to
25 locate a GEO Tracker?

1 A Yes, sir

2 Q And --

3 MR BUTLER Beg the Court's indulgence

4 BY MR. BUTLER

5 Q And did you have a photograph, State's 31, to
6 use as a guide to help make the measurements?

7 A Yes, sir, I did

8 Q And were you able to determine the height from
9 the ground of the bullet hole in the GEO Tracker depicted
10 in State's 31?

11 A By taking that same type of rule that we just
12 showed in the other one, I measured the distance from the
13 ground up to where this bullet hole is there And it's
14 approximately 42 inches off the ground to that height

15 Q And, of course, on the GEO Tracker you were
16 looking at there was no bullet hole, so how did you
17 determine where the bullet hole would have been?

18 A By looking at this information that's right
19 here, I just came up the distance from the ground and came
20 over and used this as a marker and used this distance as a
21 marker

22 Q You determined that height to be what?

23 A Right at 42 inches

24 Q And did you -- in calculating, did you make a
25 determination as to how high off the ground somebody's arm

1 would be if it were sticking out of the window of the
2 truck in Defendant's 5?

3 A In taking in consideration that height of,
4 basically, 51 inches at that edge, taking a ruler and
5 placing it adjacent to my arm and some other people and
6 said how far basically is the bone coming out from the arm
7 and that's approximately two inches So I added two
8 inches to that distance if I were doing something at
9 180 degrees making it now 53 inches in the air

10 Q So somebody extending their arm out of the truck
11 as depicted in Defendant's 4 -- excuse me, Defendant's 5,
12 would be 53 inches off the ground?

13 A Yes, sir

14 Q And that bullet hole in that Tracker in State's
15 31 is 42 inches off the ground?

16 A Yes

17 Q So it's obviously 9 inches lower?

18 A Correct.

19 Q Are you familiar with Defendant's Exhibit 1?

20 A Yes, sir, I am

21 Q And what is that?

22 A That's the drawing that I generated

23 Q And how did you generate that diagram?

24 A That's taken from the point spot that we first
25 discussed This is taking and putting any of these

1 locations -- we have from a designated point where we
2 placed our tripod to begin our point spots And then we
3 went out and measured all of the sizes on the edges of the
4 building where the drain and drain coverage would be,
5 where the ditches would be across the front as well as
6 there are numerous points to where the edge of the roadway
7 is, the fog line, which is the white line, where the
8 center line would be, the opposing fog line, the opposing
9 grass line and over here, then we have where the actual
10 CPS pump station is

11 MR BUTLER Your Honor, at this time, we would
12 move Defendant's 1 into evidence

13 MR DURANT No objection

14 MR RUNYON No objection

15 THE COURT It's admitted

16 (WHEREUPON, Defendant's Exhibit No 1 was
17 admitted into evidence)

18 BY MR BUTLER.

19 Q Mr Cantrell, do you have a more detailed
20 version of Defendant's 1 that shows the elevation at
21 various points on that diagram?

22 A Yes, I do via the computer

23 MR BUTLER Your Honor, at this time, I ask
24 Mr Cantrell to step down to his computer

25 THE COURT. Certainly

1 (Witness exits the witness stand)

2 BY MR BUTLER

3 Q Could you pull that up for us, please?

4 A Yes, sir

5 Q Okay And what is that that's on the screen?

6 A That is the same diagram that we were just
7 discussing, only at this point, it's a little more
8 legible, perhaps, than what it was there because of trying
9 to enhance that and blow it up as a print Now,
10 hopefully, some of the wording and so forth are a little
11 more clearer.

12 Q Can you blow it up and focus on the area around
13 the ditch? And those lines and red dots that are on the
14 screen, what do those depict?

15 A These red dots represent points of elevation as
16 well as points of lateral or horizontal or vertical lines,
17 depending on which way you're looking, this way or that
18 way They represent points that we made a measurement for
19 permanent reference on this file as to locations at the
20 scene

21 Q And how did you do that?

22 A I participated with the Kemp Aaron's
23 Professional Surveying Company and we went around from the
24 scene, took physical locations and saved those into a
25 machine that would then translate into what these point

1 files were located called data points

2 Q Each has a number associated with it?

3 A Yes, it does

4 Q That number is just a point of reference for
5 you?

6 A Just a point of reference

7 Q And at any of those points of reference, you
8 can, based on the measurements that you took, tell us what
9 the elevation is relative to some fixed point?

10 A Yes, I can

11 Q Okay And the area that is depicted in there
12 which you've got labeled ditch?

13 A Yes, sir

14 Q It's obvious that's a ditch, but can you tell us
15 about that?

16 A The outer point starting here at this point --
17 let me make it easier for you to see If you start here
18 at this point and work your way, this is the outer most
19 easiest to walk around where you're probably not going to
20 fall into soft pluff mud or any type of mud As you begin
21 to go into this level, you're at a lower elevation If
22 you go into this level, you're actually standing in the
23 water

24 Q And are you familiar with State's 6?

25 A Yes, sir

1 Q And that would be a diagram of basically the
2 same scene that we're talking about?

3 A Correct

4 Q Okay And you're also familiar with the video
5 from Deputy Frichtl?

6 A Yes, sir

7 Q And based on this diagram and that video, what
8 car is that that's depicted on the computer -- on the
9 screen that's the purple car?

10 A That would have been the victim's car, Jamie's
11 car

12 Q And the light blue car, what would that be?

13 A This vehicle?

14 Q Yes

15 A That would have been the GEO Tracker parked
16 behind it

17 Q And that sign in between there, that's a road
18 sign that is there at the scene?

19 A Yes, it is

20 Q Okay. Where have you placed the victim's body
21 in this case on that diagram?

22 A I placed the victim's body here adjacent to the
23 vehicle near the front wheel and also near the A color
24 vehicle, which is where your windshield connects to the
25 door, the front door

1 Q You have not placed him in the ditch?

2 A He is not in the ditch, no

3 Q Now, can you pan out for me, please? And
4 referring back to State's 6, were you able to make a
5 determination generally as to the location of points D and
6 E, the shell casings as depicted in State's 6 on your
7 diagram?

8 A Yes

9 Q And where would that be in general?

10 A In general, it's going to be in the same general
11 area

12 Q And you obviously can't say -- using this
13 diagram, the testimony, the reports, you can't say exactly
14 where that was, can you?

15 A No, sir

16 Q You don't pretend to be that precise, do you?

17 A No, sir

18 Q You can't go back in time, can you?

19 A No, sir

20 Q Okay. Using the information that you have, can
21 you tell us what the difference in elevation is from
22 points D and E on State's 6 and where the victim is in
23 State's 6 and where you have the victim in your depiction
24 on the screen?

25 A The difference between this point and this

1 point, placing it right here, the difference in that is
2 actually 4 8 inches

3 Q Okay

4 A In height.

5 Q Okay I want you to --

6 MR. DURANT Excuse me, I didn't hear that.

7 THE WITNESS 4 8 inches in height.

8 MR DURANT Between which two points?

9 THE WITNESS From this point and this point,
10 height 4 8 inches

11 MR DURANT Sorry

12 BY MR BUTLER.

13 Q That's not what I'm asking you If you can go
14 further out here?

15 A Okay

16 Q Is that not a number that you've calculated
17 previously?

18 A Just a second I go out here as you suggested,
19 that's a difference of two inches, right, two inches.

20 Q 2 inches from where?

21 A From the height of what would be 1 06 to a
22 difference being out in the vicinity Two inches height
23 elevation So coming out to this area versus what it
24 would be over here, I'm going to have right at a two-inch
25 drop at that point where I just measured

1 Q Did you already give us the number, the
2 difference between D and each and here and the victim?

3 A The difference between D and E and here is 4.8
4 inches

5 Q Okay The difference in elevation from point D
6 and E to where the victim is is how much?

7 A 4 8

8 Q Now, taking into consideration -- taking into
9 consideration the height of the window from the vehicle?

10 A Okay

11 Q And the height of the victim, what can you tell
12 about -- what can you tell us about the difference between
13 those two points? How much difference would that be?

14 A You want the victim standing or at the base of
15 his feet?

16 Q Standing

17 A The victim standing would then be at a total of
18 from level grade to the side of the car, the victim is
19 going to being standing 18 inches taller than the 53
20 coming out the car So he's going to be 18 inches higher
21 at that distance, if that's answering your question

22 Q What is the difference in elevation between the
23 53 inches from the truck, the arm extending from the
24 truck, and the point of entry of the bullet wound based on
25 the testimony from the pathologist and the autopsy report?

1 A (Indicating)

2 Q What does that depict?

3 A This depicts an angle of 40 feet, this depicts
4 just an angle as if we were standing here at 53 inches
5 tall from a -- this being level plain, this being the
6 window of the truck Here we're going and adding the
7 victim standing up on the path at 40 feet away That's
8 just a downward angle coming out of the truck

9 Q How did you arrive at the 40 feet?

10 A Just placing the victim --

11 Q Using -- can you explain by using State's 6?

12 A Placing the victim approximately where he is
13 here and coming across with a distance of 40 feet, to say
14 from here to here is approximately 40 feet, so what is the
15 angle at that point for shooting out

16 Q So you've been able to determine that using the
17 victim's height and the measurements from the pathologist
18 at the point of entry and the measurements from the truck?

19 A Yes

20 Q That the trajectory of the bullet would have
21 been at a downward angle?

22 A At a downward angle at that point

23 Q And that's because of the difference in
24 elevation?

25 A The difference in elevation he's standing versus

1 where -- approximately 40 feet what the height of the
2 truck would be going like this (indicating).

3 MR BUTLER Beg the Court's indulgence

4 BY MR BUTLER

5 Q Mr Cantrell, as depicted in the graphic, the
6 angle would be something like this?

7 A Correct

8 Q Okay Not like this?

9 A Correct

10 Q Okay And there are ways that you can change
11 the distance, shorten it, lengthen it I'm not asking you
12 to do it, but you can change the elevation and you can
13 change the point of entry and the angle?

14 A Correct

15 Q Is there any way that you could -- using the
16 figures that you've used here, is there any way that you
17 could make that instead of downward upward like this?

18 A No

19 Q There's no way that can happen?

20 A No

21 Q Okay.

22 MR. BUTLER That's all I have

23 THE COURT Mr Durant?

24 CROSS-EXAMINATION

25 BY MR DURANT

1 Q I believe you have said you have never been
2 qualified as an expert in shooting reconstruction, is that
3 correct?

4 A Correct

5 Q And that's not what you do for a living, right?

6 A No, sir.

7 Q Basically, what you do for a living -- who
8 generally hires you?

9 A I'm sorry?

10 Q Who generally hires you?

11 A Insurance companies, plaintiff and defense law
12 firms, some private individuals

13 Q And you're basically a litigation expert,
14 correct?

15 A I do a lot of that I also volunteer a lot of
16 time at the highway patrol, sheriff office's and so forth
17 doing their training and doing this type of thing

18 Q And people come hire you to testify in court,
19 basically?

20 A Yes

21 Q Now, let's start with some of your assumptions
22 in this case. You measured the truck, of course, it was
23 51 inches from the ground, correct?

24 A Yes.

25 Q And all of the measurements you're doing, of

1 course, you added two inches to that, I think, for the
2 arm?

3 A Center of the arm

4 Q And that's assuming that the arm is directly out
5 straight?

6 A At a 180, yes

7 Q At a 180 Not that it would be down like that,
8 perhaps?

9 A Indicating as if it was a 180 straight out.

10 Q So, I mean, that's roughly a 180 right there,
11 right?

12 A No, it's not

13 Q Further down?

14 A Further down

15 Q Okay You tell me?

16 A Further down

17 Q (Indicating?)

18 A Further down Further down. Point your finger
19 out straight (indicating) That's approximately 180.

20 Q Okay So if the gun was being shot like that,
21 that's 6 inches lower right there, right?

22 A That is 6 inches lower as far as the bullet

23 Q Okay So which would make your 53 like 48, 47,
24 right?

25 A It depends on the angle that someone is holding

1 the gun if that's your question

2 Q If he were holding it up here, it would be
3 higher, wouldn't it?

4 A It would be higher

5 Q If he were holding it down there, it would be a
6 lot lower, wouldn't it?

7 A Yes.

8 Q So everything you're doing is, obviously,
9 depending on assumptions, correct?

10 A Correct.

11 Q Also, everything you do depends on relative
12 location -- when you go out there and measure, correct me
13 if I'm wrong, you can measure elevations pretty accurate,
14 correct?

15 A Yes

16 Q To the points that you measure?

17 A To the points that you measure, yes

18 Q And I believe -- if you put your program back up
19 there for me, please

20 A (Witness complies)

21 Q Okay Referring to Defendant's Exhibit No. 1,
22 now, you have -- that's pretty accurately measured,
23 correct?

24 A Correct.

25 Q And that is measured from a base point, which is

1 on what, the middle of the highway?

2 A The original measurement comes from the area
3 where the first initial point is over here

4 Q Everything is made off that point?

5 A 1 and 2

6 Q All of your elevations are either above or below
7 that one point, is that correct?

8 A Correct

9 Q And so you have elevations around -- that's a
10 drain, right?

11 A That's correct

12 Q And this is the ditch that the cars were around,
13 correct?

14 A Correct

15 Q And then this is a flat area out there, right?

16 A That's where the people enter and exit so they
17 don't drive in the ditch

18 Q And then there's another ditch?

19 A Correct

20 Q And you've been out there, of course?

21 A Yes

22 Q And that's not much of a ditch to begin with
23 right there, is it?

24 A In terms of --

25 Q I mean, it's not what you would consider a deep

1 ditch, is it?

2 A I think from grade to the point of actual water,
3 it's a total of about five feet deep approximately.

4 Q And your points of measurement were around the
5 ditch?

6 A Correct

7 Q Okay. And around there and nothing in between?

8 A Correct

9 Q So -- do we have a laser pointer?

10 A I've got one right here

11 Q Okay. So in terms -- this is referring to
12 State's Exhibit -- Defendant's Exhibit No 1, this is the
13 ditch -- I mean, the drain? That's the drain, correct?

14 A Correct

15 Q And then we've got the ditch here and the ditch
16 here?

17 A Yes.

18 Q And you were assuming the shots were fired from
19 back here?

20 A I'm assuming the shots were being fired
21 somewhere in this vicinity of this marker

22 Q Right, assuming that the shots were fired back
23 in this area?

24 A Yes, sir

25 Q Do you know what the elevation is there?

1 A I don't know what the exact elevation is, but
2 it's like I gave before, it's approximately a two inch
3 difference between what the elevation is there versus
4 here

5 Q There's a two inch difference between there and
6 there, correct?

7 A Approximately, yes

8 Q And then when we're doing -- you did some
9 assumptions -- let's go back to your other diagram. The
10 one that shows the downward path of the bullet

11 A (Witness complies)

12 Q Okay Now, once again, that angle is basically
13 depending upon taking into your projections concerning
14 these people being 40 feet away, correct?

15 A Yes

16 Q Your assumption is 40 feet away?

17 A Yes

18 Q So if they were 50 feet away, it would be
19 different If the truck was five feet further back that
20 way and the victim was five feet further back that way, it
21 would be different, right?

22 A Correct

23 Q Basically, the further you get them away, the
24 more oblique the angle?

25 A Correct

1 Q Can you do it from 50 feet? Just move it back
2 five each way

3 A (Witness complies)

4 Q Okay And now --

5 A Do you want the lines moved, also?

6 Q First of all, let's start with the elevation I
7 mean, isn't it possible that the elevation may be
8 different at that point and at that point than it is at
9 this point and this point? In other words, I mean, the
10 elevation at this point may be different than the
11 elevation at this point? It may not be much, but it may
12 be an inch or so?

13 A Yes

14 Q Especially, in a gravel driveway and rutted out
15 with cars going in and out of there?

16 A Potentially, yes

17 Q And over here on the side that the victim was
18 at, if he was five feet further that way, then it's also
19 a possibility that he might be a couple inches higher than
20 he would be if he was at your assumed 40 feet, right?

21 A He could be somewhat higher or lower

22 Q Okay Moving them out, yeah, move them on out
23 to the 50 feet range.

24 A (Witness complies)

25 Q Now, can you connect those up?

R CANTRELL - CROSS-EX BY MR DURANT

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1 A They won't actually connect It's not going to
2 stay

3 Q It won't stay Let me give you another
4 measurement over there on the right-hand side of that.
5 The measurement you had your downward angle based on, of
6 course, is the angle of the measure of the gunshot wound?

7 A Correct

8 Q Okay And correct me if I'm wrong, in pretrial
9 matters, you said in doing your calculations, the victim
10 was 71 inches tall?

11 A 71 inches

12 Q And I believe the testimony from the medical
13 examiner was that the graze wound to the victim's back was
14 20.8 inches from the top of his head?

15 MR RUNYON. 20 2

16 THE WITNESS I don't recall

17 BY MR DURANT

18 Q 20 2 inches from the top of his head. So can
19 you take your 71 and come down 22?

20 A This point here is already taking this into play
21 with his elevation and that height

22 Q Pardon me?

23 A This part right here, this is already taking
24 that assumed elevation

25 Q What assumed elevation?

1 A Where he's at in the roadway off of the grade
2 and taking that bullet impact height

3 Q I'm not talking about the bullet there I'm
4 talking about 71 inches tall, subtract 20 inches from
5 that, which is the graze wound injury, and give me that
6 height based upon the relative elevations from five feet
7 this way and five feet that way, just like we did before
8 the jury came back

9 A That's what you get That's the angle

10 Q Okay A straight across angle, basically?

11 A That's what you're getting right here I cannot
12 make that grip -- grab

13 Q And --

14 A That would be straight across

15 Q Okay Once again, all of this depends on how
16 the victim is, right?

17 A Yes

18 Q Basically, depends on the victim being standing
19 up dead straight?

20 A As you're standing, yes

21 Q Okay. And it doesn't take into consideration
22 the victim maybe being bent over to run, does it?

23 A The exemplary standing stance as if you were
24 standing straight up

25 Q Correct. And, you know, the whole point of your

1 testimony, sir, is that there would be a downward angle;
2 is that correct? Is that what you're trying to tell the
3 jury?

4 A The angle shows a downward angle at 40 feet.

5 Q Do you want to get up there and stand on that
6 platform You've heard all of the testimony in this case,
7 have you not?

8 A Yes, sir

9 Q You're up above me, correct?

10 A Yes, sir

11 Q And -- or however you want to get. You can be
12 up above me, you can be running But if you're shooting
13 at me and I turn to run, sir, where is that bullet path
14 going to be on me?

15 A If you turn to run, your bullet path is not
16 going to be coming through your arm

17 Q If I turn to run, you're shooting at me and I
18 turn to run and I'm bending over and I'm shot right here
19 and the bullet comes through my side and lodges right
20 here --

21 MR DURANT Where's my stick?

22 MR BUTLER: It's my stick that you can borrow

23 BY MR DURANT

24 Q I believe your testimony was about an angle
25 maybe about like this, correct?

1 A Let me --

2 Q No, you let me do the questioning, okay?

3 A Sure.

4 Q Now, you're shooting at me, whatever you want to
5 do Say this is the angle and I turn to run, now where is
6 that stick pointing, sir?

7 A That stick is pointing straight out from one
8 impact point coming out directly like this from the body
9 It's also pointing down

10 Q Okay

11 A That's pointing directly --

12 Q You tell me whenever I hit up with you, okay?

13 A Okay

14 Q In other words, sir, you don't know, isn't that
15 true?

16 A I don't know what angle he was standing

17 Q Exactly You don't know And all your computer
18 mumbo jumbo proves nothing?

19 MR. RUNYON Is that a question or a statement,
20 Judge, I didn't understand?

21 BY MR DURANT

22 Q Does it?

23 A My computer shows the angles based at the
24 designated feet from the distance It shows the angles of
25 the potential impact points and it shows elevations from

1 the respective points at the scene

2 Q And bottom line, sir, unless you know exactly
3 where the vehicles were located, exactly where the
4 defendant is located, exactly where that truck is located,
5 exactly the exact distance between that truck to the
6 victim and the exact position of the victim's body at the
7 time that he is shot, then you can make this thing say
8 anything, can't you? You can make it show anything?

9 A You would rather have some exact measurements
10 from people at the scene when they were out there, yes,
11 sir

12 Q Which you don't have?

13 A Correct, we do not have.

14 Q So everything you say is pure speculation based
15 an assumed set of facts?

16 A It's not speculation It's based on the facts
17 as known as the scene as provided by law enforcement and
18 by the other witnesses

19 Q One other thing I wanted to ask you You're a
20 firearms instructor?

21 A I'm sorry, I couldn't hear you

22 Q You said you were a firearms instructor as well?

23 A Yes, sir

24 Q You're familiar with firearms presumably?

25 A Yes, sir.

1 Q In No 1, shell casings aren't always located in
2 the exact location of where a gun is fired, correct,
3 semiautomatic weapon?

4 A Correct

5 Q A semiautomatic weapon is not always fired at
6 the exact location that the rounds may be found?

7 A As I just answered twice, correct

8 Q I'm sorry, I didn't hear your answer I'm
9 sorry?

10 A That's okay

11 Q I apologize And 9-millimeter rounds are
12 generally low velocity rounds, correct, compared to like a
13 rifle round?

14 A Compared to a rifle round

15 Q They are subject to be deflected, are they not?

16 A Yes, they are

17 Q In fact, I think we have a fairly good picture
18 of one deflecting through the headrest of the GEO Tracker,
19 is that correct?

20 A Yes, it has been a former exhibit

21 Q Okay. And I believe it's State's Exhibit No
22 38?

23 A Yes, sir

24 Q Which appears from that picture to be downward
25 and then upward, is that correct?

R CANTRELL - CROSS-EX BY MR DURANT

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1 A Correct.

2 Q And it's equally possible, sir, that it could
3 have been deflected going through the back door of that
4 Tracker, too, isn't it?

5 A Correct

6 Q But you would agree with Detective James that
7 that shot came from the rear of that Tracker, correct?

8 A Yes

9 Q And you would agree, sir, would you not, that if
10 Mr Murphy -- excuse me, if Mr Simmons was facing
11 Toogoodoo Road and the shots came from the direction you
12 are and he turned to run this way, as I demonstrated
13 earlier, that it could explain the angle of entry into his
14 body, is that correct?

15 A It could explain it

16 MR DURANT Thank you, sir.

17 THE COURT Mr Runyon?

18 CROSS-EXAMINATION

19 BY MR RUNYON

20 Q Mr. Cantrell?

21 A Yes, sir

22 Q Between you and Mr Butler and Mr. Durant, I've
23 had a flashback to 1957, '58, one of the most miserable
24 years of my life trying to learn geometry in high school
25 Let's talk about the speculation of you and Mr Durant or

1 anybody else You sat here in this courtroom and you
2 listened to the testimony, correct?

3 A Yes, sir, I did

4 Q And your calculations, your opinion is based
5 upon the evidence presented by the State, correct?

6 A Correct

7 Q All right Now, the fact of the matter is is
8 had the crime scene gone out there and made all of the
9 appropriate measurements, you would have to base your
10 opinion on that, correct?

11 A Correct

12 Q Now, there was a witness who testified for the
13 State, as I recall, he was standing at the front of
14 Mr Simmons' car and that the last time he saw
15 Mr Simmons, he was standing facing his car?

16 A Correct

17 Q And he was standing upright?

18 A Correct

19 Q All right So based upon the only evidence that
20 is in evidence, Mr Simmons was shot --

21 MR RUNYON Where is that stick? Let me borrow
22 your stick

23 MR BUTLER Next time I'll bring enough for
24 everybody

25 BY MR RUNYON

1 Q Mr Simmons' entry wound -- strike that
2 You've already established in your colloque with
3 Mr. Durant that a handgun round can deflect once it hits
4 something?

5 A Correct

6 Q And so that what we're talking about -- and you
7 ought to correct me if I'm wrong because I ain't too
8 bright about all these things -- what we're really talking
9 about is where the bullet goes in, correct?

10 A Yes

11 Q As measuring angles and what have you Because
12 once it hits something, God only knows where it's going to
13 go, right?

14 A Correct

15 Q Now, the evidence in this case, as I understand
16 it, from the State firearm's expert is that bullet that
17 struck Mr. Simmons apparently came apart in his body?

18 A Yes, as I heard that testimony

19 Q There's no testimony that bullet deflected off
20 of anything, is there?

21 A No, sir

22 Q So based upon the evidence in this case,
23 Mr Simmons was struck by, for lack of a better
24 expression, a clean round?

25 A That's correct

1 Q And that the real test is the entry wounds as so
2 far as whether it's, in this case, 180 degrees, correct?

3 A Yes

4 Q Okay. Now, you can talk about all this
5 elevation is over here and all that sort of stuff and
6 whether he's standing so far below grade and all that sort
7 of stuff The simple fact of the matter is the entry
8 wound was at 180-degree level?

9 A Correct

10 Q Okay If he crouches, that places him lower to
11 the ground, correct?

12 A Correct.

13 Q I'm going to embarrass myself right now, okay
14 I apologize for that If he jumps up in the air at the
15 time the shot is fired -- I couldn't jump that high
16 because I'm 63 and not in the best of shape, then that
17 elevates him up in the air and would change the level --
18 the conclusion of the level from which the shot may have
19 been fired?

20 A Correct.

21 Q But we don't know that he's jumping up in the
22 air, do we?

23 A No, sir

24 Q And we don't know that he has turned to run, do
25 we?

R CANTRELL - CROSS-EX BY MR RUNYON

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1 A No, sir, not from any testimony

2 Q The only evidence is he's standing here looking
3 at his car, facing his car, correct?

4 A Correct

5 Q That's the testimony and the evidence in the
6 case?

7 A Yes, sir

8 Q Now, and the graze wound, which is likewise
9 horizontal, is down here on his back?

10 A Correct

11 Q Lower than the entrance wound up here?

12 A Yes, sir

13 Q And that's horizontal, too?

14 A Yes

15 Q Now, I don't know anything about all this stuff
16 about the curvature of the earth and all that
17 gravitational stuff and all that sort of stuff, but
18 generally speaking, within the range of a weapon, if you
19 pull the trigger and fire that weapon, does the bullet go
20 where you aim it, so to speak?

21 A In a general range of anything less than
22 50 feet, yes

23 Q All right Now, can you determine the angle of
24 deflection if the bullet is fired more than 50 feet away?

25 A In this case, if the side measurements had been

1 done on the headrest from the interior from the ground up,
2 they would have exact measurements Going up also the
3 angle of the windshield, there would have been some angle
4 reflection there and would be able to show an angle going
5 up

6 If they had been able to open up the body
7 without making any other destruction because of the body
8 mass, they would have been able to potentially place the
9 bullet at its location, but they'd have masses going
10 through so you have the point going down here to the point
11 of final rest You have no idea what its actual path is
12 without trying to preserve too much stuff and either do
13 some X-rays or MRI's, which apparently wasn't done.

14 Q See, I'm a simple sort of fellow, I'm not trying
15 to get into all that, which I'm not taking issue with your
16 answer But the further back you move the shot, so to
17 speak, in State's Exhibit No -- is it 6?

18 A Yes, sir

19 Q State's Exhibit 6 We have so many exhibits I'm
20 forgetting the numbers at this point

21 The further back you move the shot, the closer
22 you get to the police car, right?

23 A Yes.

24 Q So that as a practical matter, based upon the
25 evidence presented by the State, we're talking about the

1 range between where the shot may have come from and where
2 the victim was struck?

3 A Correct

4 Q Okay. Now, there's no evidence that the truck
5 door was open, was there?

6 A None has been presented to my knowledge

7 Q Or that the gunshot come from an open truck
8 door?

9 A Not to my knowledge.

10 Q So the evidence is -- the evidence in this case
11 is that the initial shot was from at least 51 inches above
12 the ground?

13 A Correct

14 Q And Mr Simmons was standing -- when I say
15 standing in the ditch, see I was born in the country So
16 he wasn't standing on the hard road?

17 A Correct

18 Q And that shoulder drops off?

19 A Correct

20 Q So he was below grade?

21 A Correct

22 Q And below the level of the parking lot?

23 A No, he wasn't below the level of the parking
24 lot

25 Q Oh, he wasn't Okay So that if I'm standing

1 in the parking lot and I shoot in his direction, I could
2 strike him with a level shot, couldn't I?

3 A Yes

4 Q But if I'm sitting in a truck 51 inches off the
5 ground, based on the evidence in the case -- you and
6 Mr Durant and everybody else can speculate all you want,
7 but the simple fact is if I'm 51 inches off the ground at
8 the very minimum and I fire that weapon, I'm not going to
9 hit somebody with a level shot, am I?

10 A No, you're not

11 Q Now, I'll keep the stick for a little while
12 longer. I might need it

13 Now, when you did the surveys and what have you,
14 when you come out of that -- when you're coming out of
15 that parking lot, you're coming up on the road?

16 A Correct

17 Q It actually rises somewhat, doesn't it?

18 A Correct

19 Q Because the parking lot is below grade?

20 A Correct

21 Q Or is it?

22 A It's below grade

23 Q Now, if I'm sitting in the truck 51 inches off
24 the ground and I'm going up hill, in essence, I get even
25 higher, right?

R CANTRELL - CROSS-EX BY MR RUNYON

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1 A Correct

2 MR RUNYON Here's your stick back

3 BY MR RUNYON

4 Q Now, you've seen the evidence, you've heard the
5 evidence in this case?

6 A Yes, sir.

7 Q All right Is it -- is there any evidence that
8 the shot in the back of the GEO Tracker -- the shot in the
9 back of the GEO Tracker, that that shot came from
10 51 inches off the ground?

11 A Not to my knowledge

12 Q Okay Now, you guys went and mixed up all of
13 the pictures Bear with me

14 MR DURANT Which one do you want?

15 MR RUNYON I've got them right here The ones
16 with the measuring stick Here we go
17 BY MR RUNYON.

18 Q I'm going to show you State's Exhibit No 17
19 And I think it's already been testified to that's a
20 picture of a dent in the Dodge truck and Mr Wenger's hand
21 with a measuring device, isn't it?

22 A Yes, sir

23 Q And there's no measuring device on State's
24 Exhibit No 32?

25 A No, sir

1 Q Okay And there were measuring devices out
2 there because I see -- well, this is another one of Mr.
3 Wenger He's just a stickler for detail, I guess
4 State's Exhibit No 12 with a measuring device?

5 A Yes, sir

6 Q I still don't understand what -- who would paint
7 a Fleetwood lime green, but anyway

8 Now, I want to show you these things here.
9 State's Exhibit No 48 and 47 show some locations of
10 quote, evidence, is that correct?

11 A Yes, sir

12 Q And those little devices, those little markers
13 there are also measuring devices, aren't they?

14 A Yes, sir

15 Q They have little incremental inches or
16 centimeter?

17 A Yes, sir.

18 Q I don't understand metrics either, so you're
19 going to have to bear with me Here's one Same with
20 State's Exhibit 43?

21 A Yes, sir.

22 Q And State's Exhibit 44?

23 A Yes, sir

24 Q Now, all he had to do to give you the
25 information is to go out there and run a tape from the

1 driveway to where those -- roughly where those
2 9-millimeter casings are to the location of where the body
3 was and that would give you a distance, won't it?

4 A Yes, sir, it could also establish the fixed
5 point such as that sign to the left, something that is
6 always going to be there

7 Q And that wasn't done?

8 A No, sir.

9 Q And so therefore, you can't testify as to what
10 those measurements were that day because that wasn't
11 testified to in this trial, right?

12 A Correct

13 Q Now, I passed geometry, by the way, barely. But
14 a straight line is a straight line, isn't it?

15 A Yes, sir

16 Q How the straight line got into Mr Simmons, at
17 least at the entrance part and across the back, is at
18 question, isn't it?

19 A Yes, sir

20 Q But the only evidence is he's standing there at
21 his car facing the car?

22 A Correct

23 Q Last time anybody saw him?

24 A No, last time somebody saw him, he was lying
25 down

1 Q Last time anyone saw him up?

2 A Yes, sir

3 Q I apologize I'm just trying to get something
4 straight

5 Now, except for -- well, Mr Durant asked you if
6 someone was running like this or -- that changes all of
7 the numbers, doesn't it?

8 A Yes, sir

9 Q It can?

10 A It can

11 Q All right. But when you've got a level of
12 51 inches to a point somewhat below that 51 inches, it
13 doesn't matter whether it's in the parking lot on
14 Toogoodoo Road or whether it's Delee Plaza in Dallas, the
15 angle is the angle is the angle, correct?

16 A Correct

17 MR RUNYON. No further questions, Judge.

18 REDIRECT EXAMINATION

19 BY MR BUTLER

20 Q Mr Cantrell, Mr Durant used the word
21 assumption in his cross-examination, I'm sure you recall
22 that, right?

23 A Yes, sir, I do

24 Q Is State's 6 your diagram?

25 A No, sir, it's not

1 Q Is your diagram based upon the imperial evidence
2 that you found out at the scene with measurements and
3 lasers?

4 A Yes, sir, it is

5 Q And, obviously, you don't know where D and E
6 are, you have to rely on what they tell you?

7 A Correct

8 Q There are fixed points that you can assume
9 remain fixed, like the sign?

10 A That's correct

11 Q Now, you saw the crime scene video that showed
12 the cups, right?

13 A Yes, sir, I did

14 Q All right That's not your video, is it?

15 A No, sir

16 Q That showed the cups over the shell casings,
17 right?

18 A Correct.

19 Q Are the points that you map on your diagram
20 assumptions?

21 A No, sir, they're not

22 Q Are the placements of those cups in the video,
23 are those assumptions? Are they your assumptions?

24 A No, they're not my assumptions

25 Q Have the testimony from any of the witnesses up

1 until now been your assumptions?

2 A No, sir

3 Q Their witnesses, right?

4 A Their witnesses

5 Q You work with what you're given?

6 A Correct

7 Q I don't want you to put it back up there again,
8 but -- well, let me ask you this way Forget all the
9 science, forget your computer, and forget your diagrams
10 and I just want you to answer this as common sensibly as
11 you can If one person is higher than the other, can the
12 angle ever be up?

13 A No

14 Q Okay If I'm bending and bending and bending,
15 how much further do I have to -- how far lower do I have
16 to go to get that?

17 A A sizable amount

18 Q Okay And if I turn and run, can I turn and run
19 and keep my shoulders towards you?

20 A Not easily.

21 Q You would have to be a contortionist, right?
22 Like this, right?

23 A Correct

24 Q I don't want you to put it back up there again,
25 but Mr Durant showed how you could change the distances

1 and change the elevation and almost get it horizontal like
2 this?

3 A Correct

4 Q Could you ever change the distances or change
5 the elevation enough to make the angle of a bullet going
6 up?

7 A No

8 Q Okay A person would have to be suspended in
9 mid air, wouldn't they?

10 A Yes

11 Q Mr Durant asked you about in reference to the
12 53 inches, that number coming from the 51 from the truck
13 and the two inches on the arm, and that you don't know
14 whether or not somebody could be shooting lower or higher,
15 right?

16 A Correct

17 Q Okay. Your figure with respect to the bullet
18 hole in the Tracker was 45 -- no --

19 A Forty-two

20 Q Nine inches lower?

21 A Yes

22 Q Okay If somebody sticks their arm out a truck,
23 to get it nine inches lower, okay, to get it nine inches
24 lower -- let's assume that you don't break your arm
25 somehow getting it nine inches lower, the trajectory of

1 that bullet is going to be what, up, down, level, what?

2 A It depends on how you're doing this with the gun
3 (indicating)

4 Q To get it level, you would have to hold your arm
5 down nine inches?

6 A Yes

7 Q And then straighten it like that?

8 A Correct

9 Q To get it level?

10 A To get it level

11 Q Okay Otherwise, for the most part, it's going
12 to go down?

13 A It's a downward angle

14 Q And nine inches, if you can do that, is going to
15 be significantly downward, isn't it?

16 A Significantly downward

17 Q Is there any way to have the projectile come out
18 at 180 degrees from a 53 inches in the air and end up
19 42 inches in the air?

20 A No.

21 Q And if the projectile enters the Tracker level,
22 okay, level?

23 A Correct.

24 Q Is there any way that that comes from 53 inches?

25 A No, sir, it does not

R CANTRELL - REDIRECT EX BY MR BUTLER

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1 Q Okay So that 40 feet, you didn't just make
2 that number up?

3 A No, sir

4 Q Okay And you admit it could be five feet one
5 way, three feet another? You admit that, right?

6 A Correct

7 MR BUTLER Beg the Court's indulgence
8 That's all I have

9 MR DURANT I just have a couple raised by
10 these gentlemen, Your Honor

11 RECROSS-EXAMINATION

12 BY MR DURANT

13 Q With regard to Mr Runyon's questions, sir, in
14 him saying -- and forget about the running of the thing,
15 you heard the medical examiner testify, correct?

16 A Yes, sir, I did

17 Q And you heard that the bullet that went into his
18 arm went through the bone and broke the bone, correct?

19 A I don't recall.

20 Q Would you like to see the coroner's report?

21 A I saw the coroner's report, but I didn't recall
22 hearing her say that I saw the report

23 Q Do you remember seeing in the report --

24 A Yes

25 Q -- that it fractured the humerus?

1 A Yes

2 Q As Mr Runyon so adequately pointed out, once
3 that happens, there's no telling where that bullet is
4 going, is there?

5 A It went inside the body and different parts.

6 Q Of course, it did, but that was after it broke
7 the arm bone, correct?

8 A It still went inside the body.

9 Q Yes, sir, it went inside the body, but it went
10 inside the body after it hit the arm bone So, I mean,
11 isn't it possible, sir, that even with his testimony of
12 standing directly up and getting shot there or a little
13 like this and getting shot there, it deflects off the bone
14 and goes upward?

15 A I have no idea what happened after that bullet
16 hit the bone, sir

17 Q And it is equally possible that the guy was bent
18 to run, isn't it?

19 A I wasn't at the scene

20 Q Exactly And there's no testimony in the record
21 that that bullet that killed him was the first one that
22 hit him either, was it?

23 A No.

24 Q And, sir, if I'm standing here and somebody
25 shoots me and grazes me across the back with a bullet, do

R CANTRELL - RECROSS-EX BY MR DURANT

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1 you think I'm going to stand up here in an anatomical
2 correct position for the next one?

3 A I wouldn't be I don't know whether you would
4 be or not

5 Q No human being -- no rational human being would
6 be, sir

7 MR DURANT And may I have your stick?

8 MR BUTLER Last time

9 MR DURANT Last time I can have the stick.

10 BY MR. DURANT

11 Q In terms of Mr Butler's demonstration about
12 going out the window, you know, like this, of course, that
13 is true, you're going to be limited by the window seal, I
14 guess, for a lack of a better term as to how low you go,
15 correct?

16 A Yes

17 Q Unless you're hanging out the window like that,
18 right?

19 A Correct

20 Q That makes a big difference, right? It also
21 makes a big difference whether you hold a weapon like
22 this, correct?

23 A Correct

24 Q Or holding a weapon like this?

25 A Potential, yes

1 Q This way seems to be more in style now adays,
2 doesn't it?

3 A Most people I see fire like this

4 Q Most people you see fire are law enforcement
5 people?

6 A No, sir

7 Q You've seen this style, sir, obviously, have you
8 not?

9 A I have seen that style, yes, sir

10 Q That's kind of in vogue now, it's called
11 gangster style?

12 MR RUNYON Objection, Judge

13 THE COURT. Sustained. Jury will disregard, no
14 evidence to base that question on
15 BY MR DURANT.

16 Q One final question --

17 Can you put me on?

18 Back to my deflection question here Once
19 again, the only thing you can tell is that there was a
20 shot from somewhere behind that Tracker, correct?

21 A Into that Tracker, yes

22 Q Based upon the evidence that's in this case, you
23 can pretty much tell there was a shot from behind that GEO
24 Tracker, correct?

25 A Correct.

1 Q You can't tell how high that shot came from,
2 correct?

3 A No, there's no exact measurements from the crime
4 scene

5 Q How low the shoot came from?

6 A Again, there's no evidence from your crime scene
7 people doing the --

8 Q How far slightly to the left or to the right
9 that came from?

10 A Again, no evidence from your crime scene people
11 to stipulate

12 Q Exactly And there's no evidence as to what
13 that bullet may have hit in the back door? Because we
14 know it sure deflected up when it went through the
15 headrest, correct?

16 A Well, the evidence reflects it was a metal
17 object as the back door, as compared to fiberglass or
18 water or pure glass

19 Q Well, the back door is metal?

20 A That's what I'm saying.

21 Q And at least two sheets?

22 A Right

23 Q And probably framed in the middle Maybe some
24 window mechanisms, I don't know But the fact of the
25 matter is is that a pistol bullet is subject to being

1 deflected, correct?

2 A Correct

3 MR DURANT Nothing further

4 THE COURT. Mr Runyon?

5 MR RUNYON. Based on matters that he brought
6 up

7 Don't give me that stick, I'll break it

8 RECROSS-EXAMINATION

9 BY MR RUNYON

10 Q Let me ask you this The only testimony in this
11 case is that gunfire came from the truck?

12 A Yes

13 Q Okay. Did you hear any testimony about anyone
14 holding an arm out and shooting in any way?

15 A No, sir.

16 Q So how it could have happened isn't part of the
17 evidence in the case, is it?

18 A That's correct

19 MR RUNYON No further questions

20 MR BUTLER One last stickless question, I
21 promise

22 THE COURT Two rounds, that's all

23 You may step down

24 THE WITNESS Thank you

25 THE COURT All right. Do you have any other

1 witnesses?

2 MR BUTLER That's all we have

3 THE COURT Mr Runyon?

4 MR RUNYON That's all we have.

5 THE COURT Will you have any rebuttal?

6 MR DURANT No, sir

7 THE COURT: All right

8 Well, ladies and gentlemen, that will be all of
9 the evidence that you're going to hear in this case It
10 is a little bit after 12 00 What I'm going to do right
11 now is we have to get ready to do closing arguments and a
12 charge on the law I'm going to send you to lunch right
13 now And what I'm going to do is give you a little bit
14 longer for lunch than I have been earlier in this week and
15 ask that you be back in the jury room by 2 00, that way we
16 can do what we need to do during lunch And when you come
17 back, we will go straight into the closing arguments and
18 then I'll charge you on the law and you will retire for
19 your deliberations.

20 So go ahead -- while you have heard all of the
21 evidence in the case, it's still improper for you to begin
22 your deliberations or discussions about this case until
23 you've been charged on the law and you've heard the
24 arguments. So I will send you to lunch and ask that you
25 be back in the jury room at 2 00

1 (WHEREUPON, the following proceedings were held
2 outside the presence of the jury.)

3 THE COURT Why don't I give you about 10 or 15
4 minutes to look at that I'll come back and we'll do a
5 charge conference And then we can take a lunch and get
6 ready for your arguments. So look at those, I'll be back
7 in about 10 minutes Okay

8 MR DURANT Okay Thank you

9 (WHEREUPON, a recess transpired)

10 THE COURT What's the State's position on the
11 jury instructions?

12 MR DURANT I have looked through them and I
13 have no objection to them I was inquiring with regard to
14 the murder, actual murder charge, whether you will be
15 considering giving maybe a State v Mouzon extreme
16 recklessness kind of charge There's a case -- I can't
17 remember the particular facts, but it was a vehicular case
18 where the guy was extremely drunk driving through like a
19 residential area at 100 miles an hour It was a school
20 zone He hit a kid and killed him And basically said he
21 was so criminally negligent and reckless in that case that
22 it rose to the level of malice I think, you know, when
23 you're in a situation where you're shooting across a
24 crowded parking lot at someone else, you're reaching that
25 same threshold So I would request that

1 THE COURT. Do you want to be heard on that?

2 MR RUNYON I object, Judge, for a lot of
3 reasons The facts in this case don't rise to the level
4 of that case And the simple fact of the matter is if
5 you're going to charge that, then I think the defense, at
6 least I have the right to argue that everybody out there
7 who fired a weapon should be in this courtroom and be on
8 trial for murder because they're all reckless when they're
9 shooting guns, seriously

10 MR DURANT I can't say that I disagree with
11 him that much, Your Honor, but these are the ones on
12 trial

13 MR BUTLER. Judge, the reason it's not
14 appropriate is because there is no criminal negligence as
15 alleged from the State's witnesses Malice can be
16 inferred from the use of a deadly weapon and that's
17 covered by your malice charge And your transferred
18 intent charge gets them to malice The criminal
19 negligence charge is not a factor in this case at all and
20 it can be extremely misleading

21 THE COURT You're not going to ask for an
22 involuntary charge as well?

23 MR BUTLER I wish there was a basis for
24 involuntary, but I just don't think that there is because
25 malice could be inferred from the use of a deadly weapon

1 You know, if the testimony was that somebody was playing
2 with a gun or something like that, but I don't see any
3 basis for one

4 MR DURANT I don't believe they could get a
5 voluntary with a -- and I agree, I mean, my position is
6 there was an intentional discharge

7 THE COURT. Nobody is asking for a lesser
8 included, I gather, right?

9 MR DURANT. Well, I asked them if they wanted
10 voluntary, but I know Mr Butler is not inclined to ask
11 that

12 MR BUTLER There's nothing in the record.

13 MR. DURANT. I haven't talked to Bill about it,
14 Judge

15 THE COURT. I will look at that case and let you
16 know

17 MR DURANT: Okay

18 THE COURT Anything else from the State?

19 MR DURANT Not at this time unless you're
20 planning on changing something in your charge

21 THE COURT Okay

22 MR RUNYON. Yes, sir, Judge, we would
23 respectfully object to the hand of one is the hand of all
24 charge because I understand that you've got two people on
25 trial But the simple fact is that the only testimony

1 here, even from Catrell Heyward, the driver, is that
2 nobody planned, nobody agreed, nobody had any forethought
3 I mean, if you take the evidence in the light most
4 favorable to the State, meaning all due respect to
5 Mr. Butler's client, Mr Ward retrieved the weapon and
6 fired it without consulting with anybody

7 Now, there may be some accessory after the fact
8 activity by some folks, but the simple fact is there's no
9 agreement There's no agreement And I would suggest,
10 Judge, that that would not be appropriate because there's
11 no indication that they get into the truck or they went to
12 shoot somebody or anything else Now --

13 THE COURT. What about Mr Murphy's testimony
14 that Tremayne said some bitch was going to die tonight,
15 and Mr Buncumb's testimony that Mr Washington said we'll
16 handle it and this was before the shooting?

17 MR RUNYON: All right First of all, Judge --
18 and I'm not being factitious when I say this There's a
19 long line of cases in the United States in various
20 jurisdictions which address the word bitch

21 THE COURT Three possible implications

22 MR. RUNYON. Primarily in terms of son of a
23 bitch And they're interesting cases, even law review
24 from prestigious law schools about it Simple fact of the
25 matter is, if you take the evidence, there was a fight in

1 the bar between a woman and at least one man

2 THE COURT Uh-huh

3 MR RUNYON Clearly, in the context of those
4 facts, even if you believe Mr Washington said something
5 like that, he's referring to some female No female is
6 being shot at in this case

7 THE COURT There are two other implications
8 from the use of that phrase One would be they're
9 referring to a dog, which would not be in any context of
10 the evidence of this case. But there would also be the
11 fact that we're in the south and a lot of people pronounce
12 son of a bitch as some bitch, which would be usually
13 referred to as a male Would not the State be allowed to
14 infer that from that testimony?

15 MR RUNYON No, Your Honor, because it's
16 requiring people to speculate as to what he actually said
17 If you take the testimony as the testimony came in, and as
18 the State presented it, some bitch is going to die tonight
19 or something like that You know, I understand the
20 knack -- I can talk in terms of each other I get along
21 better out there than I did in town But the simple fact
22 of the matter is, is to suggest to the jury that they can
23 conclude that he said son of a bitch, in essence, by
24 slurring things, I mean, that's a little bit much And we
25 object to that, Judge

1 MR DURANT You can't take that one statement
2 isolated You have to put it into context as to
3 everything that was going on out there that night, Judge
4 As I will argue to you on the DV motion, you know, you've
5 got to take into consideration the whole Petersfield
6 versus Cherry Hill thing The fact that he was coming
7 from a fight over there at Dunmeyer's car at the time that
8 he made both of these statements, headed toward his truck
9 to get in it right before this shooting There was this
10 running gun battle going down the road I mean, you can't
11 take that one statement and dissect it like that without
12 putting it into the context of the evidence presented as
13 to what happened out there that night

14 I think if you put all of that evidence
15 together, the only conclusion that you can draw on this is
16 that, you know, these people -- these folks were from
17 Petersfield, had been aggrieved by these folks from Cherry
18 Hill and they were going to settle the score

19 THE COURT. Mr Butler, do you want to --

20 MR BUTLER. Yes, sir, if I could, please I
21 guess it's unclear to me why whatever instruction you put
22 on Mr Washington's statement, some bitch is going to die
23 tonight, I mean, that's imputed to him and can go to
24 malice and motive I'm not sure why that is evidence of
25 accomplice liability, how it can all be imputed to John?

1 THE COURT Because they're accused of acting in
2 concert bo

3 MR BUTLER Right, but when he says some --
4 let's say he said some son of a bitch or some bitch is
5 going to die tonight, I don't understand why that would
6 ever be imputed to anybody other than the person that said
7 it

8 THE COURT· You can infer from the circumstances
9 that they were getting in the car and going to kill
10 somebody

11 MR BUTLER There's no evidence that John is
12 even present when that statement is made There's no
13 evidence that John is anywhere around when that statement
14 is made No testimony that he heard it, no testimony that
15 he acted on it The only testimony is that he is there,
16 and that's it. The only testimony is that he's there and
17 that these two people are aligned with Petersfield. And
18 if that is the basis for accomplice liability, then
19 anybody who's out there aligned with Petersfield could be
20 thrown into the mix

21 The case that Mr Durant relies upon, the
22 Dickman case, they say that this testimony vied some
23 evidence that they were acting to a plan. Both of these
24 people -- the defendants in Dickman, they passed a gun
25 back and forth You know, they were both in the car at

1 the same time There was testimony that one of them
2 couldn't shoot and they handed the gun to the other one.

3 The other problem, Judge, is this, and I appeal
4 to the State versus Leonard, 355 S E 2nd 270 The problem
5 the State has in this case is they don't know who shot
6 him Okay Mr Durant said DV, maybe he meant something
7 else He said they're both principals He couldn't have
8 meant that I don't know what he meant If they were
9 both principals, then there's no need for a hand of one
10 charge because the whole basis for the hand of one charge
11 is if one's a principal and one's an accomplice But if
12 they're both principals, there's no basis for a hand of
13 one charge if they're both principals --

14 MR DURANT They're both principals Principal
15 just distinguishes them between accessory before the fact
16 and accessory after the fact.

17 MR BUTLER You mean they're both principal
18 first or principal second?

19 MR. DURANT They're both principals to the
20 principle crime It makes no difference in sentence or
21 anything, or indictment or anything You've got accessory
22 before the fact, you've got accessory after the fact. If
23 they're present-aiding and abetting, they're principals

24 MR. BUTLER They're not --

25 MR. DURANT And once again --

1 THE COURT One at the time

2 MR BUTLER Whoever shoots is the principal
3 first Whoever drives is principal second Whoever goes
4 in the store and robs the stores is the principal first.
5 Whoever drives the get away car is principal second. They
6 can both act as principals That academic discussion is
7 really not so relevant here

8 My point is this He can't use a hand of one
9 charge to compensate for the deficiencies in their case
10 and hope that the jury just finds them both guilty And
11 that's what Leonard stands for and I will speak to the
12 facts of that in a minute

13 The only testimony is that there were shots
14 coming from the truck where three people were The only
15 testimony that gets this case past directed verdict as it
16 relates to Mr. Ward is from Tremayne Washington and
17 Catrell Douglas, both of whom say they didn't have
18 anything to do with it. So the State's principal
19 evidence -- let me finish, the State's principal evidence
20 is that John was shooting and that they're just along for
21 the ride and that they didn't do anything Based on their
22 testimony, they're not guilty of anything So I don't see
23 how they can -- the State can have it both ways

24 And what Leonard stands for, Leonard was a
25 reckless homicide case where the only issue was who was

1 driving the car And the judge -- trial judge submitted
2 to the jury hand of one, hand of all One would have been
3 driving, one was the passenger, they couldn't figure it
4 out So since they couldn't figure out who was driving,
5 the trial judge at the State's request charged accomplice
6 liability and the jury found them both guilty And what
7 Leonard stands for in part is that you can't use a hand of
8 one charge to compensate for your deficiencies in your
9 case to determine who the principal is

10 So for the State to -- for the State to ask for
11 it on this evidence, I think it's not what a hand of one
12 charge is for and I think it's improper and we object to
13 it And I don't think it's supported by the case that
14 Mr Durant cites.

15 MR DURANT: And neither is the case that he
16 cited It's clearly a vehicular case and says the
17 vehicular cases are clearly different because there can
18 only be one driver. And, you know, that's basically
19 really stretching the straw

20 Once again, and I will argue this from the
21 beginning to end, but the only evidence I have to show is
22 any evidence, that's the standard If there is any
23 evidence to support the fact that these two people were
24 acting in concert doesn't require I have to prove a
25 conspiracy Doesn't require I have to prove a verbal

1 agreement between them It does require that I have to
2 prove any kind of agreement between them other than what
3 can be inferred by their conduct

4 And their conduct is this, like I said, they're
5 friends, they've been friends for a long time. They were
6 at the club together They're identified with a
7 particular group at that club There's a -- lack of a
8 better word, a gang fight between two rival groups.
9 They're part of that fight out there. He's coming across
10 the road He makes the statements that he makes Ward's
11 also been put out there at that fight by Detective Hawks'
12 testimony now They're coming back to the truck when he
13 makes those statements They get in the truck at the time
14 Ton-Ton is coming down here ridiculing the Petersfield
15 people and provoking a fight and they go off. You've got
16 to take into consideration, like I said, Judge, it was a
17 running gun battle going down the street

18 And yes, I know what Catrell Douglas said and I
19 know what Tremayne Washington said and they said the same
20 thing any defendant ever says You know, they start off
21 saying I don't know nothing about nothing and then when
22 you can put them in the truck, well, I was in the truck,
23 but we didn't do anything When you put them in truck and
24 you know they were shooting out of it, well, I was in
25 there, but I wasn't the one shooting and I never heard

1 about anything I didn't know what they were shooting
2 about Of course, they're going to say that But you
3 can't take that out of context to everything else that was
4 going on out there that night between the two gangs. And
5 the fact that Mr -- you know, Mr -- they ditched the
6 truck at his aunt's house The fact that he's washing his
7 hands in bleach the next morning. I mean, it's -- the
8 whole thing indicates that they were up to it -- up to
9 here (indicating) in this thing

10 MR RUNYON And that makes a very good argument
11 that Mr Catrell Heyward and Mr Washington could be
12 accessories after the fact But here's another problem we
13 have, Judge Now, I understand about court administration
14 and all the stuff about the style of the indictment and
15 what have you. But we have --

16 THE COURT I'm glad you understand it.

17 MR RUNYON: Well, I don't agree with it. But
18 here's the problem, we've got two separate indictments,
19 two They're not indicted for acting one with the other
20 Now, if the indictments process, which is mandated by our
21 State Constitution, means anything, it means to put the
22 defendants on notice I mean, frankly, the way we got it
23 right now, it would be far more logical that the jury
24 might just be in a posture to decide between the two of
25 them, you know, take this one, take that one. Not say oh,

1 well, he was the principal shooter and Mr. Washington was
2 hand of one, hand of all The simple fact is, Judge, the
3 indictments are the indictments and they drew them, we
4 didn't We just kind of came to trial And we don't
5 think the hand of one, the hand of all is born out by the
6 evidence in this case.

7 And I understand from a prosecutor's point of
8 view that's what he really believes right down in here.
9 But the evidence doesn't put them in a position of being
10 the hand of one is the hand of all

11 THE COURT All right I will look at those two
12 cases before I make a final decision on that.

13 Anything else on the charges on Mr Washington?

14 MR RUNYON No, Judge

15 THE COURT For Mr. Ward?

16 MR BUTLER Judge, if you do charge hand of
17 one, hand of all, we would request -- well, even if you
18 don't, we request a mere suspicion charge And I think
19 that language comes from State V Schrock That's all I
20 had -- excuse me

21 MR RUNYON State V Horn

22 MR BUTLER Schrock is 322 S E 2nd 450 And we
23 would also request in the context -- this is only if
24 accomplice liability is -- knowledge, in order to be
25 guilty as an aider or abetter, the participant must be

1 chargeable with knowledge of the principal's criminal
2 conduct It's the first part of a mere presence charge
3 I saw that the mere presence part was in there, but not
4 knowledge I wrote down the wrong cite when I wrote this
5 down last night

6 THE COURT They haven't been indicted --

7 MR DURANT If you're talking about he has to
8 have knowledge of the intent to kill, I don't think that's
9 the law in the State He has to have knowledge they're
10 engaging in criminal conduct.

11 MR BUTLER Not knowledge of intent to kill,
12 but knowledge that he's engaged in criminal conduct, sure
13 Beg the Court's indulgence

14 It's in State V Langley, 515 S E 2nd 98, a
15 person must personally commit the crime or be present at
16 the scene -- hold on, that's not it, I'm sorry There it
17 is To be liable as an aider or abetter, the participant
18 must be charged with knowledge of criminal conduct Mere
19 presence at the scene is not sufficient

20 MR DURANT If you include that, I would also
21 request this language, the common purpose may not have
22 been to kill and murder, but if it was unlawful and all
23 present participating in the unlawful common design is as
24 guilty as the slayer

25 MR BUTLER: Well, no, that's already covered

1 the hand of one charge.

2 MR. DURANT I mean, if you want to put that
3 knowledge element in there, that just goes on to
4 distinguish that knowledge of the criminal conduct, but
5 not knowledge of any intent to kill

6 MR BUTLER No, because it doesn't say
7 knowledge with intent to kill You're reading something
8 into it that's not in there There's nothing that deals
9 with the knowledge If you charge the hand of one, hand
10 of all, the hand of one, hand of all is already covered by
11 your charge, but nothing in there --

12 MR DURANT: I think if you charge mere presence
13 and hand of one covers it as it is

14 MR BUTLER Well, we would ask for the
15 knowledge charge.

16 THE COURT. All right

17 Mr Runyon?

18 MR RUNYON Judge, if we've reached the
19 point -- is this the point where I can make a motion for a
20 mistrial?

21 THE COURT. I suppose if you'd like, you can
22 make a motion for a mistrial about any time

23 MR RUNYON Okay Judge, during the course of
24 this -- with all due respect to my friend over here.
25 During the course of this trial, he used the word gangster

1 style and shooting a weapon It was objected to and what
2 have you Just this morning, he reiterated that, using a
3 gun gangster style, we objected and the Court sustained
4 the objection

5 Judge, I understand things can -- how things can
6 go, but the simple fact of the matter is gangster style
7 infers that my client or Mr Ward or both of them are
8 gangsters. And that has a very real impression I mean,
9 we've got one lady who is from the African-American
10 community We've got a lot of people that live in
11 Mt Pleasant and what have you That conveys to them an
12 image of these people are gangsters and therefore, they
13 must have done something If they hadn't done it, they
14 probably will do it and that sort of thing That's not
15 the case and that's not what we've got going here That's
16 certainly not in evidence that on that day in question --
17 or that night in question either one of these people did
18 anything or that Mr Ward fired the gun gangster style or
19 whatever. I really do think that the reference introduces
20 an inference of uncharged and/or unconvicted crimes or
21 maybe even the inference of convicted crimes, which
22 certainly is not proper

23 MR BUTLER. Judge, I would join in that motion.
24 And also point out that the reference was purely
25 rhetorical because they were discussing gunshot angles and

1 there's no way that so-called gangster styles any
2 difference with the angle So it was purely rhetorical
3 And it had been objected to earlier in the trial and
4 sustained So I would join the motion on those grounds
5 And I think I have to at the close of my case since it's
6 finished, renew my motion for directed verdict for all
7 basis previously stated

8 MR. RUNYON And I have to renew my motion for
9 directed verdict

10 THE COURT. Mr. Durant, do you want to speak to
11 that?

12 MR. DURANT Not really, Your Honor I think in
13 the context that it came up, it was not any reference to
14 either one of these two gentlemen It was a reference to
15 a style of holding a handgun when I was talking to a
16 supposed firearms expert

17 THE COURT. I will deny the motion. In your
18 closing, you're not to refer to them as gangsters
19 Speaking of closing, how long will you take?

20 MR. DURANT Do we need to discuss the order?

21 THE COURT. Are y'all going to require that he
22 open on the law?

23 MR. DURANT I don't intend to open on the law,
24 I was just going to close in full

25 MR. RUNYON This is the interesting thing, it

1 always comes up and I've been practicing law a long time
2 Occasionally -- you know, he and I aren't together on
3 this I mean, he's a nice fellow and I would be more than
4 happy to buy him a drink, but we're not together I
5 didn't put in any evidence How come I'm bound on him
6 putting in evidence and not be able to close last?

7 THE COURT Because I can't split the baby on
8 this

9 MR RUNYON Well, I just want to finish off,
10 Judge And I'm making that motion I'm asking, Judge

11 THE COURT All right

12 MR DURANT. I really don't know, Your Honor, I
13 really don't know what I'm going to say yet Twenty
14 minutes maybe Okay I don't know. Thirty minutes. I
15 don't know I've never timed myself, Your Honor

16 THE COURT. Mr Runyon?

17 MR RUNYON: Well, I will talk shorter if you
18 let me talk after both of these guys

19 THE COURT. There's a temptation there

20 MR. RUNYON. I got to throw something out,
21 Judge. I got to throw it out there. I don't know, about
22 the same amount of time Mr Durant is going to take to
23 open. Twenty or 30 minutes at the most

24 THE COURT Mr Butler or Miss Jenkinson?

25 MISS JENKINSON: I think 30 minutes.

1 THE COURT Okay

2 So y'all have a very short opening, then they
3 will take roughly 30 minutes each And then you will have
4 the right to close

5 All right Let's meet back at about quarter til
6 and I will have had a chance to look at those cases and
7 let you know if I made any changes See you back in a
8 little bit.

9 (WHEREUPON, a lunch break was taken)

10 THE COURT Just for the record, you were going
11 to renew your directed verdict motions and I don't think I
12 denied them on the record, so they are denied

13 Also, during, I believe it was Detective Hawks'
14 testimony, we had a bench conference in which the
15 defendants made an objection to testimony by Detective
16 Hawks, which the State offered under 613(b) as extrinsic
17 evidence about a prior statement And I just wanted to
18 note the objection and that I overruled the objection and
19 allowed the testimony I wanted to clear those things up
20 for the record

21 On the jury instructions, the only change I
22 made, if you will look on page six, it would be the first
23 full paragraph. The second paragraph, I added a statement
24 from the Muzon case that says malice as an essential
25 ingredient of murder, that's how it begins, does not

1 necessarily import ill will toward the individual injured,
2 but signifies, rather, a general malignant recklessness of
3 the lives and safety of others or a condition of the mind
4 that shows a heart regardless of social duty and fatally
5 bent on mischief Other than that, that's the only change
6 I make

7 MR RUNYON Defendant Washington respectfully
8 objects to the addition of reinforcing the term malice and
9 we renew our objection as it relates to the hand of one,
10 the hand of all.

11 THE COURT Noted

12 MR BUTLER We share the same objection and
13 object to the failure to charge mere suspicion and
14 knowledge

15 THE COURT You know, I looked at the cases that
16 you gave me and mere suspicion, as I saw it in the cases
17 you suggested, was just the level of evidence on a
18 directed verdict I didn't see a mere suspicion charge
19 that would apply to the facts of this case

20 MR BUTLER Yes, sir It was Schrock, I think
21 I know it's also standard on DV, but it's also a requested
22 jury charge If I gave you Schrock and it's a DV case,
23 that's the one I usually appeal to

24 THE COURT Well, Schrock is -- the only
25 reference to mere suspicion that I could find --

1 MR. BUTLER Mere suspicion, however strong, is
2 not enough

3 THE COURT Yeah, on the first headnote, when
4 motion for a directed verdict is made in a criminal case,
5 the trial judge is concerned with the existence or
6 nonexistence of evidence, not its weight The trial judge
7 should grant a directed verdict motion when the evidence
8 merely raises a suspicion that the accused is guilty.
9 Unless I missed it, that's the only reference to the word
10 mere suspicion.

11 MR. BUTLER. It probably is And I don't
12 know -- there are cases that go to mere suspicion charge
13 that have that language. And I don't know if it's taken
14 from that case or not, but I understand the Court's
15 position Note my objection, please

16 THE COURT Okay Noted

17 All right Then as soon as we get all of the
18 jurors back in, we'll begin

19 (WHEREUPON, the Court received note from the
20 jury)

21 THE COURT All right The jury has -- we have
22 a rather verbose jury foreperson here He likes to write
23 Anyway, I have two questions The first of which is the
24 simplist The jury requests the use in the jury room of
25 the stick that was used in the courtroom that belonged to

1 the defense

2 MR DURANT The stick was not ever offered.

3 MR RUNYON. I will break his stick and then it
4 won't be an issue

5 MR DURANT: Maybe somebody can just send them a
6 broom into the jury room

7 THE COURT Well, that leads to the next one and
8 I suppose it's better to find these things out ahead of
9 time than afterwards, but the jury foreman writes, sir, as
10 a former sergeant in the United States Marine Corp from
11 1965 to 1969, my primary MOS, which means military
12 occupation speciality, was as an ammunition tech and
13 explosive disposal, including -- I guess that's NUC, I
14 guess K and biohazardous material With that MOS, I was
15 not considered nor was I a ballistic expert. However, I
16 was qualified as an expert with the rifle and pistol and
17 was trained as a marksmanship instructor for USMC recruits
18 at MCRD Parris Island, South Carolina, prior to becoming a
19 drill inspector, second battalion, Parris Island, South
20 Carolina The above occurred after 13 months of combat in
21 Vietnam

22 Further, though, there were no records kept due
23 to coactness and security, I was trained as a sniper by
24 the Marine Corp for the CIA I was never activated,
25 however, for that purpose

1 My reason for stating the aforementioned is that
2 in a practical sense, one can say I have a great deal of
3 knowledge in trajectory After all of this, my question
4 to you, sir, is when we reach the stage of deliberations,
5 should I explain my qualifications to my fellow jurors or
6 should I just let my opinion regarding those facts be to
7 my -- facts be my opinion Signed the foreman

8 Any thoughts on that?

9 MR DURANT. Your Honor, quite frankly, I mean,
10 what he tells other people on the jury, we can't say
11 anything about Certainly, doesn't disqualify him. I
12 mean, you know, he certainly was not questioned in that
13 regard in terms of voir dire or anything It certainly
14 doesn't disqualify him from acting as a juror in the case
15 I don't know that the Court can actually instruct him
16 on -- other than not talking to outside influences, I just
17 don't know that you can instruct him on what they're to
18 consider in the jury room

19 MR BUTLER I think I understand his concern
20 His concern is can he appeal to his background when
21 they're discussing things And I think that the thing to
22 tell him is you can consider the evidence and your
23 everyday experiences But no one person's opinion is to
24 be given any more weight than anybody else In other
25 words, I don't think it's appropriate -- and I don't think

1 he's going to do this, but I don't think it would be
2 appropriate for him to say hey, you listen to me I know
3 about these things and you don't His vote and his
4 opinion is no more relevant than the other 11 people.
5 Now, I've never had this come up and I don't know exactly
6 how you communicate that to him, but

7 THE COURT: Well, he seems like a pretty
8 straightforward fellow I think if I just told him that
9 that, you know, he's one of 12 and he can certainly draw
10 upon his life's experiences, however, the jury needs to
11 understand that While he may have a background in that
12 field, he's not an expert He has not been called to give
13 evidence and that to the extent that he wants to talk
14 about things, he needs to limit it to the evidence and
15 they don't need to give his opinion any more weight than
16 any other juror's opinion

17 MR RUNYON Being the only lawyer here that has
18 served on a jury when he was a lawyer, I can tell you that
19 that instruction would be sufficient, but it's still not
20 going to make a bit of difference when you get back there
21 It's kind of a bizarre place, the jury room, be it civil
22 or criminal

23 THE COURT: Well, actually, I think most of you
24 probably -- or all three parties probably feel that it
25 might work to their advantage so, you never know

1 Okay Well, with that in mind, I will talk to
2 him about that after I charge them

3 Are all of the jurors back?

4 MR RUNYON Judge, it might -- may be a time
5 when you talk about the jury verdict or something like
6 that

7 THE COURT I'm sorry?

8 MR RUNYON. The time to maybe give them an
9 instruction about the duties as a juror might be somewhere
10 in just before you talk about the form of the verdict.

11 THE COURT That's fine, that's what I intend to
12 do Once I finish the charge, I would address their
13 notes

14 MR RUNYON All right

15 THE COURT All the jurors are back Is
16 everyone ready?

17 MR DURANT Yes, Your Honor

18 MR RUNYON Yes, sir, Your Honor.

19 THE COURT Bring the jury in

20 (WHEREUPON, the following proceedings were held
21 in the presence of the jury)

22 THE COURT Ladies and gentlemen, as I told you
23 before lunch, now you've heard all of the testimony in the
24 case We will now move to that portion of the trial which
25 you're going to have closing arguments by the lawyers and

1 then I will charge you on the law that applies to this
2 case. I will remind you just as I did at the beginning of
3 the trial that the closing arguments by the lawyers are
4 not evidence They're simply now going to summarize the
5 evidence that you've heard, argue the law as they
6 anticipate I will charge it and try to convince you to
7 render a verdict in their client's behalf

8 At this time, the procedure that we follow is
9 the State is to open on the law, so to speak Mr. Durant
10 will make a brief opening statement at this point, then
11 the defendants will have the opportunity to make a closing
12 argument And then Mr Durant on behalf of the State will
13 have the opportunity to close in full After that, I will
14 charge you on the law and then you will render your
15 verdict after deliberations

16 Mr Durant, when you're ready, you may begin,
17 sir

18 MR DURANT Your Honor, the State would waive
19 opening on the law and close in full

20 THE COURT. All right Mr Runyon?

21 MR RUNYON Mr Foreman, ladies and gentlemen
22 of the jury, the hardest part about a criminal case is
23 that it's real serious, serious for the State and serious
24 for the defendant This case is particularly difficult
25 because someone died in this whole incident And we can't

1 overlook that, we just can't

2 Now, having said that, however, your duty --

3 I've been practicing law for 37 years and I don't know of
4 a single jury that I've seen that didn't do it, but your
5 duty is to take the evidence presented to you In this
6 case, primarily by the State, although there's evidence by
7 way of cross-examination and what have you, take the
8 evidence presented by the State and conclude that it
9 proves beyond a reasonable doubt that Mr Washington had
10 something to do with this, more than just getting in the
11 back of his truck intoxicated

12 They have a high standard and, frankly,
13 Mrs Kent and Mr Butler will be representing or are
14 representing very ably Mr Ward I'm not going to get
15 into their territory, but the simple fact of the matter is
16 that you're going to have to conclude as a part of this
17 that one of these gentleman, primarily, according to the
18 State's theory of the case, Mr Ward shot the gun that
19 delivered the fatal shot to this victim.

20 It's that simple and that complicated Because
21 on the night in question -- and we're not suggesting to
22 you this is the way a neighborhood should be But on the
23 night in question, there was something in the club And
24 the lady in question, as I recall the testimony, delivered
25 either a right or left cross to one of the gentlemen and

1 knocked his cap off his tooth She must have had a pretty
2 powerful punch And some disturbance occurred and it
3 moved outside and what have you

4 Based on the testimony that you've heard, the
5 shooting occurred, the shooting occurred. Now, I don't
6 know why people shoot when these things happen, but it
7 did It came from down the road It came from up the
8 road. It came from all over

9 When everything kind of semi-calmed down, the
10 deceased was laying in the ditch, so to speak, not in that
11 ditch, but laying on the downward slope fatally injured
12 It was a 9-millimeter weapon that fired the projectile

13 Now, Mr Washington was there that night He
14 was in the club Mr Washington was drinking.

15 Mr Washington was in his truck The gentleman driving
16 the truck said look, I was driving the truck
17 Mr Washington gave me the keys, pulled it up Nobody
18 ever discussed anything about shooting anybody or getting
19 involved in anything, but a lot of things happened

20 And we got in the truck, Mr Ward got in the
21 truck and all of a sudden, he says -- I don't want to
22 misstate it He thinks Mr Ward shot the gun out the
23 truck, not Mr Washington Nobody agreed to do this,
24 nobody discussed doing this, nobody said yeah, get the gun
25 and shoot at those people or anything like that

1 So His Honor is going to talk to you about the
2 hand of one is the hand of all Well, you've got two
3 problems here One of the basic foundations of the hand
4 of one is the hand of all is that you kind of have an
5 agreement You kind of have a concert of action implied
6 or inferred Here, the only thing they were trying to do
7 from all of the evidence until -- under the State's theory
8 of the case now, Mr Ward allegedly fired the weapon, was
9 to leave there because things were getting a little bit
10 hairy You had a gunfire over here You had gunfire from
11 up the road And they found some 40-caliber shells up
12 there I mean, I don't know what it was, but a lot of
13 people had a lot of guns and a lot of people were
14 shooting

15 Now, the State has got to present -- I mean, you
16 could go back in the jury room and say sure, somebody is
17 dead, we will just convict these people You can do that
18 That's not your duty It really isn't Your duty is to
19 find beyond a reasonable doubt the State has proven their
20 theory of the case Their theory of the case is Mr. Ward
21 fired out the window and Mr Washington was somehow
22 involved and Mr Simmons died as a result

23 Now, you heard from the last gentleman, the
24 witness got on the stand for Ms. Kent and Mr Butler and
25 he talked about angles and he talked about elevations and

1 all that sort of stuff And my friend over here, he got
2 up and said all of that doesn't make any difference. All
3 that doesn't make any difference It doesn't matter how
4 high you're sitting in the truck, it doesn't matter where
5 you are They can't justify it They can't make where
6 the victim was standing behind his car and lying below
7 grade of the road, they can't justify all of these
8 physical factors with the level of the gunfire that
9 entered -- now, I'm not worried about where it went
10 because it went and it did some fatal damage. But you've
11 got to judge where it went in

12 And let me tell you something, they have the
13 gentleman They brought him in here from SLED, one of the
14 preeminent ballistic people in the southeast And,
15 frankly, if we were doing one of these reality shows on TV
16 and betting on preeminent ballistic people in the country,
17 I would put my money on him, too

18 Let's narrow it down to the southeast He told
19 you, his testimony was, that that bullet that they took
20 out of the young man's body was damaged and separated most
21 probably during the course of going through his body
22 There's no evidence, no testimony that bullet struck
23 anything or anything else So a level shot ends up here,
24 right here, (indicating) and the bullet graze was across
25 the back here. And you can jump somebody up and down or

1 turn to run like this or however they want to theorize it
2 The simple fact is that you've got to deal with the
3 evidence they present I will tell you why Because
4 Mr Murphy, he was the third witness, he said he saw shots
5 from the truck as it headed down the road. That doesn't
6 really coincide with what a lot of other people said. He
7 saw a truck -- or gunfire from the road -- from the truck
8 as it headed down the road

9 Now, if that's the case, then no fire from that
10 truck could have struck the deceased because he's standing
11 kind of behind his car It just didn't happen that way
12 It just didn't happen that way The 9-millimeter shot
13 came from somewhere else And, of course, the preeminent
14 ballistic expert told you that there's a whole list of
15 9-millimeter weapons and it's a very popular caliber of a
16 gun to have these days I don't know, I've been down
17 around the Hollywood area numerous times late at night and
18 I've never had to have any kind of gun, but some people
19 feel comfortable with them

20 Now, there was even one witness who said that he
21 thought the gunfire came from back here in the parking
22 lot But you still can't put the deceased on the same
23 level as the shooter You just can't do it He's
24 standing below grade The geography and the topography is
25 important. He's standing below the grade of the highway,

1 kind of down in the ditch, not all of the way down in the
2 ditch but below the parking lot or what have you, and he's
3 hit by two shots, both of which are straight level,
4 horizontal to the ground, horizontal at least,
5 180 degrees

6 And Dr Presnell, she came in here and she told
7 you how thorough she was, and the simple fact of the
8 matter is, is you can't change that physical evidence.
9 You just can't change it And your job, I would
10 respectfully submit to you, is not to try to figure it out
11 with some other explanation other than based upon the
12 evidence that the State has presented to you

13 Now, could this have been different? Yeah, I
14 guess it could have See all of these measuring things
15 and these markers? And you saw Mr Wenger's pictures
16 Mr Wenger, who is now out on disability, he's a
17 meticulous man, really meticulous He went over and put
18 things, took pictures of them and he had a measurer there
19 so you could have some perspective You know, when you
20 take a picture of something close up like he did on the
21 Cadillac, for example, you can't tell how big the door
22 handle is I mean, you really can't But if you put a
23 measurer there -- and there's a picture of the hole in the
24 Tracker 41 inches above the ground And in the pictures,
25 videotape and all that sort of stuff that was taken, the

1 Tracker is shown on the road But you've got to remember,
2 the Tracker was behind the Accord Now, 41 inches, we
3 know one thing, we don't know, you know, the angle of the
4 bullet in that car It went all over the place, which is
5 not unusual But when it went in, it went in straight,
6 41 inches above the ground

7 Now, are those reasonable doubts? I would
8 submit to you they really are And it's tough I would
9 submit to you that -- on behalf of Mr Washington we're
10 not saying that Mr. Ward fired any fatal shot because the
11 geography and the terrain, it just doesn't add up
12 Assuming for the sake of argument, if you believe and you
13 conclude for the sake of argument that Mr Ward or
14 Mr Washington fired a shot out of the car, but all of the
15 evidence is that Mr. -- it says that -- if anybody says
16 Mr Ward did anything or Mr Washington did anything, you
17 heard it from the driver of the truck and what have you
18 It just couldn't have happened There were numerous guns
19 out there and there were other people shooting around.

20 Now, the interesting thing is is that despite
21 all of the hunting with the metal detectors, they never
22 found other shell casings They never found spent
23 projectiles, which is not unusual You know the old
24 saying about fire an arrow in the air, where it goes, I
25 know not where That's what happens when you fire a

1 projectile It can go a particular range and then strike
2 something and goes another way and who knows where it
3 goes

4 Simple fact of the matter is is the State is
5 presenting to you -- and His Honor is going to tell you
6 what the law is His Honor is going to tell you So if I
7 say something about the law that doesn't agree with what
8 the bench says, you take what he says I respectfully
9 apologize if I do, but, hopefully, I don't I don't think
10 I will But you take the law as His Honor says it

11 The facts are your province, however I would
12 respectfully submit to you that the State has not proven
13 that Mr Washington was part and parcel of any shooting by
14 agreement or tacit understanding or anything else

15 I will respectfully submit to you that the
16 circumstances would reflect -- and I'm not going to get
17 that stick from my friend over there -- that a shot into
18 the Tracker parked here came from some distance away at a
19 level of about 41 inches because that's where it hit the
20 Tracker The truck puts you 51 inches above the ground to
21 even start playing with the figures about whether or not
22 this is two inches higher or this is way out here or what
23 have you But the simple fact is the Tracker is here and
24 he gets hit We don't know the caliber of weapon that
25 hits the Tracker, by the way It could have been a

1 9-millimeter It could have been one of those other guns
2 And, obviously, with the Tracker facing this direction, it
3 came from somewhere down in here

4 The deceased is over here, not really behind
5 this sign This sign is not -- this is not a 3D diagram
6 This is a conceptual diagram But he's down here
7 There's a car There's a sign on the side of the road.
8 There's Mr Simmons' car and there's Mr. Simmons This is
9 below grade This is above where Mr Simmons was
10 standing It shot straight level And the State can say
11 oh, well, we don't worry about that We're not concerned
12 about that The simple fact is they didn't take the
13 measurements that night and someone made a decision not
14 to Maybe it was too many people each doing one thing and
15 no one directing, but they didn't take the measurements
16 They didn't attempt to arrive at that conclusion based
17 upon where was the body lying, what's the ditch with
18 regard to the parking

19 And in this, there are some other interesting
20 factors You hear Detective Hawks -- and I don't
21 understand this I really don't Mr Washington had been
22 drinking Everybody at the club had been drinking And
23 he really shouldn't. The worst thing you can have is
24 alcohol and guns and cars But the simple fact is
25 everybody there had been drinking Went there, you know,

1 you go out on a Saturday night, have a good time Go to
2 church on Sunday morning and make up for it So
3 Mr. Washington had been drinking Big surprise, big
4 surprise

5 And Mr Durant made a big -- I wouldn't say big
6 deal, but made a point of asking Detective Hawks well, did
7 Mr Washington shower or clean up or what have you He
8 didn't smell like he had been drinking a lot. Well, is he
9 saying that he cleaned up and that's why he didn't smell
10 like he had been drinking? What does that have to do with
11 it? Really and truly? He was in the back seat of the
12 truck The back seat of the truck And Mr Heyward said,
13 next morning when the police were around trying to sort
14 things out, they said come on over here to Petersfield
15 And they got cleaned up and they went over I don't know
16 many people who don't get up in the morning, brush your
17 teeth, wash your face, sometimes take showers if you can
18 get to the bathroom, so to speak, if you have enough
19 bathrooms and don't have a whole lot of people But the
20 simple fact is that there's no question about the fact
21 that Mr Washington had been drinking

22 Now, I don't know if you can hang anything on
23 this so-called Petersfield-Cherry Hill kind of thing I
24 can tell you the fact that people live in different
25 geographic areas maybe there's some geographic animosity

1 from time to time, but that's just kind of -- I mean, he's
2 from Petersfield and he's from Cherry Hill Well, you
3 know, they got to be feuding They got to be mad at each
4 other I'm not sure what that's all about The simple
5 fact of the matter is is that Jamie Simmons was from
6 Petersfield He's dead So under the theory of the --
7 the State's got you following theories.

8 Under the theory of the State is that he was
9 accidentally shot by somebody from Petersfield, okay.
10 They didn't intend to shoot him Or, perhaps, under their
11 theory of a big feud -- anyway, it wasn't like the
12 Hatfield and McCoys because it didn't reach into the
13 governor's office of two states, didn't have a case go all
14 the way to the United States Supreme Court I know about
15 that And it wasn't about control of the very lucrative
16 timber market in the Tug River and Ohio River valleys. It
17 was just people maybe not liking each other because of
18 where they live.

19 But the simple fact is, is the legitimate issue,
20 if you're going to say it's some sort of neighborhood
21 thing, that someone from Cherry Hill was shooting, maybe
22 not even intending to hit him, just shooting, who was at a
23 level that could have inflicted that fatal wound

24 That gentleman I told you about, Mr Murphy I
25 believe it was, he says after the truck went by, I noticed

1 Jamie had gone down I saw him standing there beside the
2 car Well, the truck goes by You're standing where you
3 are and assuming that you're standing behind the car like
4 this jury rail here. You're not going to get shot in the
5 side of your arm You're just not going to do it And
6 the fact of the matter is Mr Durant -- and legitimately
7 so, said well, if you turn to run like this and down here
8 like that. The problem with all of those scenarios is
9 that when you take a 5-foot 9-inch man and you start
10 having him out of there, getting low, his arm goes down,
11 his arm gets lower 180-degree shot that started here,
12 came from about level -- I mean, if you have them turn to
13 go, you have them crouch down. If you have them kneel
14 down behind the car, that means the gun was on the level
15 with him Didn't come out of that truck.

16 So here is what I'm asking you to do I'm
17 asking you to find because the fatal shot -- and this is a
18 problem, they didn't even prove it came from that gun.
19 But the simple fact is I'm asking you to find
20 Mr Washington not guilty There's no proof that anybody
21 agreed to do this I mean, it's a spur of the moment
22 thing At the very best, it was a spur of the moment
23 thing as a result of somebody else shooting. But the
24 simple fact is, Mr Washington didn't agree to it. He
25 didn't tell Mr. Ward to fire the shots And the State

1 hasn't proven beyond a reasonable doubt that the fatal
2 shots were fired by a weapon in that car They just
3 haven't done it So you have the task of wrestling with
4 this issue and deciding beyond a reasonable doubt that the
5 State has or hasn't done it If you can't reach that
6 decision, then your duty is to return a verdict for the
7 defendants It's that simple and that complicated and
8 that difficult

9 Now, I'm going to sit down in a minute and
10 Mr Ward's lawyers will have a chance to talk to you. I
11 apologize, it's has been a relatively short trial, but I
12 apologize if I've said or done anything during the last
13 three and a half days that has offended you I've only
14 been doing this for 37 years and it's still practicing.
15 But if I have done something that offended you, get me
16 down the road for it But I do apologize if I've done
17 something that's offended you other than take up your very
18 busy time with this case This is an important time for
19 you It's an important time for the State It's an
20 important time for Mr Washington I'm going to sit down
21 now

22 Thank you for your attention Thank you for
23 your consideration and ask you to find Mr Washington not
24 guilty because they haven't proven beyond a reasonable
25 doubt that the shots that killed this young man even came

1 from that truck Under their theory of the case, he
2 certainly didn't fire them There is no agreement or plan
3 or anything else put in evidence to cause anyone to fire
4 those shots from that gun Therefore, I would ask you to
5 find Mr Washington not guilty. Thank you

6 THE COURT Miss Jenkinson?

7 MISS JENKINSON Thank you, Your Honor, may it
8 please the Court

9 John Ward was not fighting anyone He was not
10 shaking anybody's car John Ward did not make any
11 threats John Ward should have picked better friends
12 Jamie Simmons was in the wrong place at the wrong time
13 John Ward was in the wrong place at the wrong time.

14 The people out at that club that night did not
15 see John Ward with a gun. This all comes down to two
16 people, Catrell Douglas and Tremayne Washington, two
17 admitted liars The State is asking you to believe two
18 people who are charged with murder, two people that the
19 State would convict of murder, two people that are looking
20 at spending the rest of their lives in prison Their fate
21 is in the hands of that man who represents the State

22 You heard from them, they're not guilty, they're
23 not guilty of anything They didn't admit anything to
24 you. They want their charges dismissed

25 Catrell Douglas said he might be guilty of a

1 misdemeanor, misprision of a felony It's not a
2 coincidence that Catrell Douglas spent 18 months in jail
3 and he testified this past December and now he's out of
4 jail It is also not a coincidence that he's still
5 charged with murder. And that is because the State can
6 still have control over him if he's still charged with
7 murder

8 Tremayne Washington, the State's own witness,
9 and you heard his testimony, is now sitting over there on
10 trial himself for murder. It's not a coincidence that
11 when Catrell Douglas was speaking to the police, he gave
12 them a statement. And the only two names -- out of all of
13 those people who were out at that club that night, the
14 only two names that he mentioned were Tremayne Washington
15 and Catrell Douglas And you know why that is? He was
16 asked about those two guys The cops wanted to know about
17 them Catrell Douglas is John's cousin Just about
18 everybody we heard from this week are cousins. They're
19 related in some way Seems like everybody in that area is
20 related The bottom line is that Catrell Douglas and
21 Tremayne Washington, as they admitted to you, do not want
22 to go to prison You heard what that's called It's
23 called pine box time. You leave in a pine box

24 They both admitted to you that they lied
25 Tremayne lies and then he lies about what he lies about

1 Catrell calculated his lies He knew his fingerprints
2 would be in that truck, so he said he had been in that
3 truck a couple days earlier Douglas was pushed by the
4 cops. He gave three statements and not until his third
5 statement, the last sentence on the last page of that
6 short statement mentioned John Ward And did the cops ask
7 him anything else? No They stopped right there That
8 was all they needed to hear That's not just a
9 coincidence

10 They had already asked him, they had already
11 said did John Ward shoot a gun and he told them no Then
12 they asked him had Tremayne Washington shot a gun and he
13 said I don't know. Why doesn't he just say no, that
14 Tremayne hadn't shot a gun? Why did he switch and say
15 later that John Ward had a gun? Because they kept pushing
16 him that John Ward was the shooter Ask yourself what
17 would have happened if Catrell Douglas had said Tremayne
18 Washington was the shooter John wouldn't be sitting over
19 there today. If they had said Tremayne, the cops would
20 have gone with that You heard how many times they lied
21 to you to benefit themselves The oath that they took
22 over there, that doesn't mean anything to them How many
23 times can the State rely on lies to prove their case?

24 You have to give Catrell Douglas and Tremayne
25 Washington a little bit of credit At least they

1 admitted, like some other witnesses that we heard from,
2 that they were lying They're not completely responsible.
3 They were fed this story and they were fed this story by
4 people who thought they knew the truth

5 We're here because the authorities decided way
6 too early what happened We wouldn't have to speculate
7 and you wouldn't be in the position that you're in We
8 don't know what happened in those interrogation rooms.
9 And if we had video, we wouldn't have to question We
10 live in the 21st century where our cameras have video
11 cameras -- excuse me -- our cell phones even have video
12 cameras, but we don't have any documentation of what
13 happened. The reason we don't have any video and the
14 reason why we don't have any audio, they don't want us to
15 know what happened in those interrogation rooms They
16 didn't want any evidence Catrell Douglas and Tremayne
17 Washington told them what they wanted to hear Neither
18 Douglas nor Washington nor the cops can go back and change
19 it because they're stuck with it now

20 The State doesn't even know what happened and
21 now they're asking you to decide what happened Don't let
22 them impose their inability to know what happened on you.
23 The solicitor gave you a very detailed opening statement,
24 but you never heard any evidence of who was doing the
25 shooting There was no evidence that John Ward was the

1 shooter because the solicitor knew that Tremayne
2 Washington had the means and Tremayne Washington had the
3 motive You heard what Tremayne Washington said out there
4 that night When the fight was going on around the truck,
5 he said we'll handle that Some bitch gonna die tonight
6 Johnny Buncumb told you that Tremayne Washington wants
7 you to believe that he was out there helping Johnny
8 Buncumb break up fights But he was saying some bitch
9 gonna die tonight

10 Tremayne Washington tried to get his friends and
11 family members to lie for him He wanted to cover
12 himself The next morning, he was washing his hands with
13 bleach I can't come up with any other reason why you
14 would be washing your hands with bleach the morning after
15 a shooting, but to remove any evidence, any evidence that
16 you were shooting a gun Don't you think that with all of
17 those people that were out there that night that if John
18 Ward had said something like some bitch gonna die tonight,
19 you would have heard it Don't you think if John Ward was
20 shaking a truck, you would have heard it.

21 The State will probably tell you that they don't
22 have to prove motive But what is John Ward's motivation?
23 That he's from Petersfield, that his family lives in
24 Petersfield, that his friends are from Petersfield?
25 Tremayne Washington also had the means. He owned the

1 truck that was out there It was his gun Somebody from
2 SLED even came down here and told you that the gun was
3 registered to him He keeps it in the center console of
4 his truck And he said he's in the back seat of the truck
5 where he can move around and shoot from either side of the
6 truck

7 There are way too many physical impossibilities
8 in this case Even the people who were out there couldn't
9 see what happened You never heard from anybody out there
10 that they saw John Ward in that truck with his arm out the
11 window shooting a gun. No one saw a gun extended from the
12 truck These are the same people who were running,
13 ducking, trying to get to their cars because they didn't
14 want to be shot themselves

15 Two 9-millimeter shell casings You heard those
16 were found in the driveway by the club the next day by
17 crime scene But from the evidence that we heard here, we
18 know of at least three shots We have one shot that went
19 through the GEO, one through Jamie Simmons' chest and one
20 that grazed his back We know they didn't find all of the
21 shell casings out there

22 Things just don't add up You heard from crime
23 scene officers who weren't very straightforward with us
24 Officer McManigal You heard from him on direct He
25 answered the solicitor's questions and he told you that

1 the bullet in the GEO came through the back of the truck,
2 went straight, hit the seat of the GEO and then deflected
3 up I believe his exact words were, it was not going up
4 and it was not going down. And if you have any question
5 about that, you can have the court reporter play that back
6 for you But then when he was asked by any defense
7 attorney, he said that he didn't use a level, wasn't sure
8 if it was straight Why do you think on direct he talked
9 about the path from the seat to the windshield, it went
10 up It was significant to him and he showed you a picture
11 of that He didn't use a level, okay, but he didn't
12 realize that that was a problem. He didn't realize it was
13 a problem until somebody from the defense was asking him
14 questions Didn't know what the problem was, but he knew
15 it could potentially be a problem And why is that a
16 problem? Because the shot had to be fired at 41 inches,
17 not from something or somewhere that was higher than the
18 Tracker.

19 You have to give him credit because he was
20 thorough He brought you pictures back He brought you
21 pictures of the metal pole coming through the seats where
22 it showed you the trajectory. But the State probably has
23 brought you the most renowned firearms expert in the
24 state And Mr. Runyon told you that as well He has been
25 examining firearms for a long time, before I was born.

1 And don't you know that the State asked him about that
2 bullet trajectory But you didn't hear from him in here
3 and that's because they didn't like what he said because
4 don't you know he would have asked

5 Jamie Simmons was standing, that's what we have
6 in evidence Not that he was running and not that he was
7 crouching down, but he was standing by the ditch

8 Catrell and Tremayne in their story say that
9 John Ward was shooting out of the truck like this It's
10 impossible The pathologist, Dr Presnell, told you. She
11 said that the bullet entered Jamie Simmons at an angle
12 through the arm and went upwards and lodged in his chest
13 The shot could not have come from the window of the truck
14 in the parking lot above Jamie Simmons It really doesn't
15 matter if he was running. It doesn't matter if he was
16 bending down He would still have to be higher than the
17 truck Mr Durant turned this way and tried to say he
18 could have been shot this way But if Jamie Simmons had
19 turned this way, the shot would have come from the road
20 Maybe that's what happened, I don't know The bullet goes
21 up, not down and that is not insignificant The grazing
22 goes straight across his back, not down.

23 There are other impossibilities Shell casings,
24 they go to the right of the gun Officer James told you
25 that If what Catrell Douglas and Washington said were

1 true, he said the gun was out this way The casings were
2 going to go to the right There is no way that all the
3 casings were found More than one witness told you that
4 shots were coming from different places And you also
5 heard that from Deputy Frichtl, who is a trained law
6 enforcement. There were so many shots that he had to
7 leave He had to leave and return later when it was safe
8 to come back How many times can you defy the law of
9 physics and still try to make it work? It doesn't work
10 The cops were misguided. They decided too early and now
11 they are left to explain away the physical
12 impossibilities There is no credible evidence that John
13 Ward was the shooter

14 This is a tragedy It is perfectly okay to feel
15 sorry for Jamie Simmons and his family If you were here
16 today to decide whether this was tragic or not, the
17 decision would be easy for you But you have to set that
18 aside The State isn't here asking you to feel sorry for
19 them What they're asking for today is they're asking you
20 to depend on the word of Catrell Douglas and Tremayne
21 Washington and decide that John Ward does not deserve to
22 live amongst us. That John Ward doesn't deserve to have
23 breakfast with his children or to take them to the park
24 They want to take that away from him And that has
25 nothing to do with sympathy and emotions. This tragedy

1 would be impounded if a young man was sent to prison for
2 something that he did not do

3 John Ward did not fight He did not shake the
4 car He did not threaten anyone You, as jurors, have an
5 awesome responsibility You have a huge decision to make,
6 but you must make a collective decision as a jury. But
7 the most important thing is that you must form your own
8 opinion and you must stand strong behind that opinion.
9 And when you're back there deliberating, you must voice
10 that opinion You must not compromise your opinion for
11 the sake of the group because each of you must decide if
12 these witnesses were telling the truth You must decide
13 if these witnesses were believable beyond a reasonable
14 doubt If you don't think that Catrell Douglas and
15 Tremayne Washington were telling the truth, you must find
16 John Ward not guilty If you can't decide who was the
17 shooter out there that night, you must find both of these
18 men not guilty You cannot compromise

19 You are then back, again, to do you believe
20 these two guys beyond a reasonable doubt The State is
21 going to ask you to decide John Ward's fate on the
22 testimony of these two admitted liars Why? Because by
23 the other evidence, it is physically impossible The
24 simplest explanation is usually the right one And in
25 this case, it is the right one It didn't happen that

1 way If it did, you would not have to rely on Catrell
2 Douglas and Tremayne Washington Make Mr Durant persuade
3 you, make him convince you that these two people are
4 believable Are these two people that you would ask for
5 directions, take their advice, depend on them? Make him
6 convince you beyond a reasonable doubt that you should
7 believe them, that you can trust them, that you can take
8 their advice You're stuck with that because all other
9 explanations are impossible It didn't happen the way
10 they wanted it to, so you must find John Ward not guilty

11 THE COURT. Mr Durant?

12 MR. DURANT Thank you, Your Honor

13 I would like to start out by thanking each and
14 every one of you for your service as jurors in this case
15 And I don't usually do this, but I have to say you're
16 about as attentive a bunch as I've ever seen up here in a
17 long time And -- I mean, believe me, I've put them to
18 sleep before I even got up here to give my opening
19 statement, but I haven't seen any of that on this jury
20 And I do want to let you know I appreciate it because I
21 know the stuff is boring to you, and it gets boring to me
22 And you know, there are certain things that we have to go
23 through to get from point A to point B by virtue of the
24 rules of evidence, so on and so forth

25 And I appreciate you bearing with us And if I

1 seem like I'm an irascible old man at times, it's because
2 I'm an irascible old man But I don't apologize for that
3 and I don't apologize for the case I try and the case I
4 bring in front of you today and that I have brought in
5 front of you yesterday and all this week

6 You know, your job as a jury is not an easy job
7 and I know that. As the Judge will charge you here in a
8 minute, your job in this case is to be the finders of the
9 facts Sift through the evidence that you've heard up
10 here on this witness stand and whatever physical evidence
11 we may have up there that you've heard over the last three
12 and a half days and you have to tell who is telling the
13 truth and who is not And you do that by finding what the
14 facts are and applying them to the law that the Judge will
15 charge to you and find a verdict that speaks the truth,
16 that speaks the truth for Mr Tremayne Washington and John
17 Henry Ward and for the State of South Carolina and for
18 Jamie Simmons, who is not here to speak for himself today

19 And it's not easy for you because unlike TV,
20 unlike CSI, this is precisely the kind of case you get
21 outside of a nightclub in Hollywood, South Carolina, at
22 3 00 in the weekend morning Signs can sometimes point
23 you in the right direction, but it can never tell you who
24 is telling the truth and who is not and that is why we
25 have juries And that's why we have always had juries and

1 that's why we will always have to have juries

2 And the only thing you need to bring to the
3 table to do your job is your common sense and your life
4 experiences and apply that to what you've heard on this
5 witness stand and whatever evidence is provided to you and
6 you'll have no problem finding out what the truth is in
7 this case.

8 Because there's a thread of truth that runs
9 throughout this entire case and, basically, there's only
10 one real story of what went on out there that night. I
11 know it may be sometimes difficult for you to grasp that
12 thread because you've heard from witnesses who may have
13 not told the truth initially and then they gave another
14 statement and gave a little bit more of the truth and
15 another bit more of the truth and that's just the way
16 things work

17 I mean, they all remind me -- I don't know if
18 any of you have children, but they all remind me of the
19 child caught with his hand in the cookie jar You go in
20 there and you see the hand in the cookie jar, were you
21 taking the cookies? No, I was just looking to see what
22 was in there Well, I mean, what's all those crumbs on
23 the floor and all over your mouth and all that? Well, I
24 was just seeing what was in there Well, maybe I ate one,
25 but I just ate one Well, I mean, I was in here five

1 minutes ago and that jar was full and now it's empty. You
2 and I are the only ones that have been in here Okay,
3 okay, I ate the cookies

4 You know, isn't that the same thing we have
5 here? And that's the way it always happens, particularly
6 with Catrell Douglas and Tremayne Washington. You've
7 heard what they had to say and I'm not up here to tell you
8 that everything they said was true Because they all
9 started out with I don't know nothing about nothing
10 Well, I mean, you were sitting in the truck? Well, I was
11 in the truck, but I don't know anything about any
12 shooting Well, people saw shooting coming out of that
13 truck? Oh, well, that happened after I got in the truck
14 or that was somebody else shooting out the truck
15 Eventually, they come around to some resemblance of the
16 truth And I will get to Mr Ward here in a moment But
17 if it were just those two pointing their fingers at John
18 Ward, we wouldn't be here today But you have more in
19 this case than that

20 And what do you have in this case? I can say
21 based upon the testimony that you've heard the last three
22 and a half days -- and I hate to keep going over the same
23 thing with these witnesses, but there's a method to my
24 madness Keith Richards, who is the guy from Petersfield
25 who was fighting with Shaquinta, who is the mama of his

1 baby, at this nightclub She is dancing with a guy from
2 Cherry Hill Okay

3 Now, number one, he doesn't like her dancing
4 with somebody else anyway He surely doesn't like her
5 dancing with somebody from Cherry Hill because you've
6 heard what the witnesses said about Cherry Hill and
7 Petersfield They don't, like, get along And as much as
8 Mr. Runyon and Miss Jenkinson may want you to have you
9 believe oh, this is just a place that they live, how many
10 of you have your subdivisions tattooed on your forearms
11 That's what Petersfield is That's what Cherry Hill is

12 Anyway, that happens inside the club Cherry
13 Hill guy comes up and sucker punches Keith Richards. A
14 fight breaks out, it's broken up and moved outside the
15 club It turns into a brawl outside between Petersfield
16 and Cherry Hill. It kind of resolves around or begins
17 resolving around this Suburban of Kevin Dunmeyer, who is
18 from Cherry Hill and is trying to spear Raulo, Raulo being
19 the guy that Keith Richards was fighting inside the club
20 But the Petersfield folks aren't happy about that, of
21 course. And they're trying to get at Raulo, hence, the
22 Suburban And they are a part of that crowd They are
23 Petersfield

24 Dunmeyer gets chased by the Petersfield folks up
25 toward Toogoodoo Road, towards Baptist Hill. At this

1 point, Ton-Ton arrives on the scene, the fame lime green
2 Cadillac Well, Ton-Ton is Cherry Hill and what does he
3 do? Number one, he's out there trying to run over the
4 Petersfield people Number two, he goes up and rescues
5 Kevin Dunmeyer Comes back, tries to run over the
6 Petersfield people again out in the road Stops his car,
7 gets out of the car, talks to Petersfield people, making
8 obscene gestures, provoking a fight and he gets what he
9 wants They go after him again. Kenneth Sanders tries to
10 punch him through the window of the car. He takes off,
11 Kenneth Sanders gets knocked down by the car He goes
12 down a little bit further and stops in that area right
13 where Mr. Tremayne Washington's truck is coming out of the
14 parking lot The Cadillac stops again, they start
15 throwing bottles out of the Cadillac At this time, the
16 truck takes off going after the Cadillac and they're in a
17 running gun battle going down Toogoodoo Road It starts
18 shooting at them before they even get out of the parking
19 lot

20 Okay We know in that truck that Catrell
21 Douglas was driving and we know that Tremayne Washington
22 was in the back seat and we know that John Ward was in the
23 front passenger seat And we don't have to rely -- even
24 though Washington and Catrell Douglas has told you where
25 everyone was in the truck, but you don't have to just

1 believe that because there's other testimony as to who was
2 in the truck and where they were seated

3 The testimony is corroborated by James Murphy
4 and Kenneth Sanders and Tron Brisbane All three of them
5 put Ward in the front passenger seat of that truck,
6 irrespective of what anybody inside the truck says

7 We know that shots were fired from the passenger
8 side of that truck and we know from Mr. Buncumb and
9 Mr. Murphy that it was the front passenger seat, the seat
10 being occupied by Mr. Ward We know that there's a
11 running gun battle down the road, that Jamie ends up dead
12 as a result of this gun battle We know that Jamie
13 Simmons died that morning We know that a 9-millimeter
14 projectile pierced both lungs, broke the bone in his arm,
15 pierced both lungs, his heart, his vena cava and killed
16 him We know that he died as a result of that gunshot
17 wound We know that the projectile that killed him was a
18 brass-jacketed 9-millimeter projectile We know that that
19 same type -- a round of that same type brass-jacketed
20 9-millimeter ammunition was found in the ashtray of Ward's
21 pickup truck -- I mean, Washington's pickup truck We
22 know that Tremayne Washington owned a Ruger P89
23 9-millimeter semiautomatic pistol, which was a pistol of a
24 type with the lands and grooves which could have fired
25 that fatal round We know that he wasn't killed with a 25

1 caliber We know that he wasn't killed with a 40 caliber
2 We know that he was not killed with a revolver, all of
3 this coming from, as both of them say Mister preeminent
4 firearms guy in the southeast

5 We know that that truck started shooting before
6 it even pulled out of the parking lot onto Toogoodoo Road
7 by virtue of the testimony that you heard and the location
8 of these shell casings here We know that there were at
9 least three shots fired, just like they said, from that
10 location One hit Jamie in the back, grazed his back.
11 One pierced his side and killed him and one went through
12 the GEO Tracker We know that there were three
13 9-millimeter shell casings, two right there and one found
14 on the hood vent of that truck, all of which were fired by
15 the same weapon, once again, by the most preeminent
16 firearms man in the southeast

17 We know that Jamie Simmons went down as soon as
18 that gunfire erupted from that truck We know that from
19 Jessie Perrigo's testimony and we know that from Ricky
20 Holmes' testimony, both of them I think one of them was
21 standing in this area and one of them was standing in this
22 area I believe Mr. Murphy said that the victim was right
23 here outside of the ditch, not in the ditch, as Mr. Runyon
24 would have you believe, facing Toogoodoo Road We know
25 that the shots came from that direction because of where

1 the shell casings were located, through and through on the
2 GEO Tracker and where the victim was struck

3 We also know -- and you will have Deputy
4 Frichtl's video in there if you want to look at You will
5 have to let the Judge know. Where did those folks react
6 from -- react to when those shots were fired? Right back
7 there where everybody in this case said the shots were
8 fired, right in that area where the truck was coming out
9 of the parking lot Therefore, we know that a bullet
10 fired from that truck killed Jamie Simmons There are no
11 more out there I mean, they searched this whole area.
12 100 yards down this way, 100 yards this way This entire
13 grass lot, all this place around here and the only thing
14 they found was this 25 that couldn't have killed him and
15 these three 40's that couldn't have killed him Those two
16 9's sure could have killed him. Those two 9's that were
17 fired by the same pistol as that 9-millimeter shell casing
18 found in the vent hood of that truck

19 If you don't believe Jamie Simmons was killed
20 from a shot in that truck, you don't have to go any
21 further, just like they say I would submit to you,
22 ladies and gentlemen, that the only reasonable conclusion
23 that you can reach based upon the testimony and evidence
24 you have heard in this courtroom was that he was killed by
25 a 9-millimeter projectile fired from that truck and

1 probably from the front passenger side of that truck
2 occupied by John Ward And that's the State's theory of
3 the case, that he was the shooter But that does not mean
4 one ounce, one bit that this man right here is not every
5 bit as guilty Is not every bit as culpable as Mr Ward.

6 Can I have the screen?

7 This is getting back to what I told you at the
8 beginning of the case The hand of one is the hand of
9 all If two or more combine together to commit an
10 unlawful act and in the execution of the criminal act, a
11 homicide is committed by one of the actors, as a probable
12 and natural consequence of the acts done in pursuance of
13 the common design, all present participating in the
14 unlawful undertaking are as guilty as the one who
15 committed the fatal act Everybody in that truck was just
16 as guilty as the man that pulled the trigger

17 And I don't say that just because they were in
18 the truck And I certainly don't say it in regard to
19 Tremayne Washington Because once again, ladies and
20 gentlemen, all I'm asking of you is to let your common
21 sense tell you what was going on out there Tremayne
22 Washington, although not from Petersfield, is a
23 Petersfield guy He's a good friend of John Ward They
24 have been good friends for ten years or so They hang out
25 together all the time, were hanging out at the club

1 together that night They're tight. Petersfield crowd is
2 tight

3 Keith, Petersfield guy, gets sucker punched in
4 that club with the Cherry Hill guy and a fight ensued
5 which moves outside You've heard from Deputy Frichtl
6 that these two groups do not get along Petersfield.
7 Outside, the fight develops between these two people
8 around Dunmeyer's truck According to what Dunmeyer told
9 Detective Hawks, both of these folks were a part of that
10 crowd that was trying to gang him out at the truck.
11 Washington was seen out there at the Suburban in the
12 altercation by Mr Buncumb, who is probably one of the
13 most independent witnesses out there, who sees him after
14 Dunmeyer is chased down the road, come back and get in his
15 truck saying we'll take care of that Or seen by
16 Murphy -- or heard by Murphy saying some bitch is gonna
17 die tonight

18 The Cadillac is out there trying to run over
19 Petersfield people in the road when it goes to rescue
20 Dunmeyer You know, Ton-Ton is provoking people Ton-Ton
21 is trying to hit people with his car Ton-Ton is throwing
22 bottles at people Heck, maybe even shooting at people, I
23 don't know But I know this, this was not a friendly
24 meeting out there in the midst of Toogoodoo Road that
25 Saturday night, Sunday morning.

1 He goes further down in front of this truck,
2 they start throwing bottles By this time, this truck
3 takes off after that Cadillac It's a running gun battle
4 going down Toogoodoo Road all the way to Harry Road where
5 the Honda gets run into the ditch But afterwards, they
6 go ditch the truck, change cars, all three of them go back
7 to the club together to see what they have thwart
8 Washington is seen washing his hands with bleach the next
9 morning And at some point or another, they stashed a
10 gun

11 And, of course, Catrell and Tremayne are going
12 to tell you they didn't know what was going on They knew
13 exactly what was going on, all of them knew exactly what
14 was going on and all of them went after that Cadillac with
15 one thought on their mind and that was to kill somebody

16 Just a few words in rebuttal and I will sit
17 down Now, this morning, y'all saw an exercise in hair
18 splitting, by all accounts pretty much You know, we can
19 sit here and I can ask a question and they can ask a
20 question and I can argue and they can argue, but y'all
21 have to decide what happened out there and y'all have to
22 decide this trajectory issue I don't think there is an
23 issue regarding the trajectory of this bullet I mean,
24 everything that is found out there is perfectly consistent
25 with the State's case Truck pulling out into the road

1 shooting at the Cadillac, which is going down the road at
2 that point Starts shooting in the parking lot at the
3 Cadillac going down the road and as it's moving And what
4 is in the way? Jamie Simmons Hits him in back, hits
5 him, hits the GEO as it's moving along, pulling out on
6 Toogoodoo Road

7 However that bullet went into Jamie basically
8 depends on what position his body was in at the time the
9 bullet struck him and nobody knows And the only way we
10 would know is if we happen to have the actual point of
11 time of impact on videotape. You know, because whatever
12 way his body was oriented toward that gunshot is how it
13 went in And plus, it goes in and hits the major bone in
14 his arm and shatters that bone You can't tell anything
15 from the trajectory inside of his body as to where that
16 bullet came from other than it came from that side

17 The same with the GEO Tracker I mean, I'm not
18 sure what point they were trying to make with some of
19 this, but bullets deflect There is nothing inconsistent
20 about the bullet going through that GEO Tracker It was a
21 through and through from the back side to the front side
22 And we can sit here and argue all we want about was the
23 shot from up here or up here or up here or up here or up
24 here or up here or up here You know it went through the
25 GEO Tracker from this general direction, which also

1 happens to be where the 9-millimeter shell casings are.

2 Duh

3 The only physical evidence in the case supports
4 the State's theory All the ballistic evidence, all of
5 the firearms identification evidence, all the testimony.
6 You know, they would have you believe that there were a
7 hundred people out there shooting that night Well, where
8 are they? Where is their brass? Where are the shell
9 casings? Where are the people on that video reacting to
10 gunshots coming here and here and here and here and here?
11 You can see on that video, they react two times, once with
12 an initial barrage when that truck is coming out -- coming
13 out of the parking lot And if you look closely, about 10
14 seconds, 15 seconds down the road, you see another little
15 flinch by one guy reacting exactly the same way, which is
16 probably these 40 calibers here You also see -- you can
17 see the whole thing happening on there You can watch the
18 guys They're watching the green Cadillac coming down
19 here They're watching this thing going on out in the
20 road That video corroborates everything that the State
21 has put in front of you

22 Just a couple points with regard to what Miss
23 Jenkinson said Catrell Douglas If he is going to give
24 up -- and I tried to raise this point during the trial.
25 If he is going to give up somebody as the shooter in this

1 case, is it going to be his cousin and lifelong
2 Petersfield guy or Tremayne Washington who he has known
3 for about two years? I don't know That's why we need
4 jurors That's why we need you to make those kind of
5 common sense determinations

6 She wants to accuse Officer James, Shawn James,
7 of partisanship Well, it appeared to me that you saw a
8 rather partisan expert witness for them this morning.
9 They asked me or could argue to you why I didn't ask Dan
10 DeFreese about the trajectory and things of that nature.
11 Because it wasn't an issue with him I tell you what,
12 they sure didn't ask him any of those questions, did they?
13 They had to wait for their paid guy to come

14 And, quite frankly, when it gets right down to
15 it, I don't even know what they're claiming happened out
16 here It would appear to me based upon all of this
17 argument of the trajectory and all that, that in the midst
18 of this gun battle between the truck that's coming out
19 right here -- and we know that these two shell casings
20 came from that truck because we have the same shell casing
21 in the truck Are they saying that some little person
22 with a gun ran out in between there, the truck that was
23 shooting at the Cadillac, fired off at least three rounds
24 in the area of where Jamie Simmons was and then had enough
25 sense to sit there and pick up his brass? Because we know

1 he had to have brass because we know it couldn't have been
2 a revolver because Dan DeFreese told us it couldn't have
3 been a revolver He had enough sense to stay there and
4 pick up his brass and disappear without anybody out there
5 having seen him? It's preposterous Just that evidence,
6 use your common sense and you will determine that at the
7 time that that Cadillac went down the road with this truck
8 blasting away at it, you will know what was in the hearts
9 of John Ward and Tremayne Washington And what was in
10 their hearts was malice. And use your common sense and
11 you will know exactly what went on that day Just like I
12 told you at the beginning of this case, it was a fatal
13 mixture of booze, guns and testosterone

14 They had been disrespected by the people of
15 Cherry Hill, fueled by booze and they went to settle the
16 score and poor Jamie Simmons got caught in the crossfire
17 Don't feel sorry for them now Don't you feel sorry for
18 them They made their bed, they have to lie in it They
19 knew what was going on They knew the consequences of
20 what they did and now it's time for them to pay the piper

21 THE COURT Ladies and gentlemen, it is now the
22 time of the trial that I charge you on the law that you
23 are to apply to the facts, as you find them I told you at
24 the beginning of the trial --

25 Mr Durant, would you do me a favor and move

1 that for me?

2 MR DURANT. I'm sorry

3 THE COURT As I told you at the beginning of
4 the trial, you are the judges -- same as I'm the judge,
5 you're the judges of the facts and I'm the judge of the
6 law. So it's now my duty to charge you as to the law that
7 you are to apply to the facts as you find them. We are
8 bound by your finding of the facts, but by the oath that
9 you took at the beginning of the trial, you are duly bound
10 to apply the law as I now charge it to you the facts as
11 you find them You are not to apply the law as you think
12 the law might be or you wish the law might be, but as I
13 charge it to you That is what your duty requires you
14 apply

15 Now, in this case, there are two defendants that
16 are on trial, each of whom are charged with murder The
17 case of each defendant and the evidence and the law
18 concerning that defendant should be considered separately
19 and individually Your verdict does not have to be the
20 same for both defendants The fact that you may find one
21 defendant guilty or not guilty should not control your
22 verdict as to the other defendant Where more than one
23 person is charged with a crime, if the evidence warrants
24 it, you may convict one and acquit the other or you may
25 acquit both or you may convict both It will depend on

1 your view of the testimony and the evidence You must
2 take each defendant and consider the evidence as to that
3 defendant and my instructions to you on the law You will
4 then write a separate verdict of guilty or not guilty for
5 each individual defendant

6 Now, I remind you of the fact that the
7 defendants were arrested, charged and indicted in this
8 case is not evidence in the case and cannot be considered
9 by you as evidence of guilt in this case nor does it
10 create any presumption or inference of guilt This
11 document -- these indictments are simply the formal
12 written instrument which contains the charges made against
13 the defendants. It is the formal document by which this
14 case is brought to court

15 Now, the defendants have pled not guilty to
16 their indictments Those pleas cast the burden on the
17 State to prove the defendants guilty beyond a reasonable
18 doubt A person charged with committing a criminal
19 offense in South Carolina is never required to prove
20 himself innocent. It is an important rule of the law of
21 this country that the defendant in a criminal case will
22 always be presumed to be innocent of the crime for which
23 he is indicted unless and until his guilt has been proven
24 by evidence satisfying you of that guilt beyond a
25 reasonable doubt The presumption of innocence is not a

1 mere legal theory It is not just a legal phrase It is
2 a substantial constitutional right which every defendant
3 is entitled This presumption of innocence accompanies
4 the defendants from the time they are charged throughout
5 the trial until you reach a verdict of guilt based upon
6 the evidence satisfying you of that guilt beyond a
7 reasonable doubt

8 Now, ladies and gentlemen, I instruct you now
9 and I emphasize to you that the fact that the defendants
10 did not testify in this trial must not be considered by
11 you in any way in your deliberations A defendant has a
12 constitutional right to remain silent and the exercise of
13 that constitutional right cannot and must not be held
14 against the defendants Under your oath as jurors, you
15 are to draw no inference and draw no conclusions
16 whatsoever from the fact that the defendants in this case
17 did not testify Do not even discuss this fact in the
18 jury room The defendants are not required to prove
19 anything The burden of proof remains upon the State to
20 prove the defendants' guilt beyond a reasonable doubt

21 Now, as I have stated, the State has the burden
22 of proving the defendants' guilt beyond a reasonable
23 doubt Some of you may have served as a juror in civil
24 cases where you were told it is only necessary to prove
25 that a fact is more likely true than not true, such as by

1 the greater weight or the preponderance of the evidence.
2 In criminal cases, the State's proof must be more powerful
3 than that. It must be beyond a reasonable doubt. Proof
4 beyond a reasonable doubt is proof that leaves you firmly
5 convinced of the defendants' guilt. There are very few
6 things in this world that we know with absolute certainty.
7 And in criminal cases, the law does not require proof that
8 overcomes every possible doubt. If, based on your
9 consideration of the evidence, you are firmly convinced
10 that either or both of the defendants is guilty of the
11 crime charged, you must find the defendant or defendants
12 guilty. If on the other hand, you think there is a real
13 possibility that a defendant is not guilty, you must give
14 that defendant the benefit of the doubt and find him not
15 guilty.

16 Now, there are two types of evidence which are
17 generally presented during a trial. There is direct
18 evidence and circumstantial evidence. Direct evidence is
19 testimony of a person who claims to have actual knowledge
20 of a fact, such as an eyewitness. It is evidence which
21 immediately establishes the main fact to be proved.
22 Circumstantial evidence is proof of a chain of facts and
23 circumstances indicating the existence of a fact. It is
24 evidence which immediately establishes collateral facts
25 from which the main fact may be inferred. Circumstantial

1 evidence is based on inference and not on personal
2 knowledge or observation The law makes absolutely no
3 distinction between the weight or value to be given either
4 direct or circumstantial evidence nor is a greater degree
5 of certainty required of circumstantial evidence than of
6 direct evidence You should weigh all of the evidence in
7 the case. After weighing all of the evidence, if you are
8 not convinced of the guilt of the defendants beyond a
9 reasonable doubt, you must find the defendants not guilty

10 Necessarily, you must determine the credibility
11 of witnesses who have testified in this case Credibility
12 simply means believability It becomes your duty as
13 jurors to analyze and evaluate the evidence and determine
14 which evidence convinces you of its truth In determining
15 the believability of witnesses who have testified in this
16 case, you may believe one witness over several witnesses
17 or several witnesses over one witness You may believe
18 part of the testimony of a witness or you can reject the
19 remaining part of the testimony of that same witness. You
20 may believe the testimony of a witness in its entirety or
21 reject the testimony of a witness in its entirety You
22 may consider whether any witness has exhibited to you any
23 interest, bias, prejudice or other motive in this case
24 You may also consider the appearance and manner of a
25 witness while on the witness stand

1 A person who has a past criminal record is
2 competent to testify during a trial. A past record does
3 not affect the ability of that witness to testify. The
4 past record may only be considered by you, if at all, in
5 determining the witness' believability. Remember, you are
6 the sole judges of the facts in this case and of the
7 believability of any and all of the witnesses.

8 Now, as I told you during the trial, the rules
9 of evidence do not normally permit witnesses to testify to
10 opinions or conclusions. There is an exception in the
11 rules which exist for witnesses we call expert witnesses.
12 And that is a witness who by education or experience has
13 become expert in some art, science, profession or calling
14 may state an opinion as to relevant and material matter in
15 which the witness claims to be an expert and may also
16 state the reasons for that opinion.

17 You should consider any expert opinion received
18 in evidence in this case and like any other evidence, give
19 it the weight you think it deserves. If you decide the
20 opinion of an expert witness is not based on sufficient
21 education or experience or if you conclude that the
22 reasons given in support of the opinion are not sound or
23 that the opinion is outweighed by other evidence, you may
24 disregard the opinion entirely. An expert witness'
25 testimony is to be given no greater weight than that of

1 other witnesses simply because the witness is an expert.
2 Further, you are not required to accept an expert's
3 opinion even though it's not contradicted

4 Now, both defendants are charged with murder in
5 violation of section 16-3-10 of the South Carolina code of
6 laws The State must prove beyond a reasonable doubt that
7 each defendant killed another person with malice
8 aforethought Malice is hatred, ill will or hostility
9 towards another person It is the intentional doing of a
10 wrongful act without just cause or excuse and with an
11 intent to inflict an injury or under circumstances that
12 the law will infer an evil intent Malice aforethought
13 does not require that malice exist for any particular time
14 before the act is committed, but malice must exist in the
15 mind of the defendant just before and at the time the act
16 was committed Therefore, there must be a combination of
17 the previous evil intent and the act

18 Malice aforethought may be expressed or
19 inferred The terms expressed or inferred do not mean
20 different kinds of malice, but merely the manner in which
21 malice may be shown to exist That is either by direct
22 evidence or by inference from the facts or circumstances
23 which are proved

24 Expressed malice is shown when a person speaks
25 words which express hatred or ill will for another or when

1 the person prepared beforehand to do the act which was
2 later accomplished For example, lying in wait for a
3 person or any other acts of preparation going to show the
4 deed was within the defendant's mind would be expressed
5 malice

6 Malice as an essential ingredient of murder does
7 not necessarily import ill will towards the individual
8 injured, but signifies rather a general malignant
9 recklessness of the lives and safety of others or a
10 condition of the mind that shows a heart regardless of
11 social duty and fatally bent on mischief Malice may be
12 inferred from conduct showing a total disregard for human
13 life Inferred malice may also arise when the deed is
14 done with a deadly weapon.

15 A deadly weapon is any article, instrument or
16 substance which is likely to cause death or great bodily
17 harm Whether an instrument has been used as a deadly
18 weapon depends on the facts and circumstances of each
19 case The following are examples of what instruments may
20 be used as deadly weapons a pistol, a shotgun, a rifle, a
21 dirk, a dagger, a knife, a slingshot, metal knuckles, a
22 razor, gasoline, a fire bomb, a Molotov cocktail and
23 lighter fluid A gun may be a deadly weapon even if it is
24 not operating

25 Now, if a defendant with malice aforethought

1 attempts to kill another person, but by mistake kills a
2 different person, the defendant still has the intent to
3 kill The intent to kill is merely transferred from the
4 original person the defendant attempted to kill to the
5 actual person killed The defendant would be guilty of
6 murder just as if the act resulted in the death of the
7 person that the defendant attempted to kill

8 If two or more persons combine together to
9 commit an unlawful act and a homicide is committed by one
10 of the actors as a probable or natural consequence of the
11 acts done, then pursuant to the common design all
12 present, participating in the unlawful undertaking are as
13 guilty as the one who committed the fatal act The hand
14 of one is the hand of all

15 Mere presence at the scene is not sufficient to
16 prove someone guilty of a crime A defendant's presence
17 where a crime is being committed or mere association with
18 a person who commits a crime does not make a defendant an
19 accomplice or aider or abettor of the person committing
20 the crime The burden is on the State to prove every
21 element of the crime charged

22 If you find after reviewing all of the evidence
23 that the State has proved that the defendant was only
24 present at the scene of the crime and they have not proved
25 beyond a reasonable doubt any other participation in the

1 crime, then you must find the defendant not guilty The
2 law is proof of -- at the scene of the crime is not
3 sufficient to find someone guilty

4 If you have heard testimony concerning a penalty
5 a person can serve for the crime alleged in this
6 indictment, in determining the guilt or innocence of a
7 defendant, you may not consider any possible penalty for a
8 particular crime The punishment for the crime is a
9 matter for me to determine and should never be considered
10 by you in any way whatsoever in arriving at a fair and
11 impartial verdict as to the guilt or innocence of the
12 defendants.

13 Now, ladies and gentlemen, your verdict must be
14 unanimous

15 Now, before I let you go, I've got a couple
16 notes from the jury foreman and I want to discuss them
17 with you briefly There was a request that the stick that
18 was used as a demonstrative aid in the courtroom go back
19 to the jury room I'm sorry, but that was only used as a
20 demonstrative aid It is not evidence in the trial and
21 therefore it cannot go back from the courtroom to you.

22 There is also some indication to me that we may
23 have one or more members of the jury who have some
24 background or experience in the use of firearms or
25 military service, something like that Now, folks, I will

1 tell you, basically, you should not discuss evidence that
2 is not in the record However, we don't expect you to
3 leave your common sense at the courthouse steps nor can
4 you be expected to ignore your life experiences or things
5 that you have learned along the way However, jurors may
6 not testify either as lay witnesses or expert witnesses.
7 If we may have had or have one or more jurors who has
8 experience in some issue such as handling firearms, that
9 is not unusual for this area where we live in. However,
10 you should not give any undue weight to the opinions of
11 any such jurors nor should you feel compelled to disregard
12 your opinions of the evidence if it conflicts with your
13 fellow jurors' opinions

14 Now, as I told you, there are two indictments in
15 this case One is for Mr Washington One is for
16 Mr Ward. These indictments will go back to the jury room
17 with you, Mr Foreman However, again, I reiterate they
18 are not evidence, they are simply the charging
19 instruments The reason they go back, Mr Foreman, is so
20 that on the back of them, you will see there is an area
21 down here that says verdict There are two possible
22 verdicts for each, guilty or not guilty And again, it
23 must be a unanimous verdict Once you reach your verdict,
24 Mr Foreman, you will write either guilty or not guilty,
25 sign it and let the bailiff know that you have reached a

1 verdict That goes for each of the indictments

2 Now, I am getting ready to send you back to the
3 jury room However, do not begin your deliberations just
4 yet We have to get the evidence together Once I send
5 word back with the bailiff and the evidence and the
6 indictments, you can begin your deliberations I also
7 have to give the lawyers an opportunity to simply tell me
8 if I misspoke or if I didn't say something that I promised
9 to say, that sort of thing This should only take just a
10 few minutes A lot of it is a formality, but we do have
11 to get the evidence together So just go back right now
12 and we will let you know in just a couple minutes when it
13 is okay to begin your deliberations Thank you for your
14 patience.

15 (WHEREUPON, the following proceedings were held
16 outside the presence of the jury)

17 THE COURT Anything from the State?

18 MR. DURANT No, sir

19 THE COURT Mr Washington -- Mr Runyon?

20 MR. RUNYON Subject to our prior objection to
21 the charge of the hand of one is the hand of all You
22 know, you said more than we wanted you to say, but you've
23 already ruled on that issue

24 THE COURT All right

25 MR. BUTLER None other than the previously made

1 objections

2 THE COURT All right Would you all get
3 together and make sure that we have all of the evidence
4 together

5 MR DURANT Also, the court reporter would like
6 me to put on the record, I gave her an evidence list of
7 the exhibits introduced in the previous trial I've
8 introduced -- we have used -- for purposes of convenience,
9 we have used the same exhibit numbers as we did in the
10 last time and just added to that list To the extent that
11 I have introduced everything into evidence or had
12 everything marked for identification that I intended to
13 mark, everything that was not addressed in this trial was
14 withdrawn by the state

15 THE COURT. All right

16 MR DURANT Is that what you wanted me to say?

17 COURT REPORTER Yes, sir.

18 THE COURT: Is there any objection to the jury
19 instructions going back to the jury?

20 MR RUNYON None from Defendant Washington,
21 Judge

22 MR BUTLER No

23 MR DURANT No, sir

24 THE COURT Okay Have we got everything
25 together then?

1 MR RUNYON As housekeeping, we need to find
2 what bag that goes in

3 MR DURANT That's a separate exhibit

4 THE COURT Any objection from the State for the
5 defendant remaining on bond during deliberations?

6 MISS JENKINSON If they showed up all of these
7 days

8 MR. DURANT. Okay

9 THE COURT Go ahead and put the alternates in
10 another room

11 (All counsel reviewed exhibits)

12 THE COURT: Go ahead and bring the two
13 alternates in and I will discharge them

14 MR DURANT Just in case, Your Honor, I think
15 it's probably okay, but would you at least inquire as to
16 if everyone is feeling okay before you discharge the
17 alternates?

18 THE COURT If you would go back and tell the
19 jury if everyone is feeling okay, we will discharge the
20 alternates

21 Go ahead and go back and tell them they can
22 begin their deliberations

23 Let the record reflect that the two alternates
24 have been discharged

25 THE BAILIFF. Your Honor, may the jury take a

1 quick smoke break?

2 THE COURT They can take a break, but tell them
3 do not begin the deliberations until everyone is back.
4 They can deliberate as long as they want. If they want to
5 break for the evening at any time, just let me know and we
6 will bring them back tomorrow

7 (WHEREUPON, the jury began their deliberations
8 at 4 00 p m)

9 (WHEREUPON, the court received a note from the
10 jury at 4 23 p m)

11 THE COURT Okay The jury needs a -- they want
12 something to watch the DVD or the VHS, which, of course,
13 we don't have to take back They can come in and watch
14 it And they also wanted a transcript of the entire
15 trial, all of the witnesses, which I always love when I
16 get a note like that But I will bring them back in and
17 tell them that we don't have anything -- do we have
18 anything to send them back?

19 THE CLERK A cassette, we do, Your Honor, but I
20 would rather say not because it's not in the best working
21 condition

22 THE COURT I will tell them any time they want
23 to listen to testimony, they can come back and let us
24 know

25 Let me ask you this, she brought up a good

1 point If they want to listen to testimony, would you
2 have any objection to her going in there and playing the
3 tape? She doesn't say anything, they don't say anything
4 in front of her?

5 MR DURANT Absolutely not

6 THE COURT It's makes it easier for them to
7 hear

8 MR RUNYON: That would be fine, Judge

9 MR BUTLER. (Shook head)

10 THE COURT. Okay

11 (WHEREUPON, the following proceedings were held
12 in the presence of the jury)

13 THE COURT. All right Folks, on your latest
14 note, as far as sending you back a video recorder or DVD
15 machine, we don't have that capability having one to send
16 back So if you want to view it, we will bring you back
17 in and you can view it from here

18 As far as the transcript of the entire trial
19 goes, we don't have that available If you want to listen
20 to any witnesses, we can play back the tape of it The
21 quality of the tape would be a lot like the one you heard
22 earlier, but we can, if you want to hear a witness, you
23 let us know which witness it is The court reporter can
24 go back in the room with you and play the tape there,
25 which might make it easier for you to hear And you

1 wouldn't be able to talk in front of her and, of course,
2 she wouldn't say anything She would play the tape and
3 when it's over would leave That's an option, but we
4 don't have the ability to give you a transcript at this
5 point in time So that answers both of your questions
6 there

7 I sent the message to you telling you that you
8 guys deliberate as late as you want tonight When you're
9 ready to break for the day, you let us know. If you do
10 want us to order you dinner -- we have arrangements during
11 the day We can order from some restaurants around here
12 But this time of day, the only people that delivers to us
13 is pizza So if you want any dinner, if you want to work
14 later, let us know, but it will take about an hour for the
15 pizza to get here, so keep that in mind. I will order it
16 whenever you tell us to Thank you very much

17 (WHEREUPON, the following proceedings were held
18 outside the presence of the jury.)

19 (WHEREUPON, the jury continued its deliberations
20 at 4:33 p m)

21 MR RUNYON It seems to me -- I have no problem
22 with the court reporter playing something if they want to
23 hear, but it seems to me if this jury wants to see
24 something, they may want to be able to see it, roll it
25 back because it's in evidence, and maybe discuss back and

1 forth So depending on what they say, maybe the clerk can
2 make this courtroom available because they may want to
3 deliberate while they're looking at things and discuss it
4 I think that would be to the advantage of both the State
5 and the defense Maybe give them the courtroom and the
6 equipment

7 THE COURT. That's an option We would have to
8 leave somebody in here for security purposes, I suppose,
9 or we could just have somebody stand outside I don't
10 know what our set up here is as far as their being able to
11 use the stuff. It's actually played off of your computer,
12 isn't it?

13 MR DURANT. The DVD's are, yeah And this is
14 like the only one in the office They do That's a lot
15 more easier to manipulate

16 MR. RUNYON When you do high technology trials
17 and don't make it possible for the jurors to get it

18 THE CLERK. Judge, we could get the one for the
19 VHS, but we have nothing for DVD

20 MR DURANT I've got mine, it's set up, it's
21 ready to go

22 THE COURT But the little screen saver that
23 says guilty, guilty, guilty

24 MR BUTLER Everything there is --

25 MR DURANT It's on VHS Like I said, the

1 beauty about DVD is because you can manipulate it or stop
2 it and back it up and things like that I mean, if they
3 want to do that, I don't care I don't need to be in here
4 during all that I will teach the clerk how to operate
5 the machinery

6 MR RUNYON The problem with that, Judge,
7 there's not supposed to be anybody around during
8 deliberations

9 THE COURT I know I'm very reluctant to let
10 him have at Mr Durant's computer and access to his
11 computer and whatever else might be on there without
12 anybody in here So as a practical matter, I think we
13 would --

14 MR. DURANT I mean, we can --

15 THE COURT Do y'all have a DVD player that you
16 can send over?

17 MR DURANT Me?

18 THE COURT. Do you have one in your office? I
19 know we have a TV somewhere around here

20 THE CLERK We have a TV and VCR. They're not
21 going to get the clarity

22 MR RUNYON. The solicitor's office has that big
23 slush fund, all those expunging fees They can run down
24 to Radio Shack

25 MR BUTLER. Our office has a TV and VCR that

1 works The clerk is saying they have a VCR, but it
2 doesn't work very well We have a TV and VCR.

3 MR DURANT. I've never tried to play this thing
4 on anything but the laptop Interestingly enough, it
5 won't play on my window DVD on my desk top

6 THE COURT. Why they're out, why don't we see if
7 we have that capability so if they come back and ask to
8 see it, we can make it available

9 THE CLERK. One thing is, the VHS, is there
10 nothing else on there but that

11 MR DURANT Yeah, right One of them is
12 Frichtl's video, actual video, that goes on for like an
13 hour and a half or something

14 THE CLERK: Judge, I will get the one they have
15 in family court

16 THE COURT Let's take a look at it Check if
17 it works and see if it's DVD or --

18 THE CLERK There's no DVD All we have is the
19 VHS.

20 THE COURT. Lets' see if it works

21 (The court was in recess while the jury
22 deliberated)

23 THE COURT They want to look at the video,
24 specifically, crowd responses. What else did they say on
25 here?

1 MR DURANT And car locations

2 THE COURT I'm told we have like four hours of
3 the man's day on that video I don't know what else is on
4 that video and I'm hesitant to send a TV and VCR back
5 there not knowing what else is on there

6 MR DURANT We can queue it up to that point

7 MR BUTLER What else is on it?

8 THE COURT There may be a scene of a police
9 officer -- I don't know what's on it

10 MR DURANT I know this, you know, you get to
11 this and it's just the car scene

12 THE COURT So none of that's in and I don't
13 know what's on it, so I say we bring them in here and tell
14 us where you want it and we'll play it And we'll be
15 quiet and let them watch it as many times as they want to
16 watch it

17 (WHEREUPON, the following proceedings were held
18 in the presence of the jury)

19 THE COURT Okay, folks, I understand you want
20 to look at the video or the DVD We were able to track
21 down the television and a VHS, but the problem that we
22 have is the video actually has about four hours worth of
23 stuff on it of the rest of the police officer's day And,
24 frankly, nobody knows what's on it So since it's not in
25 evidence, it's really problematic to send that back with

1 you not knowing what else is on that tape So what we
2 will do is stick it in Mr Durant's laptop and we will
3 play it We will put it at the start point where you tell
4 us you want it and we will play it And if you want us to
5 replay it, we will play it as many times as you want.
6 Obviously, we are not to be privy to your deliberations,
7 so we're going to sit here I ask that you don't say
8 anything or discuss it You, Mr foreperson, tell us if
9 you want it played multiple times and we'll play it When
10 you're ready to go back, let us know

11 Is it all right to start there or fast forwarded
12 to a point

13 THE FOREMAN Just before the shots

14 THE JUROR This's good

15 THE COURT I think that's about where that is.

16 (The DVD of Deputy Frichtl's was played to the
17 jury)

18 THE FOREMAN Thank you

19 THE COURT Everyone raise your hand if you have
20 seen enough

21 (WHEREUPON, all hands raised)

22 THE JUROR Can we rewind one more time just a
23 little bit?

24 (The clerk rewound the tape)

25 THE FOREMAN Thank you, Your Honor

1 THE COURT Okay Let us know if you want us to
2 order you dinner All right Thank you

3 (The jury continues their deliberations at
4 6 18)

5 THE COURT That's it We will let you know
6 when you are needed again

7 (WHEREUPON, the court was in recess awaiting a
8 verdict)

9 THE COURT All right I understand we have a
10 verdict Bring the jury on back

11 (WHEREUPON, the jury returned to open court at
12 6 33 p m to report its verdict.)

13 THE COURT All right Mr Foreman, I
14 understand the jury has reached a verdict, is that
15 correct?

16 THE FOREMAN That's correct, Your Honor

17 THE COURT That is as to both defendants?

18 THE FOREMAN Yes, Your Honor

19 THE COURT It's a unanimous verdict as to both
20 defendants?

21 THE FOREMAN Yes, it is, Your Honor

22 THE COURT Would you hand the verdict form to
23 the bailiff, please?

24 (The Court reviews the verdict)

25 THE COURT All right Hand them to the clerk.

1 The defendants rise, please

2 The clerk may publish the verdict

3 THE CLERK· Yes, Your Honor Indictment

4 2003-GS-10-5895, the State of South Carolina versus John
5 Henry Ward, Jr, indictment for murder, we, the jury, find
6 the defendant guilty, signed by Lawrence White,
7 foreperson, dated June 9, 2005

8 Ladies and gentlemen of the jury, if this is
9 your verdict, please reply by raising your right hand.

10 (All hands raised)

11 THE CLERK· Thank you, put them down.

12 Indictment 2003-GS-10-5894, the State of South Carolina
13 versus Tremayne Rashaad Washington, indictment for murder,
14 we, the jury, find the defendant guilty, signed by
15 Lawrence White, foreperson, dated June 9th, 2005

16 Ladies and gentlemen of the jury, if this is
17 your verdict, please reply by raising your right hand.

18 (All hands raised)

19 THE CLERK Thank you, you may put it down.

20 THE COURT Does Defendant Washington wish to
21 have the jury polled?

22 MR RUNYON Yes, Your Honor.

23 THE COURT All right Poll the jury How
24 about Defendant Ward?

25 MR. BUTLER Yes, sir, and separately, please

1 THE COURT Poll them separately, please

2 THE CLERK Yes, Your Honor

3 Ladies and gentlemen of the jury, I will be
4 asking you two questions, is this your verdict and is this
5 still your verdict. When I call your name and jury
6 number, would you please stand and reply

7 As to Tremayne Rashaad Washington, Lawrence
8 White, Juror No 196, is this your verdict?

9 THE JUROR Yes, it is

10 THE CLERK Is this still your verdict?

11 THE JUROR Yes, it is.

12 THE CLERK Thank you, please be seated

13 Juror No 223, Sara Lyle Is this your verdict?

14 THE JUROR Yes, it is.

15 THE COURT Is this still your verdict?

16 THE JUROR Yes.

17 THE CLERK Thank you, please be seated

18 Juror No 91, Noel Johnson Is this your
19 verdict

20 THE JUROR Yes, it is

21 THE CLERK Is this still your verdict?

22 THE JUROR Yes, it is.

23 THE CLERK Thank you, please be seated

24 Juror No 104, Robert Lasseter, Jr Is this
25 your verdict?

1 THE JUROR Yes, it is
2 THE CLERK Is this still your verdict?
3 THE JUROR Yes, it is
4 THE CLERK Thank you, please be seated
5 Juror No 177, Janie Sutton Is this your
6 verdict?
7 THE JUROR Yes, it is
8 THE CLERK: Is this still your verdict?
9 THE JUROR Yes, it is
10 THE CLERK Thank you, please be seated
11 Juror No 49, Jon Doyle Is this your verdict?
12 THE JUROR Yes, sir
13 THE CLERK Is this still your verdict?
14 THE JUROR Yes, sir
15 THE CLERK Thank you, please be seated.
16 Juror No 195, Elanor Whitcomb Is this your
17 verdict?
18 THE JUROR Yes, sir
19 THE CLERK Is this still your verdict?
20 THE JUROR Yes, sir
21 THE CLERK Thank you, please be seated
22 Juror No 68, Ronald Gorick Is this your
23 verdict?
24 THE JUROR Yes, sir
25 THE CLERK Is this still your verdict?

1 THE JUROR Yes, sir.

2 THE CLERK Thank you Please be seated

3 Juror No 138, Mark Panisari Is this your
4 verdict?

5 THE JUROR Yes, sir

6 THE CLERK Is this still your verdict?

7 THE JUROR Yes, sir

8 THE CLERK Thank you, please be seated

9 Juror No 33, Mary Cook Is this your verdict?

10 THE JUROR Yes, it is

11 THE CLERK. Is this still your verdict?

12 THE JUROR. Yes, it is

13 THE CLERK Thank you, please be seated

14 Juror 239, Leanne Wojtkowski Is this your
15 verdict?

16 THE JUROR Yes, it is

17 THE CLERK Is this still your verdict?

18 THE JUROR Yes, it is

19 THE CLERK Thank you, please be seated

20 Juror No 27, Shana Caporossi Is this your
21 verdict?

22 THE JUROR Yes, sir

23 THE CLERK. Is this still your verdict?

24 THE JUROR Yes, sir

25 THE CLERK: Thank you

1 Is there anyone's name I have missed?

2 (There was no response)

3 THE CLERK Your Honor, the verdict stands as to
4 Tremayne Rashaad Washington

5 As to John Henry ward, indictment for murder.

6 Juror No 196, Lawrence White Is this your verdict?

7 THE JUROR Yes, it is

8 THE CLERK. Is this still your verdict?

9 THE JUROR Yes, it is

10 THE CLERK Thank you, please be seated

11 Juror No. 223, Sara Lyle Is this your verdict?

12 THE JUROR Yes, sir

13 THE COURT Is this still your verdict?

14 THE JUROR. Yes, sir

15 THE CLERK Thank you, please be seated

16 Juror No. 91, Noel Johnson Is this your
17 verdict?

18 THE JUROR Yes, sir

19 THE CLERK Is this still your verdict?

20 THE JUROR Yes, it is

21 THE CLERK Thank you, please be seated

22 Juror No 104, Robert Lasseter, Jr Is this
23 your verdict?

24 THE JUROR Yes, it is

25 THE CLERK Is this still your verdict?

1 THE JUROR Yes, sir, it is
2 THE CLERK Thank you, please be seated
3 Juror No. 177, Janie Sutton Is this your
4 verdict?
5 THE JUROR Yes, sir, it is
6 THE CLERK Is this still your verdict?
7 THE JUROR Yes, sir, it is
8 THE CLERK Thank you, please be seated
9 Juror No. 49, Jon Doyle. Is this your verdict?
10 THE JUROR Yes, sir
11 THE CLERK Is this still your verdict?
12 THE JUROR Yes, sir
13 THE CLERK. Thank you, please be seated
14 Juror No. 195, Elanor Whitcomb Is this your
15 verdict?
16 THE JUROR Yes, it is
17 THE CLERK: Is this still your verdict?
18 THE JUROR Yes, sir, it is
19 THE CLERK. Thank you, please be seated
20 Juror No 68, Ronald Gorick. Is this your
21 verdict?
22 THE JUROR. Yes, it is
23 THE CLERK: Is this still your verdict?
24 THE JUROR. Yes, it is
25 THE CLERK. Thank you, please be seated

1 Juror No 138, Mark Pantsari Is this your
2 verdict?
3 THE JUROR Yes, sir
4 THE CLERK: Is this still your verdict?
5 THE JUROR Yes, it is
6 THE CLERK. Thank you, please be seated
7 Juror No 33, Mary Cook Is this your verdict?
8 THE JUROR Yes, sir.
9 THE CLERK. Is this still your verdict?
10 THE JUROR. Yes, sir.
11 THE CLERK. Thank you, please be seated
12 Juror No. 239, Leanne Wojtkowski Is this your
13 verdict?
14 THE JUROR. Yes, it is
15 THE CLERK Is this still your verdict?
16 THE JUROR. Yes, sir.
17 THE CLERK Thank you, please be seated
18 Juror No. 27, Shana Caporossi Is this your
19 verdict?
20 THE JUROR. Yes, sir
21 THE COURT: Is this still your verdict?
22 THE JUROR. Yes, sir
23 THE CLERK: Your Honor, the verdict stands
24 THE COURT Ladies and gentlemen, I want to
25 thank you for the services you have provided this week.

1 At the beginning of the week, we talk about how this is a
2 responsibility and a duty of being a citizen of the United
3 States and of this country It's also a privilege to
4 serve on a jury It's a very, very difficult thing that
5 you've done this week I know it is This was a
6 difficult case Very emotional time, I'm sure, for you as
7 well. But, you did your duty as citizens and we
8 appreciate that Somebody has got to do it and this is
9 the way we do it in this country When you stop to think
10 about it, when you compare it to the way trials are
11 conducted around the world, you know, this is the best
12 system known to mankind

13 Many countries, you do not have the right to a
14 trial by a jury Many people don't know that, but there
15 are very few countries, less than a handful of countries
16 which you have the right to a trial by jury Even in
17 England, the country in which we get our legal system,
18 they have done away with jury trials in most civil cases
19 and even in a lot of criminal cases So it is something
20 that is a rare and unique way of administering justice
21 But you all have done it You have done it commendably
22 I have watched you throughout the trial, you have listened
23 very closely to the evidence You paid attention to all
24 of the testimony I never once saw anybody sleeping. You
25 all did a wonderful job as far as following what your duty

1 was You answered the call of your government and you
2 came and you did what you were supposed to do and you
3 should be proud of that

4 As time goes on, I hope you will reflect back on
5 the experience as a good one. You know, we bring in a
6 hundred or so people at the beginning of the week, nobody
7 knows each other and yet, I always talk to the jurors
8 afterwards and, you know, I find that many times,
9 especially when you've had a multi-day trial, the jurors
10 have bonded. Some people make friends for the rest of
11 their lives And you may stay in contact, you may not.
12 But I hope you will look back on this as a positive
13 experience and you will feel better about our legal
14 system

15 The lawyers in the case did a remarkable job. I
16 mean, the legal profession takes -- looks bad sometimes on
17 TV Some of it, we bring ourselves on some and some of it
18 is the nature of the television shows and things like
19 that But I think, it's my personal opinion that the
20 legal profession in this case shined very brightly The
21 lawyers, both for the State and the defendant, are as high
22 a caliber as you're going to see In my opinion, much
23 better than what you see on TV because this is real life
24 that we're dealing with, very, very serious subjects. So
25 I would just like to thank them while you're still here

1 because I know that you probably feel the same way as I
2 did, hopefully, made you feel better about the legal
3 profession and the legal system as well

4 Now, the hour is late and so I will tell you
5 that your jury service is at a conclusion now and you are
6 free to go home We will now have sentencing And so you
7 are welcome to stay, if you want. If you do want to go, I
8 will pause for a few minutes so any of you that wish to go
9 home because it is getting late, you can do that
10 However, it will probably take just a few minutes because
11 I will give the lawyers an opportunity to talk and the
12 defendants an opportunity to talk and you can see what the
13 sentences is that I will impose But I will give you that
14 option that if you want to go home now, you're welcome to
15 do that If you want to stay, just let me know

16 It looks like everybody wants to stay So we
17 will go into that phase of the trial right now

18 So, at this time --

19 MR BUTLER If I could first, I have to renew
20 all motions for a mistrial and directed verdict based on
21 all grounds previously stated as well as the motion for a
22 new trial

23 MR RUNYON Your Honor, I would join in those
24 motions I would renew my directed verdict motion under
25 the Schrock line of cases because I just think that

1 particularly --

2 THE COURT Go ahead

3 MR. RUNYON The State Supreme Court especially
4 addresses whole circumstantial evidence issues
5 Therefore, I renew that motion for directed verdict I
6 serve as that for the foundation for a motion for a new
7 trial I renew the motion for a new trial on the grounds
8 stated previously

9 THE COURT Motions are noted and denied

10 All right Mr Durant, do you have sentencing
11 sheets?

12 MR DURANT. No, sir, I don't

13 THE COURT. All right

14 MR DURANT: I'm not sure that we have any
15 around.

16 THE CLERK: I have to go to the next courtroom

17 THE COURT. I can go ahead and impose the
18 sentence and then fill it out

19 Mr Durant, I will let you go first What would
20 you like to tell me?

21 MR DURANT Your Honor, we have no position on
22 sentence

23 THE COURT Mr Runyon?

24 MR RUNYON Your Honor, never argue with the
25 jury verdict That's for an appellate court. The simple

1 fact of the matter is Mr. Washington is before you today
2 The only sentence avenue open to the Court is extremely
3 substantial And I'd ask the Court to sentence
4 Mr Washington to the absolute minimum you can because --
5 and I'm not belittling what occurred that night The jury
6 has spoken as far as what his role may or may not have
7 been The simple fact is that this was not an armed
8 robbery It was senseless There's no question about
9 that, the way the whole thing occurred But I ask the
10 Court to hand down the minimum under the statute I don't
11 think the Court -- I mean, the Court can always go higher
12 and I ask the Court to avoid that

13 His mother is in court with him today, Judge
14 His father is not here because his father had to pull a
15 shift at the docks He comes from a good family, lives in
16 the northwest section of the city My oldest boy taught
17 him at Garrett High before my oldest son went on to be
18 associate principal down at Colleton County High So I've
19 had contact with his family for a number of years I know
20 their substance Mr Washington's father is a member of
21 the Canadian football league Hall of Fame, having played
22 up there a number of years ago It's just real
23 substantial folks, Judge And I'd ask the Court to
24 consider imposing the minimum under the statute.

25 THE COURT: How old is your client?

1 MR RUNYON My client is now 26, Judge He was
2 a lot younger when this whole thing started He was about
3 24 when the whole thing started

4 THE COURT. How far did he get in school?

5 MR RUNYON Graduated from high school, Judge

6 THE COURT. What is his employment in?

7 MR RUNYON He does construction work He was
8 waiting for this to be over to be cleared to work at the
9 ILA At the time of this occasion, he had a side business
10 of trying to produce some records and, actually, produced
11 some records But he does construction work and he has --
12 for the last two years, he has had a small construction
13 company doing home repairs

14 THE COURT What's his prior record?

15 MR RUNYON No prior record, Judge

16 MR DURANT. He had a prior trafficking in the
17 State of Florida, I believe it was dismissed

18 MR RUNYON That was dismissed, Judge

19 MR DURANT He has current charges for
20 trafficking as well

21 MR RUNYON. I don't think the Court can
22 consider that, Judge, I would respectfully submit

23 THE COURT I won't

24 Mr Washington, would you like to say anything?

25 DEFENDANT WASHINGTON Well, sir, I guess I got

1 to respect what the jurors came up with even though I know
2 I had no involvement in the actual crime itself The only
3 thing I can do is pray to God and hope I get an appeal and
4 get a better shot next time, Your Honor I guess I feel
5 sorry it turned out the way it turned out, but I guess
6 that's just a part of life You go through struggles and
7 everything, this is just one of those struggles I guess
8 I just hope for the best in the long run.

9 My heart goes out to the family and everything
10 I'm sorry for their loss, but now my family has a loss
11 also of a crime I didn't even commit I just wish the
12 jury could have took a little bit more time and go over
13 the actual evidence because, like you told the jury
14 earlier, it's beyond reasonable doubt when you make such a
15 harsh and such a hard decision But it's still got to
16 have no doubt to the situation at all when you give such a
17 verdict

18 THE COURT All right Any of his family
19 members want to speak?

20 MR RUNYON Mrs Washington?

21 MRS WASHINGTON Yes

22 As for when this trial first started, like I
23 said in the first trial, I could feel the mother's pain
24 because I lost a child in a shooting the year before. The
25 day in which her child was killed on the 11th, the child

1 I lost mother died that morning, the 10th, prior to all of
2 this taking place My son, Tremayne, I knew did not fire
3 a gun He had no reason knowing the pain in which we were
4 already in to leave home with the intent to kill someone
5 because we know the pain of grief and sorrow

6 And for those who made the verdict and connected
7 these two together, may God be with you all Because God
8 has the last word And what's going to be will be. And
9 God say revenge is his saith the Lord Reunite when
10 everyone in the court, however it went down, we do not
11 have the last word.

12 THE COURT What are you implying?

13 MRS WASHINGTON And I'm very sorry for your
14 loss, honey, because I felt the pain you felt And I'm
15 feeling it double

16 THE COURT I'm not sure what you said when you
17 will have the last word what you're implying

18 MRS WASHINGTON I didn't say I have the last
19 word I said God has the last word

20 THE COURT Okay I wanted to make sure that I
21 did not misunderstand you

22 MRS WASHINGTON God has the last word

23 THE COURT Okay

24 MRS WASHINGTON There's no way in the world I
25 have the last word God has the last word And like I

1 said, I feel her pain because I have been in her shoes
2 And all of this happened during the same time I was going
3 through this same pain, again, the morning prior to her
4 son being killed My son was going through it, I was
5 going through it The whole family was going through it
6 So it wasn't no need for my son wanting to go take another
7 life because we were already grieving And now with this,
8 we're grieving again And the young man that killed my
9 son didn't spend an hour in jail and he was killed in my
10 home by an adult And for them not to know actually who
11 killed this young boy and to give my son now, who I have
12 went through this grief before, I can't see it and don't
13 understand the system, but it is you all's system

14 And like I say, I pray for you all I'm praying
15 for the mother and her pain and I'm praying still yet to
16 get my pain relieved And like I say, God has the last
17 word For me to stand before you all today with my
18 testimony of these grieves of both side of the family is
19 God's will to give me the strength And you all will have
20 to give account to him on how you all have --

21 THE COURT Ma'am, I've heard enough from you

22 MRS WASHINGTON Okay

23 THE COURT All right Mr Ward Who is going
24 to speak on behalf of Mr. Ward?

25 MISS JENKINSON I am, Your Honor

1 Mr Ward is 32 years old He graduated from
2 Baptist Hill High School He grew up in the Hollywood
3 area He is here and has been in court all week with his
4 girlfriend, Alexis McKinley John has three children.
5 His mother would also be here, but she is sick. She lives
6 in the Hollywood area She's still there

7 We are certainly respectful of the jury's
8 verdict It's obvious from the testimony that people were
9 acting very foolishly out there But I think it's also
10 obvious that nobody intended for Jamie Simmons to get
11 killed John knew Jamie Simmons and he's very sad that
12 this happened to him and I know this family feels the same
13 way I have advised John, because of the appeal issue,
14 that he shouldn't speak, but I am speaking for him that he
15 is very sad and sorry that this happened to Jamie, who he
16 had known growing up

17 I would just ask the Court to consider the
18 minimum sentence And he was working, has a good family
19 and has children out there and we would like for him to
20 see them again.

21 THE COURT· Anyone that wishes to speak on
22 Mr Ward's behalf, family member or anything?

23 Yes, sir, your name?

24 MR. THOMLIN Antonio Thomlin (phonetical)

25 THE COURT REPORTER I'm sorry, his name?

1 THE COURT Your name again, sir?

2 MR THOMLIN Antonio Thomlin (phonetical) .

3 I'm his cousin Like I say, we grow up together John is
4 a pretty good fellow You know, not only are we cousins,
5 but we are real good friends And he will do anything for
6 one of his homeboys, what we call each other And to the
7 young guy who died, I don't know too much about him, but I
8 always seen him As a matter of fact, they used to hang
9 together. I know John would have never hurt him because
10 they be friends I wasn't there that night, but I heard
11 about it Where we at, you got a lot of idiots out there
12 running around with guns Probably ain't heard about it,
13 I don't know if you did I'm just getting off work. You
14 know, it's foolish for guys to be running around doing
15 things, but that's how it is sometimes But I just pray
16 that y'all have mercy on him

17 THE COURT How about from the victim's family?

18 MR DURANT The victim's mom, Mrs Ruby Simmons
19 would like the opportunity to address the Court, Your
20 Honor

21 THE COURT Yes, ma'am

22 MRS. SIMMONS I just want to thank you very
23 much for allowing me the opportunity to stand before you
24 and to speak for Jamie and our family. Again, I want to
25 thank you I want to especially thank the jurors. It's

1 been two years, very, very long years We've been through
2 two trials, this is the second And I just want to thank
3 everybody involved, the solicitor and detectives, everyone
4 has been really great to us

5 I think if I had made this statement at the time
6 that it happened, it probably would come out a whole lot
7 different I don't consider myself a vindictive person
8 I am a Christian I'm not going to stand before you and
9 say please give him life I'm not going to say life for
10 life Though, two years ago, if you asked me, I probably
11 would have said that It's been a very, very hard two
12 years And I think -- I mean, even the position that
13 we're at right now, I would trade hands with any of these
14 family members right now I could have the opportunity to
15 see my child I could have had the opportunity -- if we
16 had switched hands right now, I could look at Jamie right
17 now I could see his face I could go to the jail
18 wherever he is going to be and hug him and talk to him and
19 hear his voice and all of this stuff, which these people
20 have I don't have that I will never have that I
21 won't ever see his smiling face again I won't ever be
22 able to hug him again I won't ever see his humorous,
23 beautiful face, any of that So I know you all are pretty
24 sad right now, but whatever you get, it's certainly more
25 than what I've gotten and what I have

1 I have pictures and I have memories that will
2 always be with me and I thank God for that He was a good
3 boy, a very good boy That club was notorious for being
4 bad I told him to never stop there I didn't know he
5 was flagged down So even knowing that his cousin stopped
6 him gave me joy because it made me know that he listened
7 to me and to his dad, who had a motorcycle accident and
8 couldn't be here

9 So I don't see it as a huge victory, but I see
10 it as a victory I see it as an end to two years of
11 terror, of horror And I just want to start living again
12 We all just want to go on with our lives And we can
13 finally say that we all have paid our debt to Jamie,
14 including these people who took his life

15 So again, I know there's some sadness here, but
16 if you were in the grave and Jamie were sitting right
17 there, I would be grateful And that's what you should
18 be, grateful You don't have to go and visit a cold
19 grave You don't have to throw flowers there You can
20 talk to your son You can hug your boyfriend You can do
21 everything that a lot of people do I can't I can't

22 Thank you very much, Your Honor That's all I
23 have to say Thank you very much. - - -

24 THE COURT Well, you know, I will never
25 disagree with the jury's verdict I don't disagree with

1 this jury's verdict. I don't mean to imply that I would
2 by stating that. I think this verdict is well supported
3 by the evidence in this record

4 The difficult part about this case is that it's
5 an absolute waste of a young man's life and of these young
6 men's lives We see so much in these courts that it just
7 absolutely gets depressing after a while to see young
8 people throwing their lives away over nothing

9 I mean, in this case here, this all appeared to
10 be about some kind of a territorial dispute among young
11 people that just makes no sense whatsoever And the only
12 thing that does make sense about it is exactly what I
13 believe Mr Durant said at the beginning, that it was a
14 mixture of alcohol and testosterone and probably
15 stupidity It is just an absolute waste The young man,
16 who by every single account, was an absolute innocent
17 bystander that got caught up in this And he's gone and
18 his life will never be replaced.

19 I've got to decide what to do with these young
20 men's lives I have two choices, 30 years in jail, which
21 means 30 years, or life imprisonment, which means without
22 the possibility of any parole On the one hand, there's
23 no doubt in my mind that the evidence as presented in this
24 courtroom merits a life sentence The acts that they did,
25 it was clearly a situation that they knew what they were

1 doing when they got in that car There's no doubt in my
2 mind that there was shooting going on and it was -- I
3 don't know what they were shooting at, but they were
4 shooting And you put a gun out in a crowd of people, you
5 have to be awful stupid to not know that it is a good
6 likelihood that somebody is going to end up shot, killed
7 or there's no good outcome in that situation For that,
8 there's no doubt in my mind that what you did deserves
9 life in prison

10 However, there is the other side of the coin and
11 that is one gentleman is 26 years old. One gentleman is
12 32 years old A 30-year sentence means that Mr
13 Washington walks out of jail at 56 Mr Ward walks out of
14 jail at 62

15 You know, if you ever study criminology, you
16 look at the statistics and the pattern for people that
17 commit crime, it starts out in your mid-teens and then
18 goes up very sharply from that point to about the time you
19 hit 25. It starts to coast down during the time until you
20 get past 35 to 40, it's way down And people in their
21 40's and 50's and 60's, we don't see in court They
22 aren't committing crimes They, by and large, have gotten
23 this out of their system. Most career criminals that we
24 deal with, it seems like, on plea week, you just don't see
25 the older folks here They've just gotten tired of the

1 lifestyle

2 I remember when I first started -- before I
3 started my job as a circuit court, in the year between the
4 time I got elected and the time I started, I made the
5 decision that I was going to go visit prisons because I
6 said if I'm going to send people there, I'm going to see
7 what it's like I want to know what I'm sending them to

8 And I went to three different prisons in this
9 state I went to Lieber, I went up at Turbeville and went
10 to McDougal and saw a wide variety of people there But I
11 will never forget talking to the warden at Lieber and the
12 number of young men that are there and the number of older
13 men that are there And I said, you know, you've been
14 watching these people for years now, what in your opinion
15 makes them get over this criminal urge, the desire to go
16 out and commit violent crimes He said time He said
17 time makes them get over it. He says, you see that guy
18 over there? He says, he's in his 50's When he came in,
19 he was 18 years old and he was a punk And it took 10 to
20 15 years to get it out of his system He said, but he
21 finally got over it He said, he'll never walk out of
22 here, but he said after a while, you just get tired of it

23 My own personal religious beliefs, which I
24 cannot factor out, you believe in redemption You have to
25 believe that people can get better. Everything about this

1 case suggests to me, in my experience, that if I sentence
2 them to 30 years, they're going to be old men when they
3 get out of jail, middle-aged men I don't know, 56
4 doesn't sound nearly as old as it use to But I swanny,
5 everything in my background and what I know about the way
6 the criminal mind works suggests to me that by the time
7 they get out of jail, they are not going to be a threat to
8 society anymore if I give them 30 years There's nothing
9 in their background that seems to suggest a violent
10 background.

11 Their debt to society is large, 30 years, with
12 that meaning a 30-year sentence is a long time to serve
13 But I still believe, I like to believe, I hope to believe
14 that at the end of the day when after they've served their
15 time, they can walk out of jail and, hopefully, contribute
16 something back to society and lead some kind of a
17 productive life That is my hope

18 Don't let me down on it I'm giving you each 30
19 years You are committed to the department of corrections
20 for a period of 30 years

21 Good luck to you

22 MR DURANT Thank you, Your Honor

23 MR RUNYON- Thank you

24 MISS JENKINSON Thank you, Your Honor

25 THE COURT- Thank you, ladies and gentlemen

1 You did a wonderful job this week You are to be
2 commended

3 ---END OF TRANSCRIPT OF RECORD---

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1 CERTIFICATE OF REPORTER

2

3

4 STATE OF SOUTH CAROLINA)

5 COUNTY OF CHARLESTON)

6

7

8 I, Holly Hiott O'Quinn, Official Court Reporter for

9 the 9TH Judicial Circuit of the State of South Carolina,

10 do hereby certify that the foregoing is a true, accurate

11 and complete Transcript of Record of the proceedings had

12 and evidence introduced in the trial of the captioned

13 case, relative to appeal, in the Court of General Sessions

14 for Charleston County, South Carolina, on the 6th through

15 the 9th days of June, 2005

16 I do further certify that I am neither of kin,

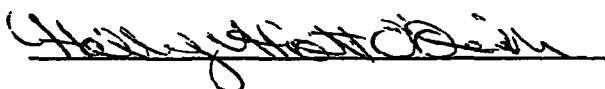
17 counsel nor interest to any party hereto

18

19 February 22, 2006

20

21

22 

23 Holly Hiott O'Quinn, RPR, Court Reporter

24

25

Date:

6605

County:

Chas. Se. Stew

VOIR DIRE

Case No: 03-65 10-5895 - Ward
 1 / State 03 65 12 5844 - Washington
St. Se

Judge:

Young

State/Pl's. Atty:

Bruce Duffant

Defendant:

John Henry Ward

Defense Atty:

Beatrice Butler / Martha Kurt
Jenkins

Tromayne R. Washington

B. H. Runyon

Court Reporter:

H. H. C. C. C.

JURY No.	Name	Sex	Race	Court	Strikes		Defense	Accept
					Plaintiff	Defense		
27	Shane Caporassi	F	W					1
239	Leanne Wojtkowiak	F	W					2
41	Evon Daise	F	B			1		
91	Noel Johnson	M	W					3
167	Edwina (Simmons) Dumb	F	B		1			
235	Chris Trueman Wright	M	W		2			
65	Leslie Gordon	F	B				1	
104	Robert Lassetter, Jr.	M	W					4
62	James Gordon, III	M	W		3			
98	Kim Kirkman	F	W			2		
177	Jennie Sutton	F	B		1			5
216	Deborah Grinn	F	W			3		
114	Ryan Scott	M	W			4		
49	John Dayle	M	W					6
63	James Gardner, II	M	W			5		
195	Eleanor Whitcomb	F	W					7
129	Paul Murphy	M	W			6		
172	Eugene Singleton	M	B		4			

the court column, please indicate who made the motion to strike the jurors "for cause".
 v. a "C" for Court, "P" for Plaintiff or "D" for Defense.

Date: 6-26-65

861

County: Chancery

VOIR DIRE

: C3 15-16-5893; Ward
 C3 5894 Washington
 ice: State of DC

Judge: Young

State/Pl's. Atty: Bruce W. Hunt

acc: John Henry Ward
 Tennessee Washington
 Reporter: Elmer H. Quinn

Defense Atty: Rattis Putter

Bill Kuyper

No.	Name	Sex	Race	*Court	Strikes			Accept
					Plaintiff	Defense	W. A. H. P. L. R. D.	
25	Liesse Mitchell	F	W			7		
28	Ronald Grick	M	W					9
110	Arthur Matthews	M	B		5			
138	Mark Pantson	M	W					9
196	Lawrence White	M	W					10
165	Elaine Shaw	F	W				2	
118	Kelly Mesurier	F	W				3	
33	Mary Cook	F	W					11
202	Gretchen Bessel	F	W				4	
223	Sarah Lyle	F	W					12
119	John Meyers	M	W					1
221	Marcia Jones	F	W				1	
3	Philip Aldous	M	W					2

For the court column, please indicate who made the motion to strike the jurors "for cause" with a "C" for Court, "P" for Plaintiff or "D" for Defense.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Roger M Young, Presiding Judge

CASE NO 2003-GS-10-5895
WARRANT/TICKET NO(S) H-395140
CHARGE(S) Murder

STATE OF SOUTH CAROLINA, RESPONDENT

VS

JOHN HENRY WARD, APPELLANT

BRIEF OF APPELLANT

William J Watkins, Jr
Heather G Ruth
WOMBLE CARLYLE
SANDRIDGE & RICE, PLLC
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400

Joseph L Savitz, III
South Carolina Office
of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Appellant

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STATEMENT OF THE ISSUES

- I Whether the trial court erred in refusing to grant a mistrial when the prosecution improperly injected gang-related issues into the trial
- II Whether the trial court erred in permitting admission of autopsy photos of the victim into evidence
- III Whether the trial court erred in charging the jury that the hand of one is the hand of all
- IV Whether the trial court erred in refusing to grant a directed verdict in favor of Ward
- V Whether the trial court erred in permitting the State to play for the jury the testimony of Tremayne Washington given in a prior trial

STATEMENT OF THE CASE

On September 2, 2003, John Henry Ward was indicted for the murder of Jamie Simmons under S C Code Ann § 16-3-10 (1976) (R p 6) A trial on the charges was held on December 6-10, 2004 The trial resulted in a mistrial because of a hung jury (R pp 933-39) A second trial was held June 6-9, 2005 In the second trial, the State tried Ward and Tremayne Washington together The jury convicted both defendants, who were sentenced to 30 years imprisonment (R p 7 & 1797) Ward received his sentence on June 9, 2005 (R p 7) On June 14, 2005, Ward appealed both his sentence and conviction (R pp 8-9)

FACTS

During the early morning hours of May 11, 2003, a disturbance took place at the Club Diamante in Charleston County, South Carolina (R pp 1032-34) Deputy Don Frichil was dispatched to investigate "a subject that was being unruly out in front of the club" and "throwing bottles in the parking lot" (R p 1034) It later was revealed that the altercation arose because of a dispute between John Campbell and Keith Richards on the dance floor of the club (R pp 1071, 1098-99, & 1214-15)

The fight, which the prosecutor referred to as "a gang fight" (R p 1696-97), eventually moved outside of the club and near the truck of Kevin Dunmeyer, which is where Richards punched Campbell (R pp 1215-16) Dunmeyer intervened and also scuffled with Campbell (R p 1216) Dunmeyer soon found himself outnumbered, fled the scene on foot, and was chased down the street by a group of men (R pp 1076-77 & 1217) Antonio Washington's lime green Cadillac picked up the fleeing Dunmeyer and drove him back to the club parking lot (R pp 1077-78 & 1218) As the Cadillac

navigated the streets, witnesses observed that “[i]t was trying to hit people” standing in the road (R pp 1150 & 1295) Antonio Washington exited the Cadillac, shouted at the crowd in the parking lot, gestured toward the crowd, invited club patrons to fight him, and tossed bottles into the crowd (R pp 1103, 1218, & 1220) After some rabbleroxing, the Cadillac began to leave the scene and struck one person as it departed (R p 1298)

James Murphy, who was present in the parking lot, saw Tremayne Washington’s Dodge truck follow the Cadillac (R pp 1104-05) Tremayne Washington, John Henry Ward, and Catrell Douglas were inside the truck (R pp 1106, 1346-47) Murphy and another witness, Kenneth Sanders, saw Douglas driving, Ward in the front passenger seat, and Tremayne Washington in the rear passenger seat (R pp 1106 & 1222) As the two vehicles began leaving the parking lot, witnesses heard gunshots (R pp 1041, 1054, 1125, & 1151) Deputy Frichtl testified that “rounds were going [off] in front of me and behind me ” (R p 1041) The gunfire was so heavy that Deputy Frichtl retreated from the scene and called for backup (R pp 1041-42)

Murphy corroborated Frichtl’s testimony about the gunfire, noting that many people were shooting in the parking lot that night (R pp 1120, 1125, & 1130-31) Ricky Holmes testified that “[g]unfire was coming from everybody”—shots were coming from “all over ” (R p 1240) Crimes scene investigators eventually discovered six shell casings three 40 caliber, two 9-millimeter, and one 25-caliber (R p 1487)

Murphy thought he saw shots being fired from the passenger side of the truck as it pursued the Cadillac, but clarified that he could not be sure from where the shots were fired (R pp 1105-06 & 1118) Catrell Douglas, facing murder charges for the events of

May 11, testified that Ward shot out of the passenger window of the truck ¹ (R p 1348) However, he further testified that the three men in the truck did not discuss or plan to fire a weapon, injure anyone, or to pursue the Cadillac (R pp 1361, 1364, & 1379) The jury also heard testimony from the first murder trial in which Tremayne Washington indicated that Ward fired shots at the Cadillac (R p 378) Tremayne Washington did not allege Ward was shooting until the eve of the first murder trial (R p 416)

Catrell Douglas could not identify the owner of the weapon or the kind of weapon Ward allegedly fired (R p 1349) Furthermore, in prior statements given to the police, Catrell Douglas never mentioned Ward firing a weapon (R pp 1358-59) An eventual search of the truck revealed an empty holster, a shell casing, an unfired bullet, and magazines (R p 1500) Records revealed that Tremayne Washington owned a Ruger, 9-millimeter pistol, but no weapon was ever recovered or entered into evidence (R p 1510)

During the shooting on May 11, 2003, at the club, Jamie Simmons was killed (R p 1507) A bullet pierced his heart and his back suffered a graze wound (R p 1544) James Murphy saw Jamie Simmons fall to the ground as bullets begin to whiz but before any shots came from the area of Tremayne Washington's truck (R pp 1131 & 1133) The police investigation revealed that Simmons was struck by a 9-millimeter bullet (R p 1522) The State's expert in firearm's identification testified that the fatal shot could have been fired from any one of up to 40 different models of 9-millimeter handguns (R p 1536) The fatal shot entered on the back side of the left arm, 11 2 inches from the top

¹ Catrell Douglas admitted that he did not want to be charged with murder and eventually told the police Ward fired a weapon (R pp 1403-04) After he provided this information, the police stopped questioning him (R p 1404)

of the shoulder (R p 1554) The State's expert in forensic pathology testified that without knowledge of whether the deceased was standing, crouching, etc , it is almost impossible to make a true determination of the bullet's trajectory (R pp 1555-56) Despite the state's expert's admission that she was unable to determined the bullet's path even after examining the victim's autopsy photos, the trial court allowed the prosecution to introduce the pictures into evidence (R p 1568) Although the bullet's trajectory is uncertain, it is clear that, at the time the bullet hit Simmons's arm, it was going upward (R p 1559) The evidence indicated that if the shot was fired from the height of the truck window — as alleged by the State — it could not have been going upward (R p 1648)

A stray bullet also hit a Geo Tracker parked near Simmons The evidence indicated that that shot which hit the Tracker was level (R p 1471) For such a level shot to have come from a firearm, which was shot out of the window of the Dodge truck, the shooter would have had to have held the gun nine inches below the base of the window—a difficult feat (R pp 1677-78)

In December 2004, the State tried Ward for the murder of Simmons The trial resulted in a mistrial because of a hung jury A second trial took place June 6-9, 2005 This time, the State tried Ward and Tremayne Washington together as an accomplice liability case under a hand of one theory (R pp 6 & 1578) The jury convicted both defendants, who were sentenced to 30 years imprisonment (R p 1797)

SUMMARY OF THE ARGUMENT

The jury's verdict should be vacated and a new trial should be ordered because of the trial court's multiple errors and the resulting denial of the defendant's due process. Courts consistently have ordered new trials when the prosecution infects trials with unwarranted gang-related remarks. The state's supreme court has determined that comments, like the references to "gangster" in this case, are unfair and make the resulting conviction a denial of due process. Thus, the defendant is entitled to a new trial because of the prosecutor's repeated suggestion that he was a "gangster," which infected the trial with prejudice and denied him due process of law. Furthermore, the defendant was unduly prejudiced by the trial court's admission of autopsy photographs of the victim. The court erred in admitting the pictures because the prejudicial effect of the photos not only outweighed their probative value, but the pictures were irrelevant and were simply introduced to arouse the sympathies and prejudices of the jury. Moreover, South Carolina courts have emphasized that such pictures should be excluded when they, like the photos in this case, show facts already established through testimony.

In addition to improperly allowing the introduction of autopsy pictures, the trial court erred in charging the jury with the hand of one is the hand of all theory of guilt. The charge was inappropriate because there was no evidence of a common plan or scheme. The lack of evidence of a common scheme is fatal to the prosecution's hand of one theory, hence, the court erred by giving the jury such a charge. As a result, the charge constitutes a reversible error because it must have contributed to the erroneous guilty verdict, which is in complete disregard of the lack of evidence regarding a common plan.

Also, the lack of such evidence should have prompted the trial court to grant Ward's directed verdict motion, it, therefore, was a mistake for the court not to do so

Furthermore, it was an abuse of the trial court's discretion to allow the jury to hear Tremayne Washington's testimony from the previous trial. Such testimony is only admissible under the South Carolina Rules of Evidence if the declarant is unavailable and if the party against whom the testimony is offered had a similar motive to develop the testimony. In this case, the testimony should not have been allowed because the declarant, Washington, was available. Furthermore, thanks to the prosecution's tactical change regarding the testimony, Ward's counsel did not have a similar motive in cross-examining Washington. As a result, it was inappropriate for the court to allow the jury to hear the testimony.

ARGUMENT

I Whether the trial court erred in refusing to grant a mistrial when the prosecution improperly injected gang-related issues into the trial

A new trial must be granted when the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Tubbs, 333 S.C. 316, 320, 509 S.E.2d 815, 817 (1999) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). In this case, the prosecution's gang references — in the opening statement and during witness examinations — "infected the trial with unfairness." Id. The remarks were not warranted because there was no evidence presented that this was a gang-related crime or that Ward was actually a member of a gang. Furthermore, even if such evidence existed, it would be barred under Rules 403 and 404(b) of the South Carolina Rules of Evidence. See State v. Alexander, 303 S.C.

377, 382, 401 S E 2d 146, 149 (1991) (stating that relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice), State v Beck, 342 S C 129, 135, 536 S E 2d 679, 683 (2000) (noting that prior “bad acts” are admissible if the record shows a logical relevance between the prior bad act and the accused crime) Despite this lack of evidence, the prosecutor repeatedly implied that Ward was a gang member and the trial court abused its discretion in declining to grant a mistrial See Tucker v Reynolds, 268 S C 330, 334, 233 S E 2d 402, 404 (1977) (stating that a denial of a motion for a mistrial is reviewed for an abuse of discretion)

Courts dealing with this issue realize that introducing evidence that a defendant is associated with a gang may be prejudicial because a jury often associates gangs with criminal activity and may improperly convict based on inferences as to the defendant’s character See United States v Bradford, 246 F 3d 1107, 1117 (8th Cir 2001) (“To be certain, there is great potential for prejudice when evidence regarding gangs is at issue”), overruled on other grounds by United States v Diaz, 296 F 3d 680 (8th Cir 2002), see also United States v McKay, 431 F 3d 1085, 1093 (8th Cir 2005) cert denied, 126 S Ct 2345 (2006) (“[G]ang affiliation evidence is not admissible where it is meant merely to prejudice the defendant or prove his guilt by association with unsavory characters ”)

The South Carolina Supreme Court dealt with a similar situation in State v Day, 341 S C 410, 422-23, 535 S E 2d 431, 438 (2000), when the prosecution referred to the defendant’s nickname of “Outlaw” multiple times in the closing argument According to the court, the prosecution used “Outlaw” only to attack the character of the defendant Id at 422, 535 S E 2d at 437-38 The court stressed that “[t]he solicitor repeatedly referred to Day as an outlaw in her closing argument in order to paint a picture of Day as

someone who was proud of his status as an outlaw, who felt he was above the law, and who was able to deceive law enforcement by hiding evidence and concocting a story about self-defense” Id at 422-23, 535 S E 2d at 438. Because the prosecutor’s comments so infected the trial with unfairness, the Court held that the resulting conviction was a denial of due process that warranted a new trial. Id at 423-24, 535 S E 2d at 438.

Another analogous case is United States v. Roark, 924 F 2d 1426 (8th Cir. 1991). In Roark, the jury heard generalized and repeated testimony regarding the drug dealing activities of the Hell’s Angels motorcycle gang, of which the defendant was a member. Id at 1433-34. The defendant was convicted of manufacturing drugs and conspiracy. On appeal, the defendant challenged the insertion of gang issues into the trial and the Eighth Circuit agreed, noting that “[t]he government began its assault on the Hells Angels organization in voir dire, and continued throughout the trial in a relentless attempt to convict Appellant through his association with the motorcycle club.” Id at 1432. Although the trial judge gave a limiting instruction because of the assertion of gang affiliation, the appellate panel concluded that this was insufficient because of the multiple references to gangs. Id at 1434.

In Roark, the Eighth Circuit frowned on the Government’s trial tactics regarding gangs, emphasizing that “[e]vidence of uncharged misconduct to show criminal propensity is inadmissible not because it is logically irrelevant, but because it is inherently and unfairly prejudicial.” Id. The panel ultimately held that the Government’s remarks about gang affiliation were reversible error and the case was remanded for a new trial. Id. See also People v. Terry, 728 N E 2d 669, 676-78 (Ill. App. 2000) (holding that

comments regarding gang affiliation were improper and reversible error because they substantially prejudiced the defendant and the evidence of guilt was not overwhelming), People v Billingsley, 425 N Y S 2d 139, 141 (1980) (holding that a new trial was required because the prosecutor's use of the word "gangster" in closing argument was calculated and prejudicial)

In the present case, like in Roark, statements about gang affiliation arose in the prosecution's opening statement. In describing the victim to the jury, the prosecutor stated that "[b]y all accounts, Jamie was not a drinker, was not a drug user, was not a gang banger" (R p 1020). Contrasting the Defendants to the victim, the prosecution stated that "they were drinking and they were beating their chest and they [had] something to prove that night" (R p 1020). The implication is clear. Defendants, unlike the victim, were drinking and gang banging at the club. The prosecutor further emphasized gang banging when he described the fight in the parking lot and the participation of "a gang of fellows from Petersfield" (R p 1021). He then made clear to the jury that Ward "is Petersfield" (R p 1021).

In questioning Dunmeyer about the fight in the parking lot, the prosecutor asked "[w]here was this gang of guys from?" and Dunmeyer responded "Petersfield area" (R p 1074). The prosecution became more blatant when, in questioning a crime scene investigator about the discharge of shell casings, he described the shooter as employing "a gangster hold" (R p 1478). A contemporaneous objection was made to this prejudicial characterization (R pp 1478-79). The prosecution again referred to a "gangster style" shooting during cross examination of accident reconstruction expert Roy Cantrell (R p 1682). The defense counsel made another contemporaneous objection, prompting the

trial judge to instruct the jury to disregard the question because there was "no evidence to base that question on" (R p 1682)

After Cantrell's testimony, no other witness was called to the stand. The defense made a motion for a mistrial based on the prosecution's improper insertion of gang affiliation into the trial (R pp 1700-01). In remarks leading up to the mistrial motion (outside the presence of the jury), the prosecution demonstrated that the "gangster" references were not made by accident. He twice referred to the incident at the club as "a gang fight" (R pp 1696-97). The trial judge denied the mistrial motion, but instructed the prosecutor to make no more references to "gangsters" (R p 1702)

The trial court erred in denying the motion for a mistrial. The repeated mentions of gangs and gangsters "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tubbs, 333 S C at 320, 509 S E 2d at 817. As the Eighth Circuit noted in Roark, a statement of "uncharged misconduct to show criminal propensity" (e g , gang affiliation) "is inherently and unfairly prejudicial." 924 F 2d at 1434. Although the trial court at one point instructed the jury to disregard references to "gangster" because there was no evidentiary basis for the comment (R p 1682), the repeated "gangster" references so infected the proceedings that the instructions were impotent. See Roark, 924 F 2d at 1434 (noting that the limiting instruction was insufficient because of the government's multiple attempts to insert gang affiliation into the trial). Just as the solicitor in Day used the name "Outlaw" for an improper purpose, the State used gangster references to paint Ward as a bad actor affiliated with unsavory characters. Day at 422-23, 535 S E 2d at 438. Thus, like the defendant in Day, Ward was denied due process of law and is entitled to a new trial.

II Whether the trial court erred in permitting admission of autopsy photos of the victim into evidence

The trial judge abused his discretion in permitting the prosecution to enter into evidence autopsy photographs of Simmons's wounds. When ruling on admissibility, a trial judge must balance the prejudicial effect of graphic photographs against their probative value. State v. Vang, 353 S.C. 78, 87-88, 577 S.E.2d 225, 229-30 (Ct. App. 2003). "To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. at 382, 401 S.E.2d at 149 (1991)). See, e.g., State v. Vang, 353 S.C. at 87-88, 577 S.E.2d at 229-30, State v. Hughey, 339 S.C. 439, 460, 529 S.E.2d 721, 732 (2000), cert. denied 531 U.S. 946, 121 S.Ct. 345 (2000).

"In the *guilt* phase of a trial, photographs of the murder victim[] should be excluded where the facts [the photographs] are intended to show have been fully established by competent testimony." State v. Kornahrens, 290 S.C. 281, 288-89, 350 S.E.2d 180, 185 (1986). Moreover, "photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a [trial] if they are irrelevant or not substantially necessary to show material facts or conditions." Id. at 288, 350 S.E.2d at 185, see also State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986).

In State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953), the South Carolina Supreme Court held that the trial court erred in admitting four photographs of the victim's body at the crime scene. The State offered the photos to show the victim's bruises from

the assault, the condition of her clothes, and that her rings had been removed and placed on another finger Id at ___, 77 S E 2d at 263 The supreme court determined that the trial court erred in allowing the introduction of the photographs because there was no dispute about the facts depicted in them Id Because all of the facts depicted in the photographs were established by medical and lay testimony, the evidence should have been excluded since it was “wholly unnecessary” and introduced only to “inflame and arouse the passions of the jury” Id

Also instructive is Middleton, in which the trial judge admitted color autopsy photographs, which showed the victim’s scalp being pulled away from her skull and her vaginal cavity being surgically opened to show evidence of sexual assault 288 S C at 24, 339 S E 2d at 693 The defendant offered to stipulate to any facts shown by the photographs, but the solicitor refused Id The South Carolina Supreme Court reversed the trial court’s decision, holding that the photographs were inadmissible because the prejudicial effect outweighed any evidentiary value, the information contained in the photographs was not contested (as evidenced by the defendant’s offer to stipulate), and the testimony of the forensic pathologist negated any evidentiary value of the photographs Id

In the present case, when the prosecution moved to introduce exhibits 79 and 80 into evidence, the defense objected on Rule 403 grounds (R pp 1545 & 1568) The trial judge overruled the objection, accepting the prosecution’s argument that the photographs were necessary to rebut defense arguments about the angle of the shot (R p 1568) This was error During cross examination, the State’s forensic pathologist admitted that the information she had available to her, including the graze wound

depicted in the photograph, did not enable her to determine the trajectory without further evidence of the victim's body position (R pp 1555-56) Hence, the photographs did not serve the purpose stated by the prosecution

As in Waitus, the autopsy photographs are of no evidentiary value and could only have been entered to "inflame and arouse the passions of the jury " 224 S C at ___, 77 S E 2d at 263 Moreover, as established in Kornahrens, any evidence contained in a victim's photograph that is established by competent testimony should be excluded 290 S C at 288-89, 350 S E 2d at 185 Here, the pathologist's testimony was sufficient to describe the wounds, therefore, the introduction of the photographs was unnecessary to establish additional facts concerning the wounds Hence, the trial judge erred in admitting State's Exhibits 79 and 80 into evidence

III Whether the trial court erred in charging the jury that the hand of one is the hand of all

The trial judge erred in giving the jury a hand of one charge The charge was confusing and directly affected the jury's return of a guilty verdict In South Carolina, jury instructions "must be considered as a whole[,] and if[,] as a whole[,] they are reasonably free from error, isolated portions which might be misleading do not constitute reversible error " State v Barksdale, 311 S C 210, 216, 428 S E 2d 498, 501 (Ct App 1993) In order to hold an error harmless, this court "must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict " State v Kerr, 330 S C 132, 144-45, 498 S E 2d 212, 218 (Ct App 1998) However, in this case, the incorrect hand of one jury charge contributed to the verdict and thus it was not a harmless error

“The hand of one is the hand of all” theory in South Carolina provides that one who joins with another to accomplish an illegal purpose is liable criminally for everything done incidental to the execution of the common design and purpose of the criminal act. See State v. Crowe, 258 S C 258, 265, 188 S E 2d 379, 382 (1972), State v. Dickman, 341 S C 293, 295, 534 S E 2d 268, 269 (2000). In order to admit evidence under “the hand of one is the hand of all” theory, the State first must show there is a common design and the accused participated in the common plan. State v. Langley, 334 S C 643, 648, 515 S E 2d 98, 101 (1999). Therefore, a court should examine the existence of a common design and intent to commit the crime, and subsequently determine whether the defendant actively participated in the conduct pursuant to the plan.

In Dickman, the appellant was found guilty of murder under a theory of accomplice liability based on “the hand of one is the hand of all.” 341 S C at 295, 534 S E 2d at 269. When evaluating the adequacy of the “hand of one is the hand of all” jury charge, the court stated that “[t]he critical question is whether there is any evidence appellant and [the other charged with the crime] were acting together.” Id. at 295-96, 534 S E 2d at 269. In addition, the State must show that the criminal activity was the “natural [and] probable consequence” of the unlawful act pursuant to the common design. Cartrette v. State, 323 S C 15, 20, 448 S E 2d 553, 556 (1994). Therefore, the State must prove that two or more persons were acting, assisting, or participating together in the commission of the offense, and that the offense was one that could be reasonably expected to occur as a result of the individuals’ concerted activity. State v. Bell, 305 S C 11, 18, 406 S E 2d 165, 169-70 (1991). A defendant’s mere presence at the scene of a

crime is insufficient to convict him under a hand of one theory State v Zeigler, 364 S C 94, 107, 610 S E 2d 859, 866 (Ct App 2005)

Here, the prosecution tried the case as one of “accomplice liability” and proceeded under the theory “that the hand of one is the hand of all ” (R p 1578) Defendants objected to the jury being charged under hand of one because there was no evidence of a common design or plan (R pp 1688-96 & 1762) The court overruled the objections and gave the charge (R p 1759) This was error and resulted in a confusing charge because there was no evidence of a common plan or scheme

In fact, the evidence revealed that Ward was not involved in the fight inside the club (R pp 1071, 1098-99, & 1214-15) When the hostilities moved to Dunmeyer’s truck, Ward was not present in the altercation (R pp 1087-88 & 1123-24) Although others were boasting and threatening, Ward was neither seen nor heard engaging in these activities (R p 1124) According to Douglas, who was driving Tremayne Washington’s truck, there was no talk, agreement, plan, or discussion that someone was going to fire a weapon (R pp 1361, 1364, 1379-80) The only plan evident was to give Douglas a ride home and for the three men in the truck to remove themselves from the dangerous atmosphere of the club (R pp 1360, 1362, & 1364)

The only “evidence” the State could muster to support a common plan was hearsay statements that Tremayne Washington said “we will handle that” (R p 1195) and “[s]ome bitch was going to die” (R pp 1100-01) The former statement, however, was not made to Ward or anyone in particular (R p 1195), and the latter statement was made in a similar fashion (R p 1115) These hearsay statements do not provide evidence that Ward acted or planned in concert with other persons to commit the offense charged under

the hand of one theory Dickman, 341 S C at 295-96, 534 S E 2d at 269 The three men were present in the truck together, but mere presence at a crime scene is not enough when the prosecution proceeds under a hand of one theory Zeigler, 364 S C at 107, 610 S E 2d at 866

Accordingly, the trial court erred in charging the jury that the hand of one is the hand of all because there was no evidence of a common scheme or plan Absent such evidence, the jury could only have been confused by the charge The prosecution asserted the hand of one theory of guilt (R p 1578), but the absence of a common scheme was fatal to its case Therefore, the hand of one is the hand of all jury charge must have contributed to the erroneous guilty verdict

IV Whether the trial court erred in refusing to grant a directed verdict in favor of Ward

Viewed in the light most favorable to the State, insufficient direct or circumstantial evidence existed to prove Ward's guilt under the hand of one theory See State v Middleton, 367 S C 527, 529, 626 S E 2d 74, 75 (2006) As discussed in the previous section, the prosecution put forward the hand of one theory of guilt (R p 1578) The only "evidence" the State could muster to support a common plan — which is critical to a hand of one case — was hearsay statements that Tremayne Washington said "we will handle that" (R p 1195) and "[s]ome bitch was going to die" (R pp 1100-01) The former statement, however, was not made to Ward or anyone in particular (R p 1195), and the latter statement was made in a similar fashion (R p 1115) These hearsay statements do not provide evidence that Ward acted or planned in concert with other persons to commit the offense charged under the hand of one theory Dickman, 341

S C at 295-96, 534 S E 2d at 269 The three men were present in the truck together, but mere presence at a crime scene is not enough when the prosecution proceeds under a hand of one theory Zeigler, 364 S C at 107, 610 S E 2d at 866 Therefore, the prosecution failed to prove its hand of one theory of guilt Accordingly, a directed verdict should have been entered in favor of Ward

V Whether the trial court erred in permitting the State to play for the jury the testimony of Tremayne Washington given in a prior trial

Although Tremayne Washington exercised his Fifth Amendment right not to testify, the prosecution declared him unavailable and played for the jury his testimony from the December 2004 proceedings, which ended in a mistrial (R pp 1427-28 & 1437) In this testimony, Tremayne Washington indicated that Ward fired a weapon at the Cadillac on the night of the incident (R p 378) It was an abuse of the trial court's discretion to allow this prejudicial testimony See State v Saltz, 346 S C 114, 121, 551 S E 2d 240, 244 (2001) (trial court's evidentiary rulings reviewed for an abuse of discretion)²

The trial court did not cite a hearsay exception when admitting the testimony, but it appears that the trial court and the prosecution relied on S C R Evid 804(b)(1) Under this rule, if the declarant is unavailable

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest,

² Counsel for Ward acquiesced in the playing of Washington's testimony (R p 1428), but later argued that the prosecution had tried the case differently than in the first trial (R pp 1577-78) This contention relates to a lack of the same motive for cross examination in the first trial as the second Thus, the issue was raised and ruled upon in the trial court

had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination

S C R Evid 804(b)(1)

The trial court first erred in declaring Tremayne Washington unavailable In South Carolina, “[a] defendant who invokes his fifth amendment privilege against self-incrimination is not ‘unavailable’ for the purposes of this rule ” State v Cheeseboro, 346 S C 526, 549, 552 S E 2d 300, 312 n 4 (2002), cert denied, 535 U S 933, 122 S Ct 1310 (2002) Accordingly, the trial court should not have declared him unavailable

The next error concerns the “similar motive” portion of the rule Counsel for Ward did not have the same motive to develop the cross examination of Tremayne Washington because the State tried the case differently in this trial than it did in the 2004 mistrial in which Washington testified In fact, counsel for Ward argued, on the record, that the State had tried the case differently (R p 1577) The examples given in the objection specifically related to the actions of Tremayne Washington

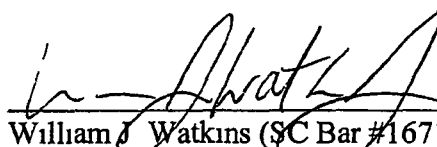
In the first trial, the prosecution ridiculed evidence that Tremayne Washington washed his hands with bleach after the shooting (R pp 770-71) and in the present case, the prosecution introduced the bleach evidence pursuant to the hand of one theory (R pp 1280-81 & 1577-78) In the first trial, when Ward was the sole defendant, the bleach evidence damaged the prosecution’s case that Ward was the shooter In the second trial, however, the bleach evidence aided the prosecution’s hand of one theory because it could lead to the inference that Washington had residue from the weapon on his hands and thus could have been the shooter Hence, had the prosecution developed a common scheme or plan, Washington’s act as the shooter also could have convicted Ward under the hand of one theory used by the State

Thus, the prosecution's use of the bleach evidence in the second trial was a major departure from the presentation of evidence in the first trial. It naturally follows that counsel for Ward would have had a different motive to cross examine Tremayne Washington in the second trial had he been given the opportunity. The State's use of the bleach evidence, coupled with the joint prosecution of Ward and Washington under the hand of one theory, rendered the December 2004 cross examination of Washington obsolete. Accordingly, the trial court erred in permitting the State to play Washington's 2004 trial testimony to the jury.

CONCLUSION

For all the foregoing reasons, the jury's verdict should be vacated and a new trial should be granted.

Respectfully submitted,


 William J. Watkins (SC Bar #16716)
 Heather G. Ruth (SC Bar #68290)
 WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
 550 South Main Street, Suite 400
 Greenville, South Carolina 29601
 (864) 255-5400

Joseph L. Savitz, III
 South Carolina Office of Appellate Defense
 1330 Lady Street, Suite 401
 Columbia, South Carolina 29201
 (803) 734-1330

Attorneys for Appellant John Henry Ward

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable Roger M. Young, Circuit Court Judge

THE STATE

Respondent

VS

JOHN HENRY WARD

Appellant

FINAL BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENA
Assistant Deputy Attorney General

DERRICK K. McFARLAND
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

RALPH HOISINGTON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Ste. 400
Charleston, South Carolina 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- 1 Whether the trial court erred in refusing to grant a mistrial when the prosecution improperly injected gang-related issues into the trial
- 2 Whether the trial court erred in permitting admission of autopsy photos of the victim into evidence
- 3 Whether the trial court erred in charging the jury the hand of one is the hand of all
- 4 Whether the trial court erred in refusing to grant a directed verdict in favor of Ward
- 5 Whether the trial court erred in permitting the State to play for the jury the testimony of Tremayne Washington given in a prior trial

1

STATEMENT OF THE CASE

Appellant, John Henry Ward, was indicted at the September 2nd, 2003 term of the Court of General Sessions for Charleston County for murder. The charges arose from the May 11th, 2003 shooting of Jamie Simmons. The case proceeded to trial on June 6-9, 2005 before the Honorable Roger M. Young, Circuit Court Judge, and a jury. At trial, Appellant was represented by Martha Kent Jenkinson, Esquire. The State was represented by Bruce DuRant, Assistant Solicitor for the Ninth Judicial Circuit.

On June 9th, the jury found Appellant guilty as charged. Judge Young sentenced Appellant to thirty (30) years imprisonment.

A timely Notice of Appeal was served. This appeal follows.

STATEMENT OF FACTS

On May 11th, 2003, John Campbell (Raulo), from the Cherry Hill community, was dancing with a young woman at Club Diamante, a Charleston County nightclub. Keith Richards, the woman's boyfriend, took umbrage and began arguing with her. Richards, from the Petersfield community, was struck by his girlfriend and as that fight was being broken up, Campbell hit Richards and ran out of the club. Richards chased Campbell outside and the fight escalated. (R 68-73, Tr pp 59-64)

Outside, Kevin Dunmeyer was waiting by his vehicle to give Campbell, his cousin, a ride home. While Dunmeyer was being brought up to speed on what happened inside the club, he saw a group of guys from Petersfield behind him. Included in that Petersfield group were John Ward and Tremayne Washington. The Petersfield group confronted Dunmeyer and Campbell and a fight ensued between "two large groups of men" from Petersfield and Cherry Hill. Dunmeyer realized he could not fight his way back to his vehicle, so he fled the scene on foot, with a number of guys chasing him. (R 1071-1076, 1100, 1190-1191, Tr p 131-136, 160, 249-50) As Dunmeyer ran off, Tremayne Washington ran to his pick up truck and was overheard saying "we will handle that", and "some bitch is going to die tonight." (R 1100-1101, 1195, Tr p 160-61, 255)

At that time Antonio Washington, from Cherry Hill, attempted to run over the Petersfield crown with his Cadillac. He then left and picked up Dunmeyer. Antonio and Dunmeyer returned to the club and began gesturing and cursing the Petersfield contingent and throwing bottles. (R 1194-1220, Tr p 254-280) Antonio and Dunmeyer then peeled out of the parking lot and Tremayne's pickup truck gave chase "pulled out, fishtailed down the road and started shooting." (R 1194, Tr p 254) Tremayne, Ward and Catrell Douglas were in the truck. Catrell was

driving, Ward was sitting in the front passenger seat and Washington was in the back (R 1106, Tr p 166) John Ward was the shooter (R 1348, Tr p 408) As Ward began shooting at the Cadillac, Jamie Simmons a bystander, was hit by stray bullets Both vehicles sped off, firing at each other

Simmons did not go in the club that night As he was driving home from work, his cousin Marcus Moultrie, flagged him down to ask him about a job Moultrie was standing in the area outside the club Moultrie and Simmons talked and Simmons began talking with another person At that time Simmons was shot and killed (R 1173-1179, Tr p 233-39) Simmons has a graze wound on the right side of his back, and was fatally wounded by a bullet that entered the back left side of his left arm and went through his lungs, aorta, heart esophagus and lodged in his chest wall (R 1543-1544, Tr p 603-04)

ARGUMENT

I

The trial judge properly denied Appellant's motion for mistrial where the solicitor's comments did not impart issues of gang related activity into the case

Appellant first claims that the trial judge erred by refusing to grant a mistrial based upon the supposed improper injection of gang-related issues at trial. However, there was no mention of gang-related activities at trial and the specific mention of holding and shooting a gun "gangster style" is a recognized term of art indicating the method of holding the gun while firing. In particular, this was relevant in determining the arc and trajectory of the shots fired.

A Events at Trial

In his opening argument, the solicitor noted that the victim, Jamie Simmons, was a victim of circumstances. In describing Simmons in his opening statement, the solicitor stated

the truly sad thing about this case is that Jamie Simmons was not drinking alcohol. And Jamie Simmons was not beating his chest and Jamie Simmons was not in a squabble with anybody that night and Jamie Simmons didn't have a gun because Jamie Simmons was an innocent bystander that got caught between two groups that did have a problem with alcohol and testosterone and guns.

By all accounts, Jamie was not a drinker, was not a drug user, was not a gang banger. He enjoyed art, he enjoyed music. He did not have a beef out there with anybody that night. (R 1019-1020, Tr p 79, line 21 - p 80, line 6)

As a witness noted, the victim "wasn't the club type" (R 1227, Tr p 287, line 9). Simmons, a security guard on Kiawah Island, was driving by Club Diamante and was flagged down by his cousin Marcus Moultrie. Moultrie talked to Simmons briefly about the possibility of getting a job where he worked. (R 1173-1174, Tr pp 233-234)

Additionally, in his opening statement, the solicitor referred to the Petersfield faction as a

“gang of” Keith Richards fellows, and a “bunch of Petersfield people ” The solicitor stated this while noting that members of the Petersfield and Cherry Hill communities shared a Hatfield-McCoy type feud (R 1021, Tr p 81) There was no objection to the solicitor’s opening argument.

During the testimony of Kevin Dunmeyer the following exchange occurred

Dunmeyer I went to enter my vehicle through the driver’s door As I walked pretty much something told me to turn around and when I turned around it was a gang of guys at my door

Solicitor A gang of guys at your door Where was this gang of guys from?

Dunmeyer Petersfield area

(R 1073-1074, Tr p 133, line 23 - p 134, line 5) Again, there was no objection

Finally, the solicitor made two references to the gun being held “gangster” style (R 1478-1479, 1682, Tr pp 538-539, p 742) ¹

B Use of term “gang ”

In perspective, Appellant’s assertion that the solicitor inserted evidence of gang affiliation into the trial is without merit That might one group of angry, unruly people squared off against another group of angry, unruly people In her opening statement, Appellant’s counsel referred to the area around the club as a “war zone ” (R 1029, Tr p 89) To characterize them as two gangs of men is accurate and appropriate ² As the above excerpt from Kevin Dunmeyer’s testimony illustrates, it was Dunmeyer, in the normal course of conversation that referred to the

¹Appellant makes the incorrect assertion that the solicitor termed the murder a “gangster style shooting ” (Appellant’s Brief p 10) “Gangster style” simply refers to an accepted characterization of a method of holding a gun while shooting It does not refer to a “gang land” type incident

²**Gang** Any company of persons who go about together or act in concert, in modern use, mainly for criminal purposes *Black’s Law Dictionary* 679 (6th Ed 1990)

group of men threatening him to a “gang of guys ” It is also clear that no attempt was made by the solicitor to tie the events of that night into some type of gang warfare The State’s case was that the animosity that night stemmed from an ongoing feud between the Cherry Hill community and Petersfield community Officer Don Frichtl testified regarding the feud between the communities (R 1033, Tr p 93) Numerous witnesses testified that the genesis of the melee was that a man from Cherry Hill was dancing with the girlfriend of a man from Petersfield (R 1070-1084, 1098-1108, 1213-1223, 1293-1300, Tr pp 130-144, 158-168, 273-283, 353-360) As noted above, no objection was raised to referring to the mob as a “gang ”

C Shooting “gangster style”

Appellant lodged a contemporaneous objection to the solicitor’s referring to employing a “gangster hold” when firing a weapon (R 1478, Tr p 538) The attorney for co-defendant Washington objected later during the re-cross examination of a defense expert witness to the solicitor referring to firing a pistol “gangster style ” (R. 1682, Tr p 742) Appellant apparently contends this terminology was gratuitous However, “gangster style” is a defined method of shooting a weapon

Firing a weapon “gangster style” is defined as firing a gun while the weapon is turned toward the side instead of the traditional firing of the gun. *Young v City of Providence*, 404 F 3d 4 (1st Cir 2005) (witness testified that Cornel was holding his gun with two hands, as a police officer would, rather than sideways with one hand a technique called “gangster-style” by some of the witnesses), *Tennessee v Golden*, 1998 WL 518071 (Tenn Crim App) (defining holding a gun “gangster style” as “the gun was turned toward the side instead of the traditional firing of the gun, it was turned toward the side”), *People v Xabandith*, 2006 WL 668388 (Cal App 3rd Dis) (“Xabandith later pulled a gun, although none of the other combatants had

drawn guns, and fired several shots, while holding the gun sideways, “gangster” style), *People v Lor*, 2002 WL 31320348 (Cal App 3rd Dis), (“Xabandith later pulled a gun, although none of the other combatants had drawn guns, and fired several shots, while holding the gun sideways, “gangster” style), *Urban Dictionary*³ (*gangster style* To hold a gun horizontally instead of the way it is normally suppose to be held vertically This reduces accuracy to close to 0% and makes it nearly impossible to hit someone unless they are right near you)

The decision to grant or deny a mistrial is within the sound discretion of the trial judge *State v Vazquez*, 364 S C 293, 613 S E 2d 359 (2005), *State v Adams*, 354 S C 361, 580 S E 2d 785 (Ct App 2003) The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law *State v Harris*, 340 S C 59, 530 S E 2d 626 (2000), *State v Kelsey*, 331 S C 50, 502 S E 2d 63

The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way *State v Beckham*, 334 S C 302, 513 S E 2d 606 (1999), and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial

Here, the angry mob of men were accurately referred to as a gang of guys Also, the positioning of the gun when fired was crucial to the expert witnesses for the State and Appellant Appellant's expert witness conceded that whether one was holding the gun conventionally or gangster style could make a big difference in the trajectory of the bullets (R 1681-1682, Tr pp 741-742) These terms were used in a normal non-gratuitous fashion Also, contrary to Appellant's assertions, no attempt was made to somehow transform the events of the night of the

³The “Urban Dictionary” is an online compilation of definitions, much like Wikipedia

murder into gang activity. Because the terms were used appropriately and briefly, there was no error and no resulting prejudice. In a proper exercise of discretion, the trial court denied Appellant's motion for a mistrial.

II

The trial judge did not abuse his discretion by allowing the State to introduce photographs of graze wounds on the victim's back

Appellant next contends that the trial judge erroneously allowed the State to introduce two photographs, **State's Exhibit 79 and 80**. The State submits that the trial judge did not abuse his discretion because the photographs depicting the graze wounds were relevant to showing the position of the victim at the time of the first shot. This testimony was relevant to illustrating and corroborating the pathologist's testimony that the victim's fatal wounds were consistent with someone who had initially been grazed, then twisted his body in a failed attempt to escape the gunfire. Also, the probative value of these photographs was not substantially outweighed by their prejudicial impact.

The trial judge allowed the prosecution to introduce two photographs of the victim from the autopsy depicting graze wounds on the victim's back, over Appellant's objection. (R. 1545, 1568, Tr. pp. 605, 628). On appeal, Appellant claims the trial judge erred by allowing the State to introduce State's Exhibits 79, and 80 because they were "unduly graphic." The Judge noted that in a bench conference, the solicitor argued the photographs were necessary to rebut the defense's theories on the angle of the shots. (R. 1568, Tr. p. 628). Also, Dr. Presnell, agreed that the victim's wounds were consistent with someone that had initially been grazed by a shot, then turned his body to protect himself. (R. 1563-1564, Tr. pp. 623-624). This further corroborated the State's theory of the case.

There was no error. "The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon the showing of an abuse of discretion. The trial judge must balance the prejudicial effect of

graphic photographs against their probative value. To constitute unfair prejudice, the photographs must create a “tendency to suggest a decision on an improper basis, commonly, though not necessarily an emotional one.” *State v Vang*, 353 S C 78, 577 S E 2d 225 (2003) (citations omitted). See also *State v Rosemond*, 335 S C 593, 596, 518 S E 2d 588, 589-90 (1999). If the offered photographs serve to corroborate testimony, it is not an abuse of discretion to admit them. *State v Nichols*, 325 S C 111, 121-22, 481 S E 2d 118, 124 (1997), *State v Kelley*, 319 S C 173, 177-78, 460 S E 2d 268, 270-71 (1995), *Vang, supra*.

Here, the photographs were used to corroborate the pathologists testimony concerning the initial graze wound and the second, fatal shot (R 1544-1550, Tr pp 604-610). Nor was the probative value of the photograph substantially outweighed by its prejudicial effect. Photographs depicting a non-fatal graze wound are not inflammatory and were not excessively prejudicial. Appellant’s contention that the photographs were of no evidentiary value ignores the State’s testimony concerning the position of the victim’s body when the shots were fired, and ignores the testimony of defense expert Roy Cantrell who presents a different theory on the victim’s positioning when the shooting began. Thus, there was no error in introducing this photograph.

Finally, to the extent that the Court found that there was any error in introducing either photograph, any error must be viewed as harmless beyond a reasonable doubt in light of the substantial evidence of guilt presented at trial. See **Argument IV**.

III

The trial judge did not abuse his discretion by charging “the hand of one is the hand of all ”

Next, Appellant alleges the trial judge erred by giving a hand of one charge to the jury. Respondents assert that Appellant overlooks critical evidence which shows the appropriateness of a hand of one charge.

By principles of accomplice liability, a defendant indicted as a principal can properly be convicted under three theories: (1) that he actually committed the act, (2) that he was present as an aider and abettor, or (3) that he was guilty under the “hand of one is the hand of all.” See *State v Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999). The elicited testimony at trial implies a joint endeavor on the part of Washington and Appellant. After the fight spilled outside of Club Diamante, the evidence is clear. Kevin Dunmeyer was confronted at his vehicle by a group of men which included the co-defendants. The men were arguing and shaking the truck. Blows were exchanged and Dunmeyer ran away and was chased down the street. At one point Tremayne Washington left Dunmeyer’s truck and ran to his truck. As Dunmeyer was running down the road, Washington was overheard saying “some bitch is going to die tonight,” and “we will handle that.” Washington was seen getting in the back seat of his truck. (R. 1072-1073, 1100-1101, 1192, 1193-1195, 1216-1217, Tr. pp. 132-133, 160-161, 252, 253-255, 276-277). Antonio Washington, in a Cadillac, attempted to run over the men previously fighting with Dunmeyer and then left to rescue Dunmeyer. Antonio and Dunmeyer returned to the club. (R. 1074-1079, 1101-1102, 1149-1151, Tr. pp. 134-139, 161-162, 209-211). Once back at the club, Antonio jumped out of his car and began provoking the crowd by gesturing and cursing. Antonio scurried back into his car and pulled off with the pickup truck giving chase. Tremayne,

Appellant and Catrell Douglas were in the truck Catrell was driving, Appellant was sitting in the front passenger seat and Washington was in the back Gunfire, erupted from the front passenger side of Tremayne's truck Shots from the Cadillac answered back Appellant was the shooter in the pick up (R 1102-1106, 1151-1152, 1155, 1196, 1218-1223, 1238-1241, 1341-1358, Tr pp 162-166, 211-212, 215, 256, 278-283, 298-301, 401-418) To witnesses, there was a direct correlation from Appellants shooting to the death of the victim As soon as the shots began, the victim was hit and killed by stray gunfire (R 1107, 1152, 1197, Tr p 167, 212, 257)

Ten minutes after the shooting, Kenneth Sanders ran into the co-defendants He informed them that the victim, who was a friend of Appellant, was killed by the gunfire Appellant fell to the ground crying (R 1225-1226, Tr pp 285-286) Later that morning, between 8 30 am and 9 00 am, Sanders received a call from Tremayne Washington Washington asked Sanders to tell police he (Sanders) was driving his truck that night (R 1227-1228, Tr pp 287-288)

Also, later that morning, Tremayne parked his truck behind Appellant's aunt's home without her permission The co-defendants slept at a friends house after the shooting and Tremayne was seen washing his hands with bleach that morning (R 1278-1281, 1287-1288, Tr pp 338-341, 347-348)

The above testimony certainly implies a joint endeavor on the part of the co-defendants with everyone in the truck having a shared intent *Cf generally State v Gates*, 269 S C 557, 238 S E 2d 680 (1977) ("hand of one is hand of all" charge appropriate for getaway driver) Thus, the testimony placed legal blame for the victim's murder on both co-defendants Consequently, the "hand of one is the hand of all" charge was appropriate and the trial court did not abuse it's discretion by so charging the jury

IV

The trial judge properly denied Appellant's motion for directed verdict on the charge of murder because the direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to prove that he is guilty of murder

Appellant's next argument is that the trial judge erroneously denied his motion for a directed verdict on the charge of murder. The State submits that this contention is without merit because the direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to prove that Appellant is guilty of murder under a theory of accomplice liability or "the hand of one is the hand of all."

As detailed in **Argument III**, the direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, is that early morning on May 11th, 2003, a fight began in a night club over John Campbell dancing with Keith Richards' girlfriend. This escalated into a rekindling of a deep seeded feud between members of the Petersfield community and the Cherry Hill Community. The fight continued outside of the club. Kevin Dunmeyer, a cousin of Campbell, attempted to take Campbell home but they were confronted at his vehicle an angry group of men which included Appellant and Tremayne Washington. After blows were exchanged and it became obvious the group of men would not allow Dunmeyer to get to his vehicle, Dunmeyer ran away with several people chasing.

Upset, Tremayne Washington ran to his truck and was overheard saying "some bitch is going to die tonight," and "we will handle that." Washington, Appellant and Catrell Douglas got in Washington's truck. Douglas was in the driver's seat. Antonio Washington and Dunmeyer returned to the club cursing and throwing debris. (R. 1074-1079, 1101-1102, 1149-1151, Tr. pp. 134-139, 161-162, 209-211) Antonio peeled out and Catrell Douglas, driving Tremayne's truck

burned out after them Appellant was sitting in the front seat and began firing a 9 mm gun in the direction of Antonio's car Immediately, the victim fell, shot by a 9 mm pistol (R 1102-1106, 1151-1152, 1155, 1196, 1218-1223, 1238-1241, 1341-1358, Tr pp 162-166, 211-212, 215, 256, 278-283, 298-301, 401-418)

The co-defendant's then began an attempt to hide and cover their crime (R 294-95, 347-350, 356-57, Tr pp 285-286, 338-341, 347-348)

In *State v Elmore*, 368 S C 230, 628 S E 2d 271 (Ct.App 2006), the Court explained the standard for review of denial of a motion for directed verdict as follows

On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State State v McHoney, 344 S C 85, 97, 544 S E 2d 30, 36 (2001) The trial court, in a directed verdict motion, is concerned with the existence or nonexistence of evidence, not with its weight State v Cherry, 361 S C 588, 594, 606 S E 2d 475, 478 (2004) This standard remains constant even when the State relies exclusively on circumstantial evidence Id "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged " McHoney, 344 S C at 97, 544 S E 2d at 36 A trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty *State v Mitchell*, 341 S C 406, 409, 535 S E 2d 126, 127 (2000) However, "[i]f there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury " McHoney, 344 S C at 97, 544 S E 2d at 36

Under principles of accomplice liability,

[w]hen two or more combine to commit a [crime] and, during the [crime], a homicide is committed as a natural and probable consequence, all present and participating in the [crime] are as guilty of the killing as the one committing the homicide If a person intentionally kills another during the commission of a felony, malice may be inferred

State v Avery, 333 S C 284, 294, 509 S E 2d 476, 481 (citations omitted), *State v Crowe*, 258

S C 258, 188 S E 2d 379, *cert denied*, 409 U S 1077 (1972)

Here, the trial judge properly denied Appellant's motion, which is predicated on misunderstandings of both the record and principles of accomplice liability. As clearly demonstrated, the State's evidence reasonably tended to prove that Appellant was at the very least present, aiding and abetting in the commission of a crime at the time the homicide was committed. His contention that he was merely present at the crime scene ignores the State's evidence that he participated in the fight outside the club, got in Tremayne's pick up and attempted to shoot Antonio Washington and Dunmeyer as they chased Antonio's car.

It is clear the goal was to shoot Antonio and Washington and the victim was an innocent bystander. Direct testimony from Catrell Douglas as well as Tremayne's previous testimony likewise implicated Appellant as the shooter in the truck.

Finally, the State submits that a homicide was a natural and probable consequence of a tacit plan to chase another vehicle and fire shots in that direction. Indeed, in a crowded area it is a consequence that is almost certain to result from such a violent plan. Therefore, Tremayne Washington was as equally guilty of the murder as Appellant, who fatally shot the victim. *Id*. The trial court's refusal to grant the directed verdict motion is well supported by evidence.

V

The trial judge properly denied Appellant's motion for directed verdict on the charge of murder because the direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to prove that he is guilty of murder

Appellant next argues that the trial court erred in allowing the State to play Tremayne Washington's testimony from the previous mistrial. We assert Washington's testimony is admissible pursuant to Rule 804(b)(1) SCRE. Therefore, the trial court did not abuse its discretion in permitting admission of the former testimony.

As an initial matter, this argument is not preserved for review. Appellant's trial counsel never once claimed or argued that Washington's former testimony was inadmissible. In fact, counsel for both co-defendant's specifically stated to the court that the testimony was within the bounds of the rules of evidence (R. 1427-1428, Tr pp 487-488). Later, counsel for Appellant argued that judicial estoppel should prevent the State from taking a different position from the first trial (R. 1575-1578, Tr pp 635-638). At no point did counsel argue for the inadmissibility of Washington's former statement. Since no specific argument was raised to or ruled upon by the trial court, the argument is not preserved. *State v Richardson*, 358 S C 586, 595 S E 2d 858 (2004).

In any event, the issue is without merit. Where a declarant is unavailable as a witness, the hearsay rule does not exclude [t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. SCRE 804(b)(1).

A witness who refused to take the oath or testify even under threat of contempt was

"unavailable", thus, his previously sworn testimony that was subject to cross-examination was properly admissible as exception to hearsay rule *Riddle v State*, 314 S C 1, 443 S E 2d 557 (1994)

In this case, Washington invoked his Fifth Amendment right to silence. Therefore, he was unavailable as a witness (R. 1428, 1615-1617, Tr pp 488, 675-677).⁴ Consequently, his testimony from the mistrial was admissible under the rules of evidence if Appellant had an opportunity and similar motive to develop the testimony on cross-examination. SCRE 804(b)(1). McCormick on Evidence, commenting on Federal Rules of Evidence 804(b)(1), states

It is often said that the issue in the two suits must be the same. But certainly the policy mentioned does not require that all the issues (any more than all the parties) in the two proceedings must be the same, but at most that the issue on which the testimony was offered in the first suit must be the same as the issue upon which it is offered in the second. Additional issues or differences in regard to issues upon which the former testimony is not offered are of no consequence. Moreover, insistence upon precise identity of issues, which might have some appropriateness if the question were one of res judicata or estoppel by judgment, are out of place with respect to former testimony where the question is not of binding anyone, but merely of the salvaging, for what it may be worth, of the testimony of a witness not now available in person. Accordingly, modern opinions qualify the requirement by demanding only 'substantial' identity of issues." (Footnotes omitted.) *McCormick, Evidence* (3d ed), § 257, pp 767-768

Defense counsel conducted a substantial cross-examination of Washington at the mistrial. The record reveals that the cross-examination consisted of thirty-two pages of transcript in which Appellant's counsel cross-examined Washington extensively about the admitted lies in his

⁴Appellant asserts the trial court erred in declaring Washington unavailable. The case partly cited by Appellant, *State v Cheeseboro*, 346 S C 526, 552 S E 2d 300 (2002) holds, in discussing Rule 804(b)(3)SCRE, that a defendant who invokes his fifth amendment privilege against self-incrimination is not "unavailable" for purposes of rule *allowing for admission of hearsay statement against declarant's penal interest when declarant is unavailable*. These non-testimonial statements are inapplicable as to Rule 804(b)(1) permission of former testimony.

statement to police as well as his specific behavior the morning of the shooting Appellant clearly had sufficient opportunity and motive to develop Washington's testimony during the original trial to satisfy the requirements of Rule 804 (b)(1) See *State v Sanders*, 356 S C 214, 588 S E 2d 142 (2003) Appellant cross-examined Washington to attack his credibility and to find inconsistencies in his testimony The purpose of his cross-examination was to show that Appellant was not the shooter and that Washington was lying to minimize the charges against himself

We assert that the trial court did not abuse its discretion in permitting Washington's former testimony as admissible under Rule 804(b)(1)

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

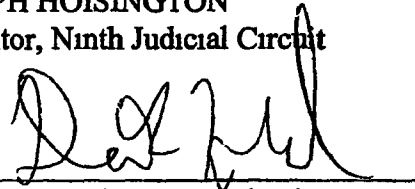
DONALD J ZELENKA
Assistant Deputy Attorney General

DERRICK K. McFARLAND
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

RALPH HOISINGTON
Solicitor, Ninth Judicial Circuit

BY


Derrick K McFarland

ATTORNEYS FOR RESPONDENT

January 11, 2007

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CHARLESTON COUNTY
Court of General Sessions**

The Honorable Roger M Young, Presiding Judge

**CASE NO 2003-GS-10-5895
WARRANT/TICKET NO(S) H-395140
CHARGE(S) Murder**

STATE OF SOUTH CAROLINA, RESPONDENT

vs

JOHN HENRY WARD, APPELLANT

REPLY BRIEF OF APPELLANT

William J Watkins, Jr
Heather G Ruth
WOMBLE CARLYLE
SANDRIDGE & RICE, PLLC
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400

Joseph L Savitz, III
South Carolina Commission
on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Appellant

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I **The Improper Injection Of Gang-Related Issues Into The Trial Warranted A Mistrial**

The State, in its brief, argues that “there was no mention of gang-related activities at trial,” (Respondent’s Brief at 5) despite the solicitor’s explicit references to a “gangster style” shooting. The State disingenuously attempts to convince this court that the solicitor’s references during the trial to a “gangster style” shooting was nothing more than a description, through the use of a “recognized term of art,” of how the gun was allegedly held. Given the shooting took place in the parking lot of night club on the outskirts of Charleston, resulted from a fight between two “rival” neighborhoods, and involved several groups of individuals driving off in their cars while firing out their car windows, the State’s argument that it believed the jurors would interpret the term “gangster style” solely as defined in the “Urban Dictionary” quoted in their brief is tenuous at best. (See Respondent’s Brief at 8)

In addition to the general context and location of the incident, when analyzing whether it is reasonable to assume, as the State argues, the reference to a “gangster style” shooting did not result in the jurors associating the Defendant or the charged crime with gangs or gang-related criminal activity, the court must also consider (1) the solicitor’s comments to the trial court (albeit outside the presence of the jury) that the incident at the club was indeed a “gang fight” (R pp 1696-97), (2) the comments during opening statements that the victim, in contrast to the defendant and others at the club that night, was not a “gang banger,” (R p 1020), (3) the State’s references to the “gang” of guys from Petersfield involved in the altercation outside the club (R pp 1021 & 1074), and (4) the complete lack of evidence that the Defendant was involved with a gang or that this was a gang related crime. The implication of the solicitor’s comments to the jury about

this “gangster style” shooting was clear the Defendant is a member of a gang associated with criminal activity and, therefore, the Defendant must be guilty because of his association with the gang See United States v Bradford, 246 F 3d 1107, 1117 (8th Cir 2001) (“to be certain, there is great potential for prejudice when evidence regarding gangs is at issue”), overruled on other grounds United States v Diaz, 296 F 3d 680 (8th Cir 2002) see also United States V McKay, 431 F 3d 1085, 1093 (8th Cir 2005) cert denied, 126 S Ct 2345 (2006) (“[G]ang affiliation evidence is not admissible where it is meant merely to prejudice the defendant or prove his guilt by association with unsavory characters”)

If, as the State argues in its brief, the solicitor merely wanted to discuss or establish the “positioning of the gun when fired” in order to establish the bullet’s trajectory,¹ he could have easily done so without referring to the shooting as “gangster-style ” The solicitor and/or the State’s witnesses could have physically demonstrated the way the gun was allegedly fired, or simply stated that the gun was held horizontally, instead of vertically This simple solution would have prevented the prejudice suffered by Defendant from the solicitor’s clear inference that he was a “gangster ”

Further, the criminal cases cited by the State in support of it’s argument that “gangster style” is a commonly used “term of art” which does not have a prejudicial connotation actually prove the opposite, the cases undeniably demonstrate that a “gangster-style” hold refers to how members of a criminal gang carry out a shooting

¹ Further, the State’s own expert in forensic pathology testified that without knowledge of whether the deceased was standing, crouching, etc , it was almost impossible to make a true determination of the bullet’s trajectory (R pp 1555-56)

For example, in People v Xabandith, 2006 WL 66388 (Cal App 3 Dist 2006), the jury convicted the Defendant of attempted murder and sustained firearm and gang allegations. During the trial, proof of the Defendant's gang association was critical to proving the State's "gang enhancement" charge. The State even offered testimony by a "gang expert" who discussed how gang members "use violence and weapons to enhance their reputations and instill fear in others" and who "opined that the instant offence benefited the gang." Id. at *2. Therefore, in Xabandith, the statements that the weapon was held "sideways or 'gangster style'" was not only explicitly relevant to the State's charges, but also could not have resulted in prejudice to the Defendant as the testimony of multiple witnesses established that the Defendant was actually a member of a gang, the El Camino Crips, and that the incident resulted from a fight between two rival gangs. Id.

Likewise, the Defendant, in Tennessee v Golden, 1998 WL 518071 (Tenn Crim App), was charged with a gang related crime. Specifically, the State produced evidence that the Defendant was a member of the "Traveling Vice Lords" gang, and the Defendant had been instructed by the gang's leader, Charles Thompson, to murder the prison guard who was responsible for guarding Mr. Thompson while he was in prison. Similarly, the Defendant in People v Lor, 2002 WL 31320348 (Cal App 5th Dist 2006) was convicted of assault with a semi-automatic firearm, attempted murder, **and participation in a criminal street gang**.

In the instant case, there was no evidence that the Defendant was a member of a gang nor was gang activity relevant to the State's charges. As such, the cases cited by the State actually **bolster** the Defendant's argument that the jury would undoubtedly

associate the solicitor's comments about a "gangster style" shooting with the idea that the Defendant was involved in criminal gang activity and must be guilty

In conclusion, the trial court abused its discretion in declining to grant a mistrial based on the solicitor's prejudicial gang-related comments since they "so infected the trial with unfairness as to make the resulting conviction a denial of due process" State v. Tubbs, 333 S C 316, 320, 509 S E 2d 815, 817 (1999) (internal quotations and citations omitted)

II Ward's Mere Presence At The Crime Scene Is Insufficient To Establish A Common Plan Or Scheme

The State incorrectly avers that "[t]he elicited testimony at trial implies a joint endeavor on the part of Washington and Appellant" Respondent's Brief at 11 After making this bold conclusion, the State offers the following evidence in support

- A fight occurred at the club,
- The altercation spilled into the parking lot,
- Blows were exchanged at Kevin Dunmeyer's truck,
- Dunmeyer fled the scene,
- Antonio Washington attempted to run over men who had been fighting with Dunmeyer,
- Tremayne Washington allegedly made a remark about handling the situation and that some "bitch" would die,
- Antonio Washington returned to the club with Dunmeyer and begin gesturing and cursing, and
- As cars sped off, some witnesses thought they saw shots coming from Tremayne Washington's truck

Respondent's Brief at 11

A common thread running through the State's "evidence" of a joint endeavor is the absence of John Henry Ward. This is a critical failing because the State must prove a common scheme or plan. See State v. Dickman, 341 S.C. 293, 295-96, 534 S.E.2d 268, 269 (2000). Ward was not involved in the fight inside the club (R pp 1071, 1098-99, 1214-15). When the hostilities moved to Dunmeyer's truck, Ward was not present in the altercation (R pp 1087-88, 1123-24). Although Antonio Washington was boasting and threatening, Ward was neither seen nor heard engaging in similar activity (R p 1124). According to Douglas, who was driving Tremayne Washington's truck, there was no talk, agreement, plan, or discussion that someone was going to fire a weapon (R pp 1361, 1364, 1379-80). The only plan evident was to give Douglas a ride home and for the three men in the truck to remove themselves from the dangerous atmosphere of the club (R pp 1360, 1362, & 1364).

Under South Carolina law, a person's mere presence at the scene of a crime is insufficient to convict him under a hand of one theory. State v. Zeigler, 364 S.C. 94, 107, 610 S.E.2d 859, 866 (Ct. App. 2005). Mere presence is all the State can muster in this case. Accordingly, the trial court erred in charging the jury that the hand of one is the hand of all.

III State v. Curry Demonstrates That The Trial Judge Erred In Charging The Hand Of One Is The Hand Of All

After Ward filed his initial brief, the Court of Appeals decided State v. Curry, 2006 WL 2884159 (S.C. Ct. App. Oct. 9, 2006). The opinion has not yet been released in the permanent law reports, but provides guidance on this disposition of this case. In Curry, Hamilton and Coursey sought to purchase illegal drugs from Curry, Savage, and

Simuel Id at *1 The three men indicated that they did not have any drugs, but were in the process of procuring illegal drugs Id Although the three never obtained the drugs, they planned to meet Hamilton and Coursey “under the guise of a drug sale in order to rob” them Id The five men met, an altercation ensued, and Hamilton was shot in the head Id

At trial, the State proceeded under a hand of one theory Curry objected to the charge, but was overruled by the trial court Id *4-5 In affirming the trial court’s jury charge, the Court of Appeals noted that the common purpose did not have to be the killing and murdering of Hamilton, but rather the participation in an unlawful undertaking, a natural consequence of which is homicide Id at *5

In the present case, there was not plan or scheme to fire a weapon or murder Simmons Also, there is no evidence of a common plan or scheme to engage in an unlawful undertaking, a natural consequence of which is homicide This is not a case such as Curry where the accused and his compatriots were already in the process of criminal mischief before the shooting occurred Hence, the trial judge erred in charging the jury that the hand of one is the hand of all

CONCLUSION

For all the foregoing reasons, the jury’s verdict should be vacated and a new trial should be granted

Respectfully submitted,



William J. Watkins (SC Bar #16716)

Heather G. Ruth (SC Bar #68290)

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

550 South Main Street, Suite 400

Greenville, South Carolina 29601

(864) 255-5400

Joseph L. Savitz, III

South Carolina Commission on Indigent Defense

1330 Lady Street, Suite 401

Columbia, South Carolina 29201

(803) 734-1330

Attorneys for Appellant John Henry Ward

January 9, 2007

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v

John Henry Ward,

Appellant

Appeal From Charleston County
Roger M Young, Circuit Court Judge

Opinion No 4270
Heard May 7, 2007 – Filed June 29, 2007

AFFIRMED

William J Watkins, Jr of Greenville, and Chief
Attorney Joseph L Savitz, III, of Columbia, for
Appellant

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W McIntosh,
Assistant Deputy Attorney General Donald J
Zelenka, Assistant Attorney General Melody Brown,
of Columbia, for Respondent

HEARN, C J John Henry Ward appeals his murder conviction, arguing the trial court erred by (1) refusing to grant a mistrial after the State insinuated the crime revolved around gang activity, (2) permitting autopsy photos to be admitted, (3) charging the jury that “the hand of one is the hand of all,” (4) refusing to grant a directed verdict in Ward’s favor, and (5) allowing the State to play a recording of a co-defendant’s testimony from a prior trial. We affirm.

FACTS

During the early morning hours of May 11, 2003, Jamie Simmons was fatally wounded when a gunfight broke out in the parking lot area of Club Diamante in Charleston County. Simmons, who had the misfortune of stopping outside the club on his way home from work to speak with his cousin, had not been involved in the altercation. Instead, the tragedy resulted from a long-running feud between residents of two communities – the Petersfield community and the Cherry Hill community. This particular fight erupted when John Campbell, a man from Cherry Hill, danced with the girlfriend of Keith Richards, a man from Petersfield. The fight began indoors, but moved outdoors where it continued to escalate.

Once outdoors, Campbell ran to a truck where his cousin, Kevin Dunmeyer, was waiting to give Campbell a ride home. As Campbell tried to flee the scene, a group of Petersfield men, which included Appellant Ward and his co-defendant Tremayne Washington, confronted Dunmeyer and Campbell. Dunmeyer was separated from his vehicle, so he attempted to flee on foot. As he ran, he was chased by a group of Petersfield men. Dunmeyer was rescued by Antonio Washington, a compatriot from the Cherry Hill community, who drove toward Dunmeyer and attempted to run over anyone from Petersfield who was in the way.

Meanwhile, Appellant Ward, co-defendant Washington, and Catrell Douglas, leapt into a truck and chased after Antonio Washington and Dunmeyer. Before the Petersfield contingent got into the truck, a witness heard co-defendant Washington declare “We will handle that,” and “some bitch is going to die tonight.” As the two vehicles left the parking lot, heavy

gunfire erupted. Later, investigators found shell casings from three different types of guns: a 40-caliber, a 9-millimeter, and a 25-caliber. Forensic experts determined it was a 9-millimeter bullet that struck and killed Simmons.

The State initially tried Ward for the murder of Simmons in December of 2004, the case ended in a mistrial due to a hung jury. Ward was tried again in June of 2005, this time with Tremayne Washington. The two were tried together as accomplices under the theory that both were guilty because "the hand of one is the hand of all."

At this second trial, numerous witnesses testified regarding the shooting. One witness, James Murphy, remembered that Simmons fell to the ground as soon as the gunfire began but before any shots came from the truck in which Ward rode. Murphy stated that he thought he saw shots fired from the passenger side of the truck. Catrell Douglas, the driver of the truck, testified that Ward fired gunshots out of the window. Although co-defendant Washington did not testify during the second trial, the jury heard testimony from Ward's first trial, wherein Washington indicated Ward had fired shots toward the other vehicle.

When investigators searched the truck, they found an empty holster, a shell casing, an unfired bullet, and magazines, but did not find a gun. At trial, no weapon was introduced into evidence, though records revealing that co-defendant Washington owned a 9-millimeter pistol were entered.

The jury convicted both Ward and Washington, and they were sentenced to thirty years' imprisonment. This appeal followed.

LAW/ANALYSIS

Ward argues the trial court erred by (1) refusing to grant a mistrial after the prosecutor insinuated the crime revolved around gang activity, (2) permitting autopsy photos to be admitted, (3) charging the jury that "the hand of one is the hand of all," (4) refusing to grant a directed verdict in Ward's favor, and (5) allowing the State to play a recording of a co-defendant's testimony from a prior trial. We address each issue in turn below.

I Insinuation of Gang Activity

Ward first argues he is entitled to a new trial because the State repeatedly suggested that he was a gangster, and this insinuation infected the trial with prejudice that denied him due process of the law. We disagree.

The comments about which Ward complains first occurred during opening statements when the prosecutor described the victim as someone who "was not a drinker, was not a drug user, [and] was not a gang banger." Unlike the victim, Ward and his co-defendant were described by the prosecutor as drinkers who "were beating their chest[s] and they [had] something to prove that night." According to Ward, this contrasting description of the victim and the defendants implied that the defendants were "drinking and gang banging at the club." Ward also complains that the prosecutor described the fight as being between "a gang of" people from the Cherry Hill community and "a bunch of Petersfield people," and later told the jury that Ward was from Petersfield. However, Ward made no objection to the solicitor's opening argument.

Later in the trial, Kevin Dunmeyer testified that when he attempted to get into his vehicle, there "was a gang of guys at my door." In response to this testimony, the prosecutor asked, "A gang of guys at your door. Where was this gang of guys from?" Dunmeyer answered, "[The] Petersfield area." Again, Ward did not object to this testimony.

Sometime after Dunmeyer testified, a crime scene investigator testified about the discharge of shell casings. The prosecutor asked if the way bullets ejected depended on whether the weapon was held "straight up" or in a "gangster hold." This time, Ward objected. Then, during the cross-examination of a defense expert, the prosecutor again asked about a method of shooting known as "gangster style." Ward's co-defendant objected, and the trial court sustained the objection, advising the jury to disregard the comment. After the defense expert testified, no other witness was called to the stand. Ward moved for a mistrial based on the State's implication that the defendants were gangsters. The trial court denied the motion, but directed the prosecutor to refrain from mentioning gangs in his closing.

“The decision to grant or deny a mistrial is within the sound discretion of the trial judge” State v Adams, 354 S C 361, 376, 580 S E 2d 785, 793 (Ct App 2003) A mistrial should only be granted when “absolutely necessary,” and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial State v Stanley, 365 S C 24, 34, 615 S E 2d 455, 460 (Ct App 2005)

Here, we find no abuse of discretion Ward failed to object to most of the references about which he now complains In fact, the only objection preserved for our review came when the prosecutor asked the crime scene investigator if the ejection of bullets depended on whether the shooter held the weapon “straight up” or in a “gangster hold” The other references came in without objection or were objected to by Ward’s co-defendant, and therefore are not preserved for review See Tupper v Dorchester County, 326 S C 318, 324 n 3, 487 S E 2d 187, 190 n 3 (1997) (explaining that appellant cannot bootstrap an issue for appeal by way of a co-defendant’s objection) We do not believe the isolated reference to which Ward objected warranted the grant of his motion for a mistrial, nor do we believe the combination of references which were unobjected to would require the trial court to grant the motion

Black’s Law Dictionary (8th Ed 2004) defines a gang as “[a] group of persons who go about together or act in concert, esp for antisocial or criminal purposes” Certainly, the groups of people on both sides of this altercation outside of Club Diamante could be referred to as gangs considering their actions that evening Furthermore, the term “gangster style” described the way the gun may have been fired – from a horizontal position rather than from the normal, vertical position See Urban Dictionary, *available at* <http://www.urbandictionary.com> (“To hold a gun horizontally instead of the way it is normally supposed to be held vertically”) Because the State’s references to gangs were not completely gratuitous and were unobjected to for the most part, we find no error in the trial court’s refusal to grant a mistrial

II Autopsy Photographs

Ward next argues the trial court erred in permitting the prosecution to enter photographs of the victim's wounds into evidence. We disagree.

The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court, and a ruling regarding photographs' admissibility will not be disturbed absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). "To constitute unfair prejudice, the photographs must create 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). "[P]hotographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a [trial] if they are irrelevant or not substantially necessary to show material facts or conditions." State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

Here, the trial court allowed two photographs which illustrated graze wounds on the victim's back. Ward objected, arguing the probative value of the photographs was outweighed by their prejudicial effect. The trial court overruled the objection, finding the jury's knowledge of the graze wound was necessary to rebut the defense's arguments about the angle of the shot, and therefore the photographs' probative value outweighed their prejudicial effect. This determination is left to the discretion of the trial court, and the record evinces no abuse of that discretion.

III Jury Charge on "The Hand of One Is the Hand of All"

Ward also argues the trial court erred by charging the jury that "the hand of one is the hand of all." We disagree.

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394

(2001) If any evidence supports a requested jury charge, the trial court should grant the request State v Brown, 362 S C 258, 262, 607 S E 2d 93, 95 (Ct App 2004)

Under “the hand of one is the hand of all” theory, “one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose” State v Langley, 334 S C 643, 648, 515 S E 2d 98, 101 (1999) Ward argues this theory should not have been charged to the jury because there was no evidence of a common plan or scheme between Ward and his co-defendant However, evidence revealed that both defendants were with the group of men who confronted Dunmeyer at his truck after the fight spilled outside of the club As Dunmeyer attempted to run away from the mob, a witness testified that Ward’s co-defendant said, “some bitch is going to die tonight,” and “we will handle that” The co-defendant and Ward then got into the truck that chased after the car in which Dunmeyer rode Witnesses also testified that Ward shot his gun toward the other car, and the victim was killed by a stray bullet from this shoot out After the shooting, the defendants slept at a friend’s house, and Ward’s co-defendant washed his hands with bleach in the morning

The evidence at trial supported the theory that Ward and his co-defendant joined together to accomplish an illegal purpose, and therefore it was appropriate for the trial court to instruct the jury that if it found such a joint endeavor existed, each defendant was liable criminally for everything done by his confederate incidental to the execution of that endeavor See id Accordingly, we find no error in the trial court’s charge to the jury that “the hand of one is the hand of all”

IV Directed Verdict

Ward next argues the trial court erred in failing to direct a verdict in his favor We disagree

“On appeal from the denial of a directed verdict, an appellate court ~~must view the evidence in the light most favorable to the State~~” State v Padgett, 354 S C 268, 270-271, 580 S E 2d 159, 161 (Ct App 2003) When

ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight State v Gaster, 349 S C 545, 564 S E 2d 87 (2002) “A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged” Padgett, 354 S C at 271, 580 S E 2d at 161 “However, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [the appellate court] must find the case was properly submitted to the jury” Id

The gist of Ward’s argument that he is entitled to a directed verdict harkens back to his argument regarding the jury charge Ward believes there is insufficient evidence to show he and his co-defendant were acting in concert As explained above, evidence was presented to show that the two were involved in the fight with Dunmeyer, that as Dunmeyer fled, Ward’s co-defendant threatened to kill someone that night, and that moments after that threat, Ward and the co-defendant got into a truck from which gunfire erupted towards the vehicle in which Dunmeyer rode Furthermore, the driver of the truck as well as the co-defendant stated that Ward was shooting out of the passenger side window of the truck Accordingly, there was some evidence that Ward shot the victim as he fired his weapon toward the other vehicle, and the trial court did not err in sending the case to the jury

V Co-Defendant’s Testimony

Finally, Ward argues the trial court erred by allowing the State to play a recording of the testimony given by Ward’s co-defendant during Ward’s first trial At trial, however, Ward never argued that this former testimony was inadmissible, but instead specifically agreed that the testimony was admissible¹ Because the issue was never raised or ruled upon by the trial

¹ On appeal, Ward admits he acquiesced to the playing of the former testimony, however, he points out that he later argued “that the prosecution had tried the case differently than in the first trial” According to Ward, this argument related back to “a lack of the same motive for cross-examination in the first trial as in the second trial,” so the issue was raised to and ruled upon by the trial court We disagree The record reveals that at the end of the trial, when Ward made his motion for a directed verdict, he argued that the State

court, it is not preserved for our review Wilder Corp v Wilke, 330 S C 71, 76, 497 S E 2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review ")

CONCLUSION

Based on the foregoing, we find the trial court did not err in denying Ward's motions for a mistrial and directed verdict We also find no error in the admission of the autopsy photographs or with the jury being instructed that the hand of one is the hand of all Finally, we find Ward failed to preserve any argument with regard to his co-defendant's testimony Accordingly, Ward's murder conviction is

AFFIRMED

GOOLSBY and KITTREDGE, JJ , concur

should be estopped from taking a position in this trial that was different from the position in the first trial Specifically, he complained that in the first trial, Ward was tried solely as a perpetrator and not as an accomplice, so the defense presented evidence that Tremayne Washington (his co-defendant in the second trial) washed his hands in bleach after the shooting In the second trial, the State presented the evidence of the hand-washing However, Ward never argued the trial court erred in allowing his co-defendant's testimony to be played during his current trial, nor did he argue that the change in the State's strategy prevented him from thoroughly cross-examining his co-defendant during that first trial Thus, his estoppel argument in no way encompassed the argument he makes on appeal

The South Carolina Court of Appeals

The State,

Respondent,

v

John Henry Ward,

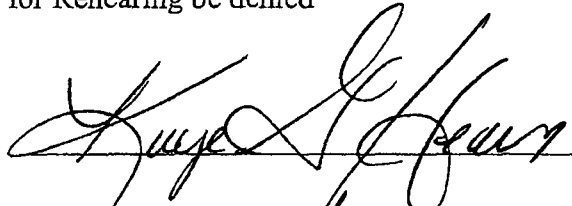
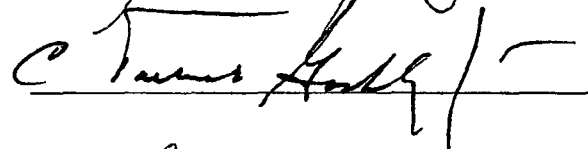
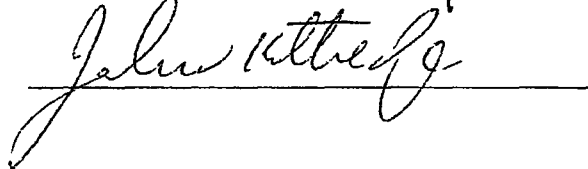
Appellant

The Honorable Roger M. Young
Charleston County
Trial Court Case No. 2003-GS-10-05895

ORDER DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 C.J.
 J.
 J.

Columbia, South Carolina

8/24/2007

cc William J Watkins, Jr Esq
Chief Attorney Joseph L Savitz, III
John Henry Ward, #309598 F3A-169
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W McIntosh
Assistant Deputy Attorney General Donald J Zelenka
Assistant Attorney General Melody Brown

COPY

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of General Sessions**

The Honorable Roger M. Young, Presiding Judge

Opinion No. 4270 (S C Ct App Filed June 29, 2007)

State of South Carolina

Respondent

v

John Henry Ward

Petitioner

PEITION FOR A WRIT OF CERTIORARI

William J. Watkins
WOMBLE CARLYLE SANDRIDGE &
RICE, PLLC
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400

Joseph L. Savitz, III
South Carolina Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Petitioner

Other Counsel of Record

HENRY DARGAN McMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Attorney General

DERRICK K MCFARLAND
Assistant Attorney General

Post Office Box 11549
Columbia SC 29211
(803) 734-6305

RALPH HOSINGTON
Solicitor Ninth Judicial Circuit

101 Meeting Street Suite 400
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 24 2007

QUESTION PRESENTED

Whether the Court of Appeals erred in ignoring this Court's opinion in State v Day, 341 S C 410, 535 S E 2d 431 (2000) and in holding that the prosecution's repeated insinuations that Ward was a member of a street gang did not require the trial judge to grant a mistrial for infecting the proceeding with unfairness as to make the resulting conviction a denial of due process

STATEMENT OF THE CASE

The Club Diamante ("the Club") is a nightclub in Charleston County Because of its location, the Club is frequented by residents of the Petersfield and Cherry Hill communities On May 11, 2003, a scuffle occurred on the Club's dance floor and spilled over into the parking lot (R pp 1032-34) Outside the Club, the boasting and antics of a few young men led to an exchange of gun fire According to police and witnesses at the scene, multiple shots from various locations scattered the Club's patrons (R pp 1041, 1120 & 1125) Unfortunately, a stray round mortally wounded Jamie Simmons

On September 2, 2003, John Henry Ward was indicted for Simmons' murder under S C Code Ann § 16-3-10 (1976) (R p 6) A trial on the charges was held on December 6-10 2004 The trial resulted in a mistrial because of a hung jury (R pp 933-39) A second trial was held June 6-9, 2005 In the second trial, the State tried Petitioner Ward and Tremayne Washington together under the hand-of-one theory The

jury convicted both defendants and the trial judge sentenced them to 30 years imprisonment (R p 7 & 1797)

Throughout the second trial, the State repeatedly insinuated that Ward was an unsavory character and a member of a street gang. The prosecution's depiction of Ward as a gang member began in opening statements. At first, the prosecution began slowly by describing the victim as "caught between two groups" (R p 1020, l 1). In his next sentence, the prosecutor contrasted the victim to Ward and observed that the victim "was not a gang banger"—clearly implying that Ward was a gang banger (R p 1020, l 4). The prosecutor then introduced the jury to the Petersfield and Cherry Hill communities, characterizing them as "oil and water," "the Hatfields and McCoys," and "North Korea and South Korea with Highway 162 being a neutral divider" (R p 1021, ll 2-11).

After painting the communities as feuding factions requiring a DMZ, the prosecutor asserted that the fight at the Club was started by 'a gang of fellows from Petersfield' (R p 1021, l 15). He told the jury that Ward "is Petersfield" (R p 1021, l 21). With his first witness, the prosecutor informed the jury that "[t]here's a lot of bad blood between Cherry Hill and Petersfield" (R p 1033, ll 21-24). With his second witness, the prosecutor asked questions about a "gang of guys" and their places of origin (R p 1074, ll 3-4).

The prosecution called to the stand Anthony Lamar Ward, who was at the Club on the night of the shooting. At the time of trial Anthony Lamar Ward was incarcerated and appeared at the courthouse in irons and in a prison jumpsuit. For no legitimate reason, the prosecution made Anthony Lamar Ward raise his arms as show the jury "Petersfield" tattooed on his forearms (R p 1292, ll 1-9). Later in questioning, the prosecution

again made reference to the tattoo when Anthony Lamar Ward described the patrons of the Club as being from various parts of Charleston (R p 1296, ll 5-8)

The prosecutor became more blatant when in questioning a crime scene investigator about the discharge of shell casings, he described the shooter as employing 'a gangster hold ' (R p 1478, l 24) There was no reason for the prosecutor to use this term He could have referred to such a mode of shooting as holding the weapon horizontal or sideways A contemporaneous objection was made to this prejudicial characterization (R pp 1478-79) The prosecution again referred to a "gangster style" shooting during the cross examination of accident reconstruction expert Roy Cantrell (R p 1682) After the objection, the trial judge instructed the jury to disregard the question because there was "no evidence to base that question on " (R p 1682, ll 13-14)

After Cantrell's testimony, no other witness was called to the stand The defense made a motion for a mistrial based on the prosecution's improper insertion of gang affiliation into the trial (R pp 1700-01) In remarks leading up to the mistrial motion (outside the presence of the jury), the prosecution demonstrated that the "gangster" references were not made by accident He twice referred to the incident at the club as "a gang fight ' (R pp 1696 l 8 & 1697 l 4) The trial judge denied the mistrial motion, but instructed the prosecutor to make no more references to "gangsters ' (R p 1702 l 18)

Despite the trial judge's instruction, the prosecutor could not resist a pointed reference to gangsters in his closing argument

[Y]ou've heard what the witnesses said about Cherry Hill and Petersfield
They don t, like, get along And as much as Mr Runyon and Miss

Jenkinson may want you to have you believe oh, this is just a place that they live, how many of you have your subdivisions tattooed on your forearms That's what Petersfield is That's what Cherry Hill is

(R p 1739, ll 5-11)

In other words, Petersfield, according to the prosecutor, is a street gang And early in the proceeding the prosecutor made clear that Ward ' is Petersfield ' (R p 1021, l 21) Based on the successful and unduly prejudicial effort to paint Ward as a gang banger, the Court of Appeals should have vacated the jury's verdict and remanded for a new trial

Instead of reversing the trial judge's decision to deny the mistrial motion, the Court of Appeals erroneously examined the "gangster" references outside the context of the entire proceeding, held that gang references were not gratuitous, and averred that use of the term "gangster" was accurate and thus permissible under the law State v Ward, Op No 4270 (S C Ct App Filed June 29, 2007) (Shearouse Adv Sheet No 27 at 81) In so ruling, the Court of Appeals misapprehended clearly established case law from this Court mandating that a new trial be granted

ARGUMENT

Whether the Court of Appeals erred in ignoring this Court's opinion in State v Day, 341 S C 410, 535 S E 2d 431 (2000) and in holding that the prosecution's repeated insinuations that Ward was a member of a street gang did not require the trial judge to grant a mistrial for infecting the proceeding with unfairness as to make the resulting conviction a denial of due process

After failing to garner a conviction in the first trial, the prosecution made gang affiliation the centerpiece of its case in the second trial In the context of the entire proceedings, the repeated insinuations about gangs were unfair, not supported by the evidence, and made the resulting conviction a denial of due process Evidence of

uncharged misconduct, such as alleged gang membership, to show criminal propensity is improper because it deflects the jury's attention from the indictment's charges and causes the jury to prejudge the accused. This prejudgment denied Ward the opportunity to defend against the offense that was charged in the indictment and persuaded jurors that Ward acted in conformity with the conduct of a typical street gang member.

A The Court of Appeals' opinion is incongruent with this Court's decision in State v. Day

The Court of Appeals' legal analysis is contrary to this Court's decision in State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). In Day, the defendant was convicted of murder and possession of a firearm. He appealed his conviction, *inter alia*, on grounds that the trial court erred in allowing the state to cross-examine a witness about Day's "Outlaw" tattoo and by permitting the prosecution to refer to Day as "Outlaw" in closing arguments. Id. at 422-23, 535 S.E.2d at 437-38. This Court observed that "[e]vidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant." Id. at 422, 535 S.E.2d at 437. Conversely, when the reference to such matter is unnecessary, the reference is unfairly prejudicial. Id.

Because there was no issue about Day's identity, this Court concluded that references to the tattoo and nickname were unwarranted and were obviously calculated to portray Day as someone proud of criminal status. "The solicitor repeatedly referred to Day as an outlaw in her closing argument in order to paint a picture of Day as someone who was proud of his status as an outlaw, who felt he was above the law, and who was

able to deceive law enforcement by hiding evidence and concocting a story about self-defense' Id. at 422-23 535 S E 2d at 438

Such improper insinuations, according to the Day Court, are prohibited by South Carolina law. Hence, this Court held that the prosecution's conduct regarding the tattoo and nickname was unacceptable, permeated the proceedings with prejudice, and thus required a new trial on due process grounds. Id. at 424, 535 S E 2d at 438

Courts from other jurisdictions have also recognized the undue prejudice caused by gang insinuation. For example, in United States v. Roark, 924 F 2d 1426 (8th Cir 1991), the jury heard generalized and repeated testimony regarding the drug dealing activities of the Hell's Angels motorcycle gang, of which the defendant was a member. Id. at 1433-34. The defendant was convicted of manufacturing drugs and conspiracy. On appeal, the defendant challenged the insertion of gang issues into the trial and the Eighth Circuit agreed, noting that "[t]he government began its assault on the Hell's Angels organization in voir dire, and continued throughout the trial in a relentless attempt to convict Appellant through his association with the motorcycle club." Id. at 1432. Although the trial judge gave a limiting instruction because of the assertions of gang affiliation, the appellate panel concluded that this was insufficient in light of the multiple references to gangs. Id. at 1434.

In Roark, the Eighth Circuit frowned on the Government's trial tactics regarding gangs, emphasizing that "[e]vidence of uncharged misconduct to show criminal propensity is inadmissible not because it is logically irrelevant, but because it is inherently and unfairly prejudicial." Id. The panel ultimately held that the Government's remarks about gang affiliation were reversible error and the case was remanded for a new

trial Id See also People v Billingsley, 425 N Y S 2d 139, 141 (1980) (holding that a new trial was required because the prosecutor's use of the word "gangster" in closing argument was calculated and prejudicial), Doherty v Florida, 726 So 2d 837 (Fla App 1999) (remanding for a new trial and holding that there "is a reasonable possibility that the admission of the testimony regarding gang membership and activities might have persuaded jurors that the group activities could be used to infer that on this occasion defendant acted in conformity with the group')

B The solicitor's conduct was much more egregious than the conduct requiring a mistrial in Day

In the present case the State began insinuating gang activity in opening statement, continued during witness examinations, and offered a parting shot in closing despite the trial judge's admonition to refrain from such argument. Although there was no evidence of gang membership or the existence of a Cherry Hill or Petersfield gang (R p 1682 l 14), the prosecution made gang affiliation a centerpiece of the case. Descriptions of the communities as "two rival groups" turned to analogies such as "oil and water," "the Hatfields and McCoys," and "North Korea and South Korea with Highway 162 being a neutral divider" (R p 1021, ll 2-11)

With the first witness called, the prosecutor's leading questions informed the jury that "[t]here's a lot of bad blood between Cherry Hill and Petersfield" (R p 1033, ll 21-24). With his second witness, the prosecutor asked questions about a "gang of guys" and their places of origin (R p 1074 ll 3-4). For no legitimate reason, the prosecution called Anthony Lamar Ward and made him raise his arms as show the jury "Petersfield" tattooed on his forearms (R p 1292, ll 1-9). Later in questioning, the

prosecution again made reference to the tattoo when Anthony Lamar Ward described the patrons of the club as being from various parts of Charleston (R p 1296, ll 5-8) The prosecutor did this even though there was no dispute about Petitioner Ward's residence, Anthony Lamar Ward's residence, or that some Club patrons lived in Petersfield See Day, 341 S C at 421-22, 535 S E 2d at 437 (reference to tattoo prejudicial when unnecessary to identify defendant or a matter at issue in trial)

After planting the seed in the jurors' minds that the disturbance was gang related the prosecutor described the person who shot Simmons as employing "a gangster hold " (R p 1478 l 24) The prosecution again referred to a "gangster style" shooting during cross examination of accident reconstruction expert Roy Cantrell (R p 1682) The transcript reveals that such a description was completely gratuitous

Q That makes a big difference, right? It also makes a big difference whether you hold a weapon like this, correct?

A Correct

Q Or holding a weapon like this?

A Potential, yes

Q This way seems to be more in style now adays, doesn't it?

A Most people I see fire like this

Q Most people you see fire are law enforcement people?

A No, sir

Q You ve seen this style, sir, obviously, have you not?

A I have seen that style yes, sir

Q That's kind of in vogue now, its called gangster style?

(R p 1681 l 20-25 to p 1682 l 1-11)

Obviously the prosecutor and the witness were gesturing with their hands to demonstrate the firing of a weapon when held horizontally or vertically. The prosecution could have also used the terms horizontal or sideways and vertical or straight when referring to a weapon's position. Instead, the prosecution took the low road of gang insinuation to persuade the jurors that they were dealing with the type of men who would shoot "gangster style."

After Cantrell's testimony, the defense made a motion for a mistrial based on the prosecution's improper insertion of gang affiliation into the trial (R pp 1700-01). In defending his actions, the prosecutor candidly informed the court that, in his opinion, the disturbance at the Club was a fight between rival street gangs (R pp 1696 l 8 & 1697 l 4). The trial judge denied the mistrial motion, but instructed the prosecutor to make no more references to 'gangsters' (R p 1702 l 18).

Despite the trial judge's instruction, the prosecutor could not leave gang insinuation alone. In closing he made this pointed argument:

[Y]ou've heard what the witnesses said about Cherry Hill and Petersfield. They don't, like, get along. And as much as Mr Runyon and Miss Jenkinson may want you to have you believe oh, this is just a place that they live, how many of you have your subdivisions tattooed on your forearms. That's what Petersfield is. That's what Cherry Hill is.

(R p 1739, ll 5-11)

In other words, Petersfield is a street gang. Ward must have been a gang banger because, according to the prosecutor, Ward "is Petersfield" (R p 1021, l 21). With this unduly prejudicial argument the prosecution's work at painting Ward as a gang member was complete and the jury returned the desired verdict.

C The Court of Appeals did not examine gang insinuation in the context of the entire proceeding

The Court of Appeals held that gang insinuation was preserved for review only to the extent that the prosecutor asked the crime scene investigator about the ejection of casings when a weapon is held “gangster style.” State v. Ward, Op. No. 4270 (S.C. Ct. App. Filed June 29, 2007) (Shearouse Adv. Sheet No. 27 at 81). The panel erroneously considered this one reference outside of the context of the entire proceedings when it affirmed the denial of a mistrial. See, e.g., State v. Forney, 321 S.C. 353, 358, 468 S.E.2d 641, 644 (1996) (holding that a determination of the prejudicial effect of evidence of criminal propensity or bad acts “must be based on the entire record”), State v. Brown, 334 S.C. 70, 543 S.E.2d 552 (2001) (same). The panel did discuss some of the other references to gangs, but overlooked myriad statements and actions by the prosecution that implied Ward was a member of a criminal street gang.

Counsel for both defendants objected to the solicitor’s characterization of a gangster hold (R. p. 1478 l. 25 to p. 1479), a similar objection was made and sustained during Cantrell’s testimony (R. p. 1682 ll. 12-13), and both lawyers reiterated these arguments during the mistrial motion (R. pp. 1701-02). In Day, this Court held that an “objection to any ‘categorization’ of the term outlaw adequately preserves the defense’s arguments that Day’s tattoo and nickname were used to impugn his character.” 341 S.C. at 422, 535 S.E.2d at 437. Hence, the gang insinuation issue is preserved and must be viewed **in the context of the entire proceeding** as was done in Day. When viewed in the context of the solicitor’s calculated efforts to portray Ward as a member of the alleged Petersfield street gang, a new trial is the only remedy for this egregious conduct.

D The Court of Appeals has improperly limited State v Day and placed its imprimatur on gang insinuation

In discussing the gang insinuations the panel found the references to be accurate despite the lack of evidence presented at trial ‘ Certainly, the groups of people on both sides of this altercation outside the Club Diamante could be referred to as gangs considering their actions that evening ’ State v Ward, Op No 4270 (S C Ct App Filed June 29, 2007) (Shearouse Adv Sheet No 27 at 81), Of course, reference to Day as ‘Outlaw ’ was also accurate, but this Court nonetheless ordered a new trial because even ‘accurate’ evidence can be unduly prejudicial and deny a defendant due process of law Day, 341 S C 422, 535 S E 2d at 437, see also S C R E 404(b) & 403

The panel failed to recognize that ‘there is great potential for prejudice when evidence regarding gangs is at issue ’ United States v Bradford, 246 F 3d 1107, 1117 (8th Cir 2001), see also United States v McKay, 431 F 3d 1085, 1093 (8th Cir 2005) ([G]ang affiliation evidence is not admissible where it is meant merely to prejudice the defendant or prove his guilt by association with unsavory characters ”), People v Billingsley, 425 N Y S 2d 139, 141 (1980) (“It was far beyond the bounds of reasonable advocacy and an extremely prejudicial use of the gangster idiom by the District Attorney in his summation ”), Doherty v Florida, 726 So 2d 837 (Fla App 1999) (remanding for a new trial and holding that there “is a reasonable possibility that the admission of the testimony regarding gang membership and activities might have persuaded jurors that the group activities could be used to infer that on this occasion defendant acted in conformity with the group’)

Indeed, other courts have held that “[i]n metropolitan areas of America there may be strong prejudice against street gangs” and thus “[e]vidence of gang membership is admissible only if it is relevant to prove” matters at stake in trial People v. Terry, 728 N E 2d 669, 676 (Ill App 2000) “When the State’s theory of gang-related motive is not supported by the evidence, the only purpose for telling the jury that the crime was gang-related could be to inflame the passion or to arouse prejudice against gangs ” Id

The dictionary definition of “gang” cited by the panel describes a gang as a group of people acting together for “criminal purposes” The purpose of the trial was to determine whether Petitioner Ward actually engaged in criminal activity—the murder of Jamie Simmons The panel’s opinion permits the jury to assume Ward was engaged in ‘criminal purposes’ based on an alleged affiliation with persons fighting at the Club Diamante In other words, the panel’s opinion permits the prosecution to avoid proof that gang-affiliation is relevant to anything, excuses Rule 403 analysis, and allows the prosecution to use gang affiliation to inflame the passion or to arouse prejudice against the defendant

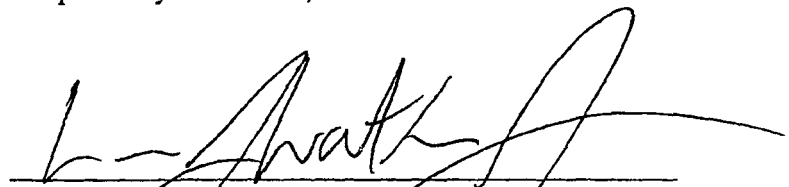
In sum, in metropolitan areas such as Charleston, South Carolina, citizens understand that gangs are unsavory characters engaged in acts of intimidation and unlawful conduct The trial judge correctly held that there was no evidence in this case that Ward was a member of a street gang The panel’s statement that the prosecution’s multiple gang insinuations were accurate and thus permissible ignores the great potential for prejudice See State v. Fletcher, 363 S C 221, 609 S E 2d 572 (Ct App 2005) (“It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual ”), United States v

Roark 924 F 2d at 1434 ("Evidence of uncharged misconduct to show criminal propensity is inadmissible not because it is logically irrelevant, but because it is inherently and unfairly prejudicial") Under the panel's decision, a prosecutor is not required to prove his case, but rather may prove a defendant's guilt by association with unsavory characters This was not permitted in State v Day and should not be permitted in this case

CONCLUSION

In the context of the entire proceedings, the myriad insinuations about gang membership were unfair, not supported by the evidence, and made the resulting conviction of denial of due process The Court of Appeals' decision is contrary to clearly established precedent of this Court (State v Day), and thus this Court should grant the petition for a writ of certiorari to protect the integrity of its precedent and to correct the miscarriage of justice below

Respectfully submitted,



William J. Watkins, Jr (SC Bar #16716)
 WOMBIE CARLYLE
 SANDRIDGE & RICE, PLLC
 550 South Main Street, Suite 400
 Greenville, South Carolina 29601
 (864) 255-5400

Joseph L. Savitz, III
 South Carolina Office of Appellate Defense
 1330 Lady Street, Suite 401
 Columbia, South Carolina 29201
 (803) 734-1330

September 21, 2007

Attorneys for Petitioner John Henry Ward

STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Roger M Young, Circuit Court Judge

Opinion No 4270 (S C Ct App filed June 29, 2007)

The State,

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HENRY D MCMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

MELODY J BROWN
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT ANNE WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, 4th Floor
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Whether the Court of Appeals erred in ignoring this Court's opinion in State v. Day, 341 S C 410, 535 S E 2d 431 (2000), and in holding that the prosecution's repeated insinuations that Ward was a member of a street gang did not require the trial judge to grant a mistrial for infecting the proceeding with unfairness as to make the resulting conviction a denial of due process

(Petition for Writ of Certiorari, p 1)

STATEMENT OF THE CASE

Petitioner, John Henry Ward, was indicted at the September 2nd, 2003 term of the Court of General Sessions for Charleston County for murder. The charges arose from the May 11th, 2003 shooting of Jamie Simmons. A jury trial was held June 6-9, 2005, before the Honorable Roger M. Young. The jury convicted Petitioner as charged. Judge Young sentenced him to thirty (30) years imprisonment.

A timely Notice of Appeal was served. After full briefing and oral argument, the Court of Appeals issued an opinion affirming the conviction. *State v. Ward*, Opinion No. 4270 (Ct App filed June 29, 2007).¹ Petitioner petitioned for rehearing, which was denied on August 24, 2007. Petitioner filed a Petition for Writ of Certiorari on September 21, 2007. This Return to Petition for Writ of Certiorari follows.

L.

¹ Reported at 374 S.C. 606, 649 S.E.2d 145 (Ct App 2007)

RESPONDENT'S STATEMENT OF FACTS

On May 11th, 2003, John Campbell (Raulo), from the Cherry Hill community, was dancing with a young woman at Club Diamante, a Charleston County nightclub. Keith Richards, the woman's boyfriend, took umbrage and began arguing with her. Richards, from the Petersfield community, was struck by his girlfriend and as that fight was being broken up, Campbell hit Richards and ran out of the club. Richards chased Campbell outside and the fight escalated (R pp 68-73)

Outside, Kevin Dunmeyer was waiting by his vehicle to give Campbell, his cousin, a ride home. While Dunmeyer was being brought up to speed on what happened inside the club, he saw a group of guys from Petersfield behind him. Included in that Petersfield group were John Ward and Tremayne Washington. The Petersfield group confronted Dunmeyer and Campbell and a fight ensued between "two large groups of men" from Petersfield and Cherry Hill. Dunmeyer realized he could not fight his way back to his vehicle, so he fled the scene on foot, with a number of guys chasing him (R pp 1071-1076, p 1100, and pp 1190-1191). As Dunmeyer ran off, Tremayne Washington ran to his pickup truck and was overheard saying "we will handle that", and "some bitch is going to die tonight" (R pp 1100-1101, p 1195).

At that time Antonio Washington, from Cherry Hill, attempted to run over the Petersfield crowd with his Cadillac. He then left and picked up Dunmeyer. Antonio and Dunmeyer returned to the club and began gesturing and cursing the Petersfield contingent and throwing bottles (R pp 1194-1220). Antonio and Dunmeyer then peeled out of the parking lot and Tremayne's pickup truck gave chase "pulled out, fishtailed down the road and started shooting" (R p 1194). Tremayne, Ward and Catrell Douglas were in the truck. Catrell was driving, Ward was sitting in the front passenger seat and Washington was in the back (R p 1106). John Ward

was the shooter (R p 1348) As Ward began shooting at the Cadillac, Jamie Simmons a bystander, was hit by stray bullets (R pp 1176-1179)

Simmons did not go in the club that night As he was driving home from work, his cousin Marcus Moultrie, flagged him down to ask him about a job Moultrie was standing in the area outside the club Moultrie and Simmons talked and Simmons began talking with another person At that time Simmons was shot and killed (R pp 1173-1179) Simmons has a graze wound on the right side of his back, and was fatally wounded by a bullet that entered the back left side of his left arm and went through his lungs, aorta, heart esophagus and lodged in his chest wall (R pp 1543-1544)

ARGUMENT

I

The Court of Appeals properly rejected Petitioner's claim the trial judge abuse his discretion in denying a mistrial

Petitioner claims the Court of Appeals erred "in holding that the prosecution's repeated insinuations that Ward was a member of a street gang did not require the trial judge to grant a mistrial " (Petition for Writ of Certiorari, p 4) Respondent submits, however, that the Court of Appeals properly found no error The Court of Appeals noted that Petitioner failed to object to all the references that he claimed, on appeal, created unfair prejudice, except for an objection to the hold of the gun as "gangster style " *State v Ward*, 374 S C 606, 612, 649 S E 2d 145, 148 (Ct App 2007) The Court of Appeals concluded that "the one isolated reference to which Ward objected" simply did not warranted the grant of a mistrial *Id* Moreover, "gangster style" is a recognized descriptive way of referencing a particular hold, thus, the reference not "completely gratuitous " *Id* Additionally, the Court found that even "the combination of references which were unobjected to" would not necessitate the grant of a mistrial, noting that a gang is defined as a group, and "the groups of people on both sides of this altercation could be referred to as gangs considering their actions that evening " *Id* The Court of Appeals properly, and reasonably, rejected Petitioner's assertion of error

A *The Record supports that the references Petitioner submits related to "street gangs" or established a "street gang" connection, simply do not raise to that level or in any way insinuate actual "street gang" activity Thus, his argument is factually incorrect.*

In his opening argument, the solicitor noted that the victim, Jamie Simmons, was a victim of circumstances In describing Simmons in his opening statement, the solicitor stated

the truly sad thing about this case is that Jamie Simmons was not drinking alcohol And Jamie Simmons was not beating his chest and Jamie Simmons was not in a squabble with anybody that night and Jamie Simmons didn't have a gun because Jamie Simmons was an innocent bystander that got caught between two groups that did have a problem with alcohol and testosterone and guns

By all accounts, Jamie was not a drinker, was not a drug user, was not a gang banger He enjoyed art, he enjoyed music He did not have a beef out there with anybody that night

(R p 1019, line 21 - p 1020, line 6)

Additionally, in his opening statement, the solicitor referred to the Petersfield faction as a "gang of" Keith Richard's fellows, and a "bunch of Petersfield people " The solicitor stated this while noting that members of the Petersfield and Cherry Hill communities shared a "Hatfield-McCoy" type of feud (R p 1021) There was no objection to the solicitor's opening argument

During the testimony of witness Kevin Dunmeyer the following exchange occurred

Dunmeyer I went to enter my vehicle through the driver's door As I walked pretty much something told me to turn around and when I turned around it was a gang of guys at my door

Solicitor A gang of guys at your door Where was this gang of guys from?

Dunmeyer Petersfield area

(R p 1073, line 23 - p 1074, line 5)

Again, there was no objection

Finally, the solicitor made two references to the gun being held "gangster" style (R pp 1478-1479, p 1682)

In perspective, Petitioner's assertion the solicitor's comments or questions insinuate a "street gang affiliation" is simply without merit That night, one group of angry, unruly people

squared off against another group of angry, unruly people. To characterize them as two gangs of men (i.e. two sides in the violent fray) is both accurate and appropriate. And, as the above excerpt from Kevin Dunmeyer's testimony illustrates, it was Dunmeyer, a witness, in the normal course of conversation, that referred to the group of men threatening him to a "gang of guys." It is also clear that no attempt was made by the solicitor to tie the events of that night into some type of gang warfare. The State's case was that the animosity that night stemmed from an ongoing feud between the Cherry Hill community and Petersfield community. Officer Don Frichtl testified regarding the feud between the communities (R. p. 1033). Numerous witnesses testified that the genesis of the melee was that a man from Cherry Hill was dancing with the girlfriend of a man from Petersfield (R. pp. 1070-1084, pp. 1098-1108, pp. 1213-1223, pp. 1293-1300).

Petitioner objected to the solicitor's referring to employing a "gangster hold" when firing a weapon² (R. pp. 1478). The attorney for co-defendant Washington objected later during the re-cross examination of a defense expert witness to the solicitor referring to the style that was "in vogue" known as "gangster style" (R. p. 1682, lines 1-14). Appellant apparently contends this terminology was gratuitous. However, as the Court of Appeals correctly found, the use of the term "gangster hold" for the style of shooting was descriptive of the hold.

Firing a weapon "gangster style" is defined as firing a gun while the weapon is turned toward the side instead of the traditional firing of the gun. *See generally Young v. City of*

² Respondent asserted same in the Final Brief of Respondent, (R. p. 7), however, the record actually shows Petitioner's objection was for "beyond the scope of cross," and co-defendant's counsel objected as to the characterization (R. p. 1478, line 24 - p. 1479, line 6). Respondent's previous counsel did not raise a procedural bar, and it has not been raised here, however, Respondent notes that Petitioner consistently failed to object to what he argues on appeal was prejudicial "street gang" evidence. This was also brought to the Court of Appeals' attention at oral argument.

Providence, 404 F 3d 4, 15 (1st Cir 2005) (witness testified that Cornel was holding his gun with two hands, as a police officer would, rather than sideways with one hand a technique called “gangster-style” by some of the witnesses)³ See also *Urban Dictionary*⁴ (*gangster style* To hold a gun horizontally instead of the way it is normally suppose to be held vertically This reduces accuracy to close to 0% and makes it nearly impossible to hit someone unless they are right near you) The Court of Appeals properly recognized that this term is a legitimate term for descriptive purposes, especially relevant and useful here where, again as the Court of Appeals correctly noted, there was evidence from the crime scene investigator regarding the shooting and ejection of bullets *Ward*, 374 S C at 612, 649 S E 2d at 148

B When viewed in the proper context, the references complained of simply did not warrant a mistrial, and does not offend this Court’s precedent.

“The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion ” *State v Vazsquez*, 364 S C 293, 299, 613 S E 2d 359, 362 (2005) “The power of the court to declare a mistrial should be used with the greatest caution and for plain and obvious causes ” *State v Johnson*, 334 S C 78, 89, 512 S E 2d 795, 801 (1999) “The granting of a motion for a mistrial is an extreme measure

³

For the purpose of showing the descriptive value, Respondent notes that several unpublished opinions have referenced this term, as well *Tennessee v Golden*, 1998 WL 518071 (Tenn Crim App 1998)(defining holding a gun “gangster style” as “the gun was turned toward the side instead of the traditional firing of the gun, it was turned toward the side”), *People v Xabandith*, 2006 WL 668388 (Cal App 3rd Dis 2006)(“Xabandith later pulled a gun, although none of the other combatants had drawn guns, and fired several shots, while holding the gun sideways, “gangster” style), *People v Lor*, 2002 WL 31320348 (Cal App 3rd Dis 2002) (“Xabandith later pulled a gun, although none of the other combatants had drawn guns, and fired several shots, while holding the gun sideways, “gangster” style)

⁴The “Urban Dictionary” is an online compilation of definitions, much like Wikipedia

which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way” *State v Beckham*, 334 S C 302, 310, 513 S E 2d 606, 610 (1999)

Here, the angry mob of men were accurately referred to as a gang of guys. There is no error in allowing this testimony, thus, no prejudice to necessitate a mistrial. Also, the positioning of the gun when fired was crucial to the expert witnesses for the State and Petitioner. Petitioner’s expert witness conceded that whether one was holding the gun conventionally or gangster style could make a big difference in the trajectory of the bullets. (R pp 1681-1682) These terms were used in a normal, non-gratuitous fashion. Also, contrary to Petitioner’s assertions, no attempt was made to somehow transform the events of the night of the murder into gang activity. Because the terms were used appropriately and briefly, there was no error and no resulting prejudice. In a proper exercise of discretion, the trial court denied the motion for a mistrial.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that, contrary to Petitioner’s assertion, the Court of Appeals decision is not in conflict with this Court’s precedent. Moreover, the review of the precedent in conjunction with review of the record shows the Court of Appeals properly denied relief and affirmed the conviction. There is no cause to grant certiorari review. Thus, the petition for writ of certiorari should be denied.

Respectfully submitted,

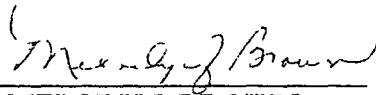
HENRY D MCMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

MELODY J BROWN
Assistant Attorney General

SCARLETT ANNE WILSON
Solicitor, Ninth Judicial Circuit

BY 
MELODY J BROWN

Office of the Attorney General
Post office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

December 21, 2007
Columbia, South Carolina

2

STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Roger M Young, Circuit Court Judge

Opinion No 4270 (S C Ct App filed June 29, 2007)

The State,

Respondent,

v

John Henry Ward,

Petitioner

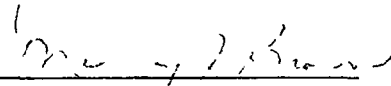
PROOF OF SERVICE

I, Melody J Brown, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorney of record

William J Watkins, Jr , Esquire
Womble, Carlyle, Sandridge & Rice
Post Office Box 10208
Greenville, South Carolina 29603

Joseph L Savitz, III, Esquire
South Carolina Office of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, South Carolina 29201

This 21st day of December, 2007


MELODY J BROWN
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

3170

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

The Honorable Roger M. Young, Presiding Judge

Opinion No 4270 (S C Ct App Filed June 29, 2007)

State of South Carolina

Respondent

v

John Henry Ward

Petitioner

**REPLY TO RESPONDENT'S RETURN TO
PETITION FOR A WRIT OF CERTIORARI**

William J. Watkins, Jr
WOMBLE CARLYLE SANDRIDGE &
RICE, PLLC
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400

Joseph L. Savitz, III
South Carolina Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, South Carolina 29201
(803) 734-1330

Attorneys for Petitioner

Other Counsel of Record

HENRY DARGAN McMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Attorney General

MELODY J BROWN
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

SCARLETT ANNE WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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I Respondent ignores significant portions of the record when arguing that gang activity was not insinuated

Respondent argues that the record is bereft of any reference or insinuation of gang activity Return to Petition for Certiorari at 5 This is incorrect In making its argument, the State ignores statements and questioning that cannot be distinguished or characterized as innocuous

For example, the State makes no mention of the questioning of inmate Anthony Lamar Ward about his "Petersfield" tattoo (R p 1292, ll 1-9) The reason for this omission by the State is inescapable The State is well aware that this Court has granted a new trial when the prosecution examines witnesses about prejudicial markings or tattoos when the reference is unnecessary and unduly prejudicial See State v Day, 341 S C 410, 535 S E 2d 431 (2000)

The State also fails to mention the prosecution's candid statements during the mistrial arguments that the altercation at the Club was "a gang fight" and thus the prosecution should be permitted to characterize the fight as such (R pp 1696 1 8 & 1697 1 4) Recognizing that no gang evidence existed, the trial judge properly instructed the prosecutor to make no more references to "gangsters" as the case progressed (R p 1702, l 18)

Finally, the State ignores a pointed reference to gangsters in the solicitor's closing argument

[Y]ou've heard what the witnesses said about Cherry Hill and Petersfield They don't, like, get along And as much as Mr Runyon and Miss Jenkinson may want you to have you believe oh, this is just a place that they live, how many of you have your subdivisions tattooed on your forearms That's what Petersfield is That's what Cherry Hill is

(R p 1739, ll 5-11)

If there was any doubt about what the prosecution meant when referring to gang fights, gangster holds, and certain tattoos, the above quote from closing argument clears the waters. In this context, references to gangsters or implications of gang activity cannot be considered as mere synonyms for a "group." In calculated fashion, the State successfully portrayed Petitioner Ward as a street gang member.

In sum, the omissions from the Return leave no doubt about insinuation of gang activity. Despite the best appellate efforts of the Respondent, the Record on Appeal cannot be contorted to conceal the prosecution's unfairly prejudicial attempt to paint Petitioner Ward as a gang banger deserving the jury's scorn.

II "Gangster style" is no mundane term of art used in everyday conversation

The State contends that "gangster style" is a common term used by citizens to describe the holding of a weapon. In support of this contention, the State cites several cases which contain the term "gangster style." A close review of these cases, however, undermines the State's argument.

For example, in People v. Xabandith, 2006 WL 66388 (Cal App 3 Dist 2006), the jury convicted the defendant of attempted murder and sustained firearm and gang allegations. During the trial, proof of the defendant's gang association was critical to proving the State's "gang enhancement" charge. The State even offered testimony by a "gang expert" who discussed how gang members "use violence and weapons to enhance their reputations and instill fear in others" and who "opined that the instant offense benefited the gang." Id. at *2. Therefore, in Xabandith, the statements that the weapon was held "sideways or 'gangster style'" was not only explicitly relevant to the State's gang enhancement charges, but also could not have resulted in prejudice to the defendant.

as the testimony of multiple witnesses established that the defendant was actually a member of the El Camino Crips and that the incident resulted from a fight between two rival street gangs Id

Likewise, the defendant, in Tennessee v Golden, 1998 WL 518071 (Tenn Crim App), was charged with a gang-related crime Specifically, the State produced evidence that the defendant was a member of the “Traveling Vice Lords” gang, and the defendant had been instructed by the gang’s leader, Charles Thompson, to murder the prison guard who was responsible for guarding Mr Thompson while he was in prison Similarly, the defendant in People v. Lor, 2002 WL 31320348 (Cal App 5th Dist 2006), was convicted of assault with a semi-automatic firearm, attempted murder, and participation in a criminal street gang

In the instant case, there was no evidence that Petitioner Ward was a member of a gang nor was gang activity relevant to the State’s charges As such, the cases cited by the State actually bolster the Petitioner’s argument that the jury would undoubtedly associate the solicitor’s comments about a “gangster style” shooting with the idea that the Defendant was involved in criminal street gang activity and acted in conformity with street gang culture

III This Court’s precedent does not permit the Respondent to view “gangster” references in isolation

The Respondent’s Return, mimicking the errors of the Court of Appeals, ignores Petitioner Ward’s argument that references to a “gangster style” shooting must be reviewed in the context of the entire proceedings It is well settled in South Carolina that evidence of criminal propensity or prior bad acts is generally inadmissible to prove the bad character of the accused or to show he acted in conformity therewith See State v.

Johnson, 306 S C 119, 125, 410 S E 2d 547, 551 (1991) “The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case ” Id (emphasis added)

The entire record reveals that “gangster style” was not used as the equivalent for “sideways” or “horizontal,” but rather to describe a reckless criminal inflicting harm on society without regard to innocent bystanders See Petition for Writ of Certiorari at 7-9 Nor was “gangster style” warranted in a discussion of shell casings ¹ As the block quote on page 8 of the Petition for Certiorari demonstrates, the solicitor gratuitously threw in the term “gangster style” to sully Petitioner Ward See id at 8, (R p 1681 ll 20-25 to p 1682 ll 1-11) Describing Ward as a gangster or the type of man who would hold a weapon “gangster style” was forbidden fruit that the prosecutor could not resist—even after a direct admonition from the trial judge

Viewing the entire puzzle instead of one individual piece, the record is clear that Petitioner’s guilt was proven by association with alleged street gang members This is not allowed under the South Carolina Rules of Evidence or this Court’s precedent See State v Day, 341 S C 410, 535 S E 2d 431 (2000)

IV Gang insinuation will continue to be brought before this Court unless the issue is dealt with promptly

Gang insinuation is a powerful and unduly prejudicial weapon in the hands of the prosecution The Court of Appeals’ imprimatur on gang insinuation coupled with growth of gang activity in South Carolina invites prosecutors to suggest gang activity

¹ The State makes a bold claim that the holding of the firearm was critical to the trajectory of the bullet However the State s own expert in forensic pathology testified that without knowledge of whether the deceased was standing crouching etc it was almost impossible to make a true determination of the bullet s trajectory (R pp 1555 56) Accordingly the trajectory argument is a Red Herring

According to recent research, gangs in South Carolina engage in “illegal drug activity, gun possession, assault, and burglary” and “have very important negative impacts on communities” Mark A. Small, et al., Gangs in South Carolina: An Exploratory Study (Clemson University Institute on Family and Neighborhood Life 2000) p. 6. “Gangs are perceived to be especially problematic in urban areas [such as Charleston County], though several rural areas indicated unwelcome activity of gangs.” Id. The citizens of South Carolina are rightly concerned about these adverse changes in their communities, and these concerns can be abused by the State when a jury is empanelled.

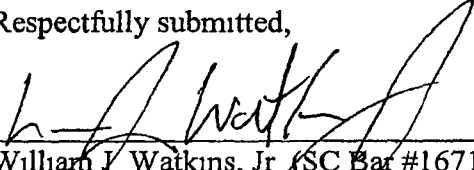
In the present case, there was no evidence that Petitioner Ward was a member of a Petersfield gang or that such a gang existed (R. p. 1682, ll. 13-14). Nonetheless, the prosecution repeatedly insinuated that Ward was a gangster. With the growth of real gang activity in South Carolina and fear in our communities, other similarly situated criminal defendants are likely to face unduly prejudicial prosecutorial misconduct touching upon alleged gang affiliation. In other words, the prosecutor’s conduct in this case is likely to be repeated as concern about gangs increases in South Carolina. Evidence of uncharged misconduct (gang membership) to show criminal propensity is improper because it deflects the jury’s attention from the immediate charges and causes the jury to prejudge the criminal defendant. Unless the integrity of State v. Day is restored and the Court of Appeals’ errors are corrected, this Court will continue to encounter gang insinuation issues raised in the Petition for Certiorari.

Accordingly, Ward respectfully requests that the Court grant his Petition so that the issue of improper gang insinuation can be dealt with before any other South Carolinians are vilified and denied due process by overly aggressive prosecutors.

CONCLUSION

The Petition should be granted (1) to restore the integrity of State v Day, (2) to ensure that criminal propensity evidence is reviewed in the context of the entire proceedings as required by state law, (3) to deal with the issue of improper gang insinuation inasmuch as it is capable of repetition, and (4) to vindicate Petitioner Ward's due process rights

Respectfully submitted,


 William J. Watkins, Jr (SC Bar #16716)
 WOMBLE CARLYLE
 SANDRIDGE & RICE, PLLC
 550 South Main Street, Suite 400
 Greenville, South Carolina 29601
 (864) 255-5400

Joseph L. Savitz, III
 South Carolina Office of Appellate Defense
 1330 Lady Street, Suite 401
 Columbia, South Carolina 29201
 (803) 734-1330

December 31 , 2007

Attorneys for Petitioner John Henry Ward

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of General Sessions**

The Honorable Roger M Young, Presiding Judge

**Case No 2003-GS-10-5895
Opinion No 4270 (S C Ct App Filed June 29, 2007)**

State of South Carolina

Respondent

v

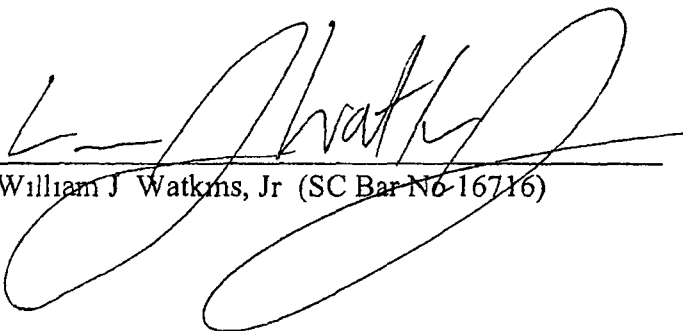
John Henry Ward

Petitioner

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the **Reply to Respondent's Return to Petitioner's Petition for a Writ of Certiorari** was served on counsel for the Respondent this 31st day of December, 2007, placing the same in the United States mail, postage prepaid and addressed as follows

Melody J Brown
S C Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211



William J Watkins, Jr (SC Bar No 16716)

FORM 5

STATE OF SOUTH CAROLINA)
County of CHARLESTON)

08 - CP - 10 - 6637
IN THE COURT OF COMMON PLEAS

JOHN HENRY WARD #309508)
Full name and prison number (if any) of Applicant)

v

State of South Carolina)
)
)
)
)
)
)

BY JULIE J. ARMSTRONG
CLERK OF COURT
2008 NOV 20 PM 1:54
APPLICATION FOR
POST-CONVICTION RELIEF

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

- 1 Place of detention SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
(MCCORMICK CORRECTIONAL INSTITUTION) 386 REDEMPTION WAY
MCCORMICK, SC 29899
- 2 Name and location of Court which imposed sentence CHARLESTON COUNTY COURT-
HOUSE, 100 BROAD STREET, CHARLESTON, SC 29401-2214
- 3 Name(s) of co-defendant(s) (if any) TREMAINE R. WASHINGTON,
CATRELL D. DOUGLAS
- 4 The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed
(a) INDICTMENT / CASE # 03-GS-10-5895

(b) MURDER 16-3-10,20 / CDR CODE # D116

(c) _____

5 The date upon which sentence was imposed and the terms of the sentence

(a) SENTENCE DATE: 6-9-05

(b) TERM: 30 YEARS / VIOLENT / MOST SERIOUS

(c) _____

6 Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7 Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8 If you answered "yes" to (7), list

(a) the name of each Court to which you appealed

I THE SOUTH CAROLINA COURT OF APPEALS

II THE SOUTH CAROLINA COURT OF APPEALS / PETITION FOR REHEARING

III THE SOUTH CAROLINA SUPREME COURT / PETITION FOR WRIT OF

(b) the result in each such Court to which you appealed CERTIORARI

I AFFIRMED

II DENIED

III DENIED

(c) the date of each such result

I JUNE 29, 2007

II AUGUST 24, 2007

III AUGUST 7, 2008

(d) if known, citations of any written opinion or orders entered pursuant to such results

I _____

II _____

III _____

9 If you answered "no" to (7), state your reasons for not so appealing

(a) _____

- (b) _____
 (c) _____

10 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully

- (a) INEFFECTIVE ASSISTANCE OF COUNSEL.
 (b) SUBJECT MATTER JURISDICTION.
 (c) VIOLATION OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

11 State concisely and in the same order the facts which support each of the grounds set out in (10)

- (a) FAILURE TO MOVE TO QUASH FATALLY DEFECTIVE INDICTMENT
 (b) DEFECTIVE INDICTMENT
 (c) FAILURE OF TRIAL JUDGE TO

12 Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? YES
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO

13 If you answered "yes" to any part of (12), list with respect to each petition, motion or application

- (a) the specific nature thereof
 I PETITIONS FOR A NEW TRIAL THROUGH DIRECT APPEAL.

II _____
 III _____
 IV _____

(b) the name and location of the Court in which each was filed

I THE SOUTH CAROLINA COURT OF APPEALS, P.O. Box 11629 Columbia, SC
 II _____
 III _____

IV

(c) the disposition thereof

I

II

III

IV

(d) the date of each such disposition

I

II

III

IV

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition

I

II

III

IV

- 14 Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

- 15 If you answered "yes" to (14) identify

(a) which grounds have been presented

I

II

III

(b) the proceedings in which each ground was raised

I

II

III

- 16 If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented
- (a) _____
- (b) _____
- (c) _____
- 17 Were you represented by an attorney at any time during the course of
- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES
- 18 If you answered "yes" to one or more parts of (17), list
- (a) the name and address of each attorney who represented you
- 1 BEATTIE BUTLER, ESQ / MARTHA KENT JENKINSON ESQ
CHAS. COUNTY PUBLIC DEFENDER / 101 MEETING ST. ST# FL, CHAS. SC 29401-2214
- 11 WILLIAM J. WATKINS JR ESQ / WOMBL / CARNLE / SANDROUSE & PRICE
PO Box 10208 GREENVILLE, SC 29603-0208
- 111 CHIEF ATTORNEY JOSEPH L. SAVITZ III / SC COURT OF APPEALS
PO Box 11629 COLUMBIA, SC 29211
- (b) the proceedings at which each such attorney represented you
- 1 TRIAL ATTORNEY / CO- COUNSEL TO TRIAL ATTORNEY
- 11 APPEAL ATTORNEY (S)
- 111 APPEAL ATTORNEY (S)

19 State clearly the relief you seek in filing this application

NEW TRIAL UPON REVERSAL

20 Are you now under sentence from any other court that you have not challenged?

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

VERIFICATION

I, JOHN H. WARD #309598, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application, that I know the contents thereof, that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application, and that the matters and allegations therein set forth are true

✓ John H. Ward

SWORN to and subscribed before me this 12
day of November, 2008

Joyce L. Young (L S)
Notary Public

My Commission Expires 8-28-2011

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

✓ I, JOHN H WARD, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true

- (1) I am the applicant in this action and I believe I am entitled to redress
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof

✓ John H Ward
Applicant

SWORN or affirmed to and subscribed before me this
12 day of November, 2008

Joyce R Young
Notary Public

My Commission Expires 8 28 2011

STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
	)	
COUNTY OF CHARLESTON	)	
	)	DOCKET NO 2008-CP-10-6637
JOHN HENRY WARD, 309598	)	
	)	
Applicant	)	AMENDED APPLICATION FOR POST
	)	CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent,	)	
_____	)	

FILED
 2009 OCT 13 PM 2:13
 JULIE J. ARMSTRONG
 CLERK OF COURT

The Applicant through undersigned Counsel respectfully wishes to amend his Application for Post Conviction Relief with respect to and in relation back to the issue of ineffective assistance of trial counsel, along with an issue of ineffective assistance of trial counsel, along with an issue of ineffective assistance of appellate counsel, Item number 10 (A) of the original application for Post Conviction relief

The Applicant respectfully makes the following claims under ineffective assistance of counsel

***Trial Counsel was ineffective for failing to object
 To prosecutor's comment referring to the applicant as a
 Member of a gang.***

Supporting facts The prejudicial effects of such comments outweighed the probative value No evidence in the record suggests that the Applicant belonged to a gang Comments were calculated to arouse the prejudice of the jury

***Trial Counsel was ineffective for failing to move
 For a separate trial***

Supporting facts Applicant and Applicant's co-defendant were indicted separately, and there was no evidence to suggest that any prior plans between the applicant and co-defendant were made to go out and commit a murder Counsel

should have objected because the second trial with Applicant's co-defendant favored the prosecution. A motion for severance was required.

***Trial Counsel was ineffective for failing to move
To quash the indictment because of defects on the face of
The indictment, which materially changed the nature of the
Offense intended to be charged in the indictment***

Supporting facts: Applicant's indictment alleged that he acted in concert with others. Acting in concert with others is not an element of murder. However, it is an element of accessory and conspiracy to which applicant was not charged by separate indictment. It was prejudicial to allow the indictment to go unchallenged, because of a material variance between proof and the indictment.

***Trial Counsel was ineffective for failing to object
To charge to jury of the hand of one is the hand of all***

Supporting facts: The hand of one is a theory and is not considered law in and of itself, however, it is a theory under which the law of accessory and conspiracy operates.

***Trial Counsel was ineffective for failing to properly
Object to and argue the use of co-defendant's recorded
Testimony from applicant's first trial which ended in a mistrial.***

Supporting Facts: The co-defendant's statements made at applicant's first trial had no probative value in applicant's second trial, and could have been used to impeach co-defendant, only if he testified inconsistently to his prior testimony. The co-defendant's statement was self-serving and violated applicant's right to confront his accuser, because his co-defendants were the only ones who actually accused applicant of being the shooter. The prejudicial effect of the testimony outweighed the probative value.

***Trial Counsel was ineffective for failing to allow
Applicant to testify at his second trial, when applicant
Testified at his first trial which ended in a mistrial.***

Supporting facts It was prejudicial for applicant not to testify at his second trial because after his co-defendant's prior court testimony was played by tape recording, it was necessary that applicant rebut the accusation that he was the shooter. The prejudicial effect of not testifying outweighed any trial strategy counsel may claim and was unduly and unreasonable under the circumstances of applicant's case.

Applicant makes the following claims against his appellate counsel for ineffectiveness:

***Appellate counsel was ineffective for failing to
Move to correct the record before the appellate court***

Supporting facts The appellate court misstated the fact that the victim was killed when the two vehicles were shooting at each other. Nothing in the record suggests that the victim was shot while the two cars were shooting at each other. Had the error been corrected the outcome would have been different.

STATEMENT OF FACTS

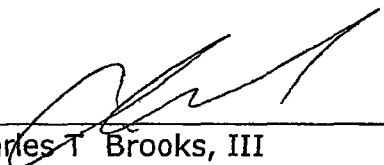
This case presents that applicant and two other acquaintances, Tremayne Washington and Catrell Douglas, were out at a night club in the Hollywood section of Charleston County when a fight broke out inside the club between a female patron and her alleged boyfriend. After this incident was broken up another follow up from that fight ensued outside the club which according to several witnesses including the officer present at the scene, the security officer working at the club, applicant and Mr. Washington, gunfire erupted and patrons began to scatter. After the crowd cleared out, a victim, Jammie Simmons, was found lying on the ground.

shot by what is believed to be a stray bullet and later died the same night as a result of said gunshot wound. The applicant in his first trial which ended in a hung jury, mistrial, testified that when he went outside the club, there were people fighting then he heard gunfire (see transcript of first trial page 5, line 15 through page 6, line 12). He also claims that a green Cadillac was shooting at no particular person and he started running again (transcript page 6, line 11 through line 23), further, that he flagged down the grey Dodge truck in which Tremayne Washington was already sitting in the back seat with a gun in his lap (Transcript page 7, line 1 through page 8, Line 2). Tremayne Washington on the other hand testified contrary to the facts recited by applicant Ward. In fact Mr. Washington claimed he asked Mr. Douglas to move his truck because of the fighting and because of the gunfire, (see transcript of Applicant's first trial, testimony of Tremayne Washington page 11, line 1 through page 12, line 7, Mr. Washington also claims he got in the backseat of his own truck and Mr. Ward was already in the truck's passenger side (transcript page 12, line 8-21). Where Mr. Washington's testimony differs from applicant's is when Mr. Washington claims gunfire was exchanged between applicant and the occupants of the green Cadillac (Transcript page 12, line 21 through page 13, line 5). Now Catrell Douglas testified at applicant's second trial that he pulled the truck up to the drive way in front of the club and from beside the club (see applicant's second trial transcript record page 406, Line 4 through page 407, Line 7, Mr. Douglas further stated that after Mr. Washington and Mr. Ward got into the truck Ward was firing shots out of the front passenger window (transcript page 408, Line 11-23). It seems that all three stories are in conflict at some point as to who was shooting from the truck.

ARGUMENT**SEE ATTACHED PAGES 4 THROUGH 24****CONCLUSION**

For the foregoing reasons, and those which will be explained at the evidentiary hearing on the merits, the applicant believes that he is entitled to relief as a matter of the law

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, John Henry Ward



Charles T. Brooks, III
Attorney for Applicant
309 Broad Street
Post office Box 3512
Sumter, South Carolina, 29150
(803) 418-5708

October 6, 2009

ARGUMENTIN REFERENCE TO ISSUE No. 1 ABOVE:

"Trial counsel was ineffective for failing to object to the prosecutor's comment referring to applicant as a member of a gang."

At applicant's second trial the solicitor made repeated reference that applicant was a gang member. The prosecutor described the victim as someone who was not a drinker, was not a drug user, [and] was not a "gang banger". (TR. P. 80, L.3-7), unlike the victim applicant and Mr. Washington was described by the prosecutor as drinkers who "were beating their chest[s] and they [had] something to prove that night " (TR. P. 80, L.8-12). The prosecutor claimed that applicant and Mr. Washington was drinking and gang banging that night. He also implied that as gang bangers they had no respect for the law-enforcement or authority. The solicitor commented that a battle between Petersfield and Cherry Hill individual had erupted referring to them as the "Hatfields and McCoys", and North Korea and South Korea (TR. P.81, L.2-11). The prosecutor further stated that the individual who was involved in the fight inside the club (Raulo) was being steered away from the crowd which ensued outside the club, and that a "gang of fellows from Petersfield were not happy about that." (TR. P. 81, L.12-25)

Applicant submits that those comments was prejudicial and quite probably affected the jury's verdict. Counsel was ineffective for failing to object to the solicitor's comments and to request curative instructions or in the alternate a mistrial. Had counsel objected, requested instructions and/or moved for a mistrial, the outcome would have been different.

Contrary to popular opinion and by the prosecutor's own acknowledgment the incident started with a man and a woman fighting in the club, (TR. P. 80, L 13-25). There is no evidence submitted to the court or on the record that indicates applicant belong to a gang nor is there evidence that Cherry Hill or Petersfield is represented as a gang.

The comment were calculated to arouse the bias and prejudices of the jury for gangs and especially gangs who don't even respect the presence of law enforcement officer's authority. It is well known that gangs are on an uprise and violence by gangs are infesting almost every urban neighborhood. However, gangs that grow out of these instances are normally identified as such by reference to specific names, such as "Bloods, Crips, Folk, Big-Money posy, etc." No such evidence exist that gangs refer to themselves by the name of the community they live in and the solicitor made no offer of such evidence.

Applicant believe he is entitled to relief because, it cannot be said that the jury did not consider the comments and inferences nor that it was harmless beyond a reasonable doubt. counsel was ineffective for failing to object and move for curative instructions or in the alternate a mistrial.

IN REFERENCE TO ISSUE No. 2 ABOVE:

"Trial counsel was ineffective for failing to move for a separate trial."

Trial counsel was ineffective for failing to move for a separate trial, do to the fact that applicant was indicted independently and not named as a co-defendant in other accused individual's indictment. Even more so, do to the fact applicant was tried at his first trial, oy himself without the mention of a co-defendant, which trial ended in a mistrial due to hung jury.

It was prejudicial for trial counsel not to seek for severance of the trials, do to the fact applicant's alleged co-defendant testified at applicant's first trial as a state witness who was not given immunity to testify and was himself charged with the same death of victim Mr. Simmons (See Recorded transcript of testimony of Tremayne Washington Page 3, Line 7 thru. L.20)

Applicant was extremely prejudiced by the joint trial because at his first trial where Mr. Washington testified and waived his right to self incrimination by taking the stand, was allowed to re-exercise that right at the applicant's second trial and refused to testify (See Second trial record page 675 line 2 thru. page 677, L. 18), however, his testimony from the first trial was played for the jury by tape recording and copy of the transcribed testimony was given to each juror for consideration, during deliberation.

At applicant's first trial he testified but was erroneously advised by trial counsel not to testify at his second trial, this change in strategy along with not moving for a separate trial or to even object to the admissibility of Mr Washington's recorded testimony affected the outcome of applicant's trial, but for counsel's actions the outcome would have been different.

Because counsel did not even raise the issue of a separate trial nor object to Mr. Washington's recorded testimony being played before the jury, applicant right to a meaningful appeal was denied as well as right to a fair trial was denied.

The South Carolina Court of Appeals Ruled in applicant's appeal, See State-vs-Ward, Opinion No 07-4270 filed 6/27/07 that "Because the issue was [never] raised or Ruled upon by the trial court, it is not [p]reserved for our review." citing Wilder Corp.-vs-Wilke, 330 s.c. 71, 497 S.E.2d 731,733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and Ruled upon by the trial judge to be preserved for appellate review").

IN REFERENCE TO ISSUE NO. 3 ABOVE:

"Trial counsel was ineffective for failing to move to quash the indictment, because of defects in the indictment which materially changed the nature of the offense intended to be charged in the indictment."

Applicant's indictment for the most part charged murder pursuant to § 16-3-10, however, it alleged as facts that applicant acted in concert with others.¹

Although applicant's indictment substantially charged him with murder, the state proceeded solely under the theory that the hand of one is the hand of all, based upon an inserted allegation and erroneous element of "acting in concert with others", which neither the hand of one, nor acting in concert is an element of murder which is obvious by the language of the code for murder §16-3-10, which defines murder as follows

"Murder is the killing of any person with malice aforethought either express or implied, §16-3-10 (1976) as amended"

No where in the murder code does it define or indicate that a murderer can be found guilty of acting in concert with others. The more specific statute which applicant could have been charged under is §16-1-40 and §16-1-50, which governs the indictment, conviction and punishment of aiding and abetting.

The gist of the state case was that applicant was guilty of aiding Mr. Washington if the jury chose Mr. Washington as the shooter, however, applicant was not charged with being an accessory to murder and cannot be convicted as an accessor under a murder indictment, because accessory is not a lesser included offense of murder; do to the dramatic differences in elements of proof.²

1. Applicant's indictment read as follows "That John Henry Ward, Jr while acting in concert with others, did in Charleston County on or about May 11, 2003, at 6619 Toogoodoo Rd., Feloniously, willfully and with malice aforethought, express or implied, kill one Jame Summons, to wit: while armed with a handgun, shot the victim about the body, and that Jame Summons did die in Charleston County as a proximate result on or about May 11, 2003." This is in violation of §16-3-10 of the South Carolina Code of laws (1976) as amended.

This code declares accessory a felony and a substantial offense within meaning of §16-1-50, which control prosecutions of accessory.³

In State-vs-Jennings, 158 s.c. 422, 155 S E. 621 (1930), The court there held "Although punishment of principals and accessories before the fact in felonies is the same under this section [code 1962 §16-1], nevertheless, the [d]istinction between principals and accessories before the fact is [r]ecognized, and although withdrawal of case from jury in murder prosecution would have effect of preventing a subsequent trial on charge defendant as accessory before the fact. See also State-vs-Greuling, 257 s.c. 515, 186 S.E.2d 706 (1972)(elements of accessory)

Applicant submits that the prosecution could not proceed under any theory which are not included as elements of the proper indictment return by the grand jury, which indictment and charge must be provided for by statute declaring the legislative specific intent to charge a specific conduct liable.

Applicant submits that the first reference to any sort of mention of a variance was when applicant's alleged co-defendant lawyer made a motion for direct verdict, [a] motion to require the state to elect, more specifically Mr Runyon who was Mr. Washington's trial counsel stated (TR. P.633, L.16-25)

"I would also ask the court to consider this motion for directed verdict, [a] motion to require the state to elect, also, because they've got these two indictments... The simple fact of the matter is they have said either Mr Washington or Mr Ward did the shooting. They [h]aven't charged each as accessory to the [o]ther. They have this vague language about acting in concert with [o]thers." (TR.P.633, L 16-25)

2. §16-1-40 Accessory "A person who aids in the commission of a felony or is an accessor before the fact in the commission of a felony by [c]ounseling, [h]iring, or otherwise [p]rocurring the felony to committed is guilty of a felony and, upon conviction, must be punished in the manner proscribed for the punishment of the principal felon."

3. §16-1-50 Indictment and conviction of accessories "A person who [c]ounsel, [h]ires, or otherwise [p]rocurer a felony to be committed may be indicted and convicted: (1) as an accessory before the fact either with the principal felon or after his conviction; or (2) of a [s]ubstantive felony, whether the principal has or has not been convicted or is or is not amenable to justice, and may be punished as if convicted of being an accessory."

".. Mr. Washington is entitled to a directed verdict of acquittal or, alternatively, Judge, the way the state has the indictments [c]onstructed, and they draw them, I think they are required to elect as to who they'er going forward on, Mr. Washington or Mr. Ward, as being the person who committed the murder." (TR.P. 635, L.5-10)

Although Mr. Runyon was on point in many respects as to the indictments and the misleading lanque of the indictments, it nonetheless was not a proper motion to remedy the defedct in the indictments failure to sufficiently state the cause of the accusation, to put the defendant(s) on notice what to answer to. Besides, the motion toquash would have been untimely and procedurally barred, pursuant S.C. Code §17-19-90.

Now, applicant's trial counsel Mr Butler attempted to "Piggy-back" off Mr. Runyon's motion but went in the direction of a material variance (TR.P. 635, L.16 thru. P.638, L.7), however failed to demonstrate prejudice, and that the material variance changed the very nature of the charge intended to be charged by the code §16-3-10 and the caption of the indictment. Also the body of the indictment of the indictment alleged the elements of murder, but alluded to accessory or conspiracy.

More specifically Mr. Butler, Counsel for applicant stated.

"... I would join in Mr. Runyon's motion as it concerns the indictment and the manner in which the indictment contemplate a theory of criminal responsibility on accomplice liability. Indictment for Mr John Ward while acting in concert with another did in Charleston County with malice aforethought, et cetera and so forth." (TR.P 635, L.16-22)

Mr. Butler knew of at least one South Carolina case which refer to a material variance between the proof and indictment, and S C. Code §17-19-100 was well established and settled law. However, Mr. Butler did not move to quash the indictment or to correct the variance to conform to the proof, if possible Mr. Butler, argued from, "State-vs-Kelvin" (citation omitted) an armed robbery case See (TR.P 636, L.8-25)

Mr Butler went on, and, almost made a proper motion to quash or correct the variance. More specifically he stated

"I submit what we have here with respect to Mr. Ward is proof at variance with allegations in the indictment. I understand why the state had done it because they don't know who was shooting. They have had to sort of cast a broad net and leave it to the jury to decide."

Mr Butler was ineffective because he never made a proper motion to quash or amend the indictment pursuant to S C Code §§17-19-90 and 17-19-100

Applicant submits that this case clearly presents a classic scenario of a material variance between proof and indictment, and by the state's own admission of its position in prosecuting each defendant More specifically, the state's response to both attorneys' assertion are as follows

"Mr. Durant: It is the state's position this is an accomplice liability case. A case that the hand of one is the hand of all. In which case, not only does the evidence against what his client did, but also the evidence of what his client did should be considered by the court and the jury in assessing who [is] responsible for the death of Jamie Simmons." (TR.P. 638, L. 18-24).

"And in the state's position, it's the state's position this case is [n]ow and has [a]lways been a hand of one, hand of all case. That is [w]hy the indictments read as they do. And there is no requirement, as Mr. Butler pointed out, I could indict — I could indictment them both a principals and if the jury found as a matter of facts that they were present, aiding and abetting, they could be guilty of the principal without any change in the indictment at all. So, certainly, if that's the case, then the converse is not going to be any different. That is just verbiage in the indictment." (TR. P. 638, L. 25 - P. 639, Lines 1-10).

Applicant submits that the state cannot avoid proving each and every element of the crime intended to be charged by alleging one thing in the indictment and proving another at trial This is especially true because, the hand of one is the hand of all theory, (and note it is only a theory, not law) is only available when a defendant is charged as and [a]ccessory to commit murder or [c]onspiracy

to commit murder. At which point all the state would need to prove is concerted actions, along with the elements of aiding and abetting. However, without those charges, the state's burden of proving the elements of such charges would be limited to a theory rather than statutory law.

The legislature has spoken as to the more specific approach to the hand of one is the hand of all, when it enacted S.C. Code §16-1-40 and §16-1-50 et. seq. as amended (1976).

Applicant submits that it is well settled that a defendant cannot be charged as a principal and convicted on evidence of accessory. In State-vs-Brazzell, 223 s.c. 103, 74 S.E 2d 573 (1953):

"Under this section [code 1962 §16-1], the conviction of a defendant charged in the indictment as a principal, on evidence tending to show that if guilty of [a]ny offense at all, it was of being an accessory before fact, [is] illegal." See also, State-vs-Sheriff, 118 s.c. 327, 110 S.E. 807 (1921); State-vs-Massey, 229 S.E.2d 332, 276 s.c. 423 (1976).

Applicant was denied the effective assistance when counsel failed to make a proper motion to quash or amend the indictment, and is entitled to have his conviction and sentence vacated and case remanded for new trial.

IN REFERENCE TO ISSUE No. 4 ABOVE:

"Trial counsel was ineffective for failing to object to charge to the jury of the hands of one is the hand of all."

Applicant contends that he was prejudiced by trial counsel's failure to properly object in a timely manner to the trial court's instructions to the jury on the hand of one is the hand of all.

The only objection to trial court's instruction began by Mr. Runyon. See (TR.P 748, L.22 thru. P.749, L.12). However, Mr. Butler applicant trial counsel did not make a formal objection, but only some adage to what Mr. Runyon already spoken on. More specifically applicant trial counsel stated.

"The other problem, Judge, is this, and I appeal to State-vs-Leonard, 355 S E.2d 270. The problem the state has in this case is they don't know who shot him Okay. Mr. Durant said DV, maybe he meant something else. He said they're both principals. He couldn't have meant that I don't know what he meant If they were both principals, then there's no need for hand of one charge, because the whole basis for the hand of one is if one's a principal and one's an accomplice.. " See (TR.P. 753, L.3-13).

The solicitor response was

"Mr Durant: They're both principals Principal just distinguishes them between accessory before the fact and accessory after the fact.

Mr. Butler: You mean they're both principal first or principal second?

Mr Durant: They're both principals to the principle crime. It makes no difference in sentence or anything, [or] indictment or anything you've got accessory before the fact, you've got accessory after the fact. If they're present aiding and abetting, they're principals ..." (TR P. 753, L.14-23)

Applicant's trial counsel Mr. Butler, continued to make his point clear, but never objected on the basis that applicant is not charged by indictment as an accessory, to allow for the hand of one instructions More specifically trial counsel stated:

"My point is this. He can't use a hand of one charge to compensate for the deficiencies in their case and hope that the jury finds them both guilty..." (TR.P. 754, L 8-10)

"Mr. Butler: Schrock is 322 S.E 2d 450, and we would also request in the contex -- this is only if accomplice liability is -- knowledge, in order to be guilty as an aider or abetter, the participant must be chargeable with knowledge of the principal's criminal conduct..." (TR.P. 758, L.22 thru. P.759, L.2)

"The Court: They haven't been indicted --

Applicant submits that the solicitor, trial counsel(s) and even the Trial Court, knew that if applicant was not charged with conspiracy or accessory to murder by proper indictment, the hand of one charge could not be given

Trial court finally instructed the jury on the hand on one without further objection or exception by trial counsel. More specifically the jury instruction were as follows:

"If two or more persons combine together to commit an unlawful act and a homicide is committed by one of the actors as a probable or natural consequences of the acts done, then pursuance of the common design all present, participating in the unlawful undertaking are as guilty as the one who committed the fatal act. The hand of one is the hand of all." (TR P. 819, L 8-14)

South Carolina Court of Appeals has Ruled on a case very similar concerning the law of charging, indicting and convicting accessory to murder. In State-vs-Martin, Opinion NO.00-25093 (field 3/27/2000), The court held: "In this case, the state failed to meet the any substantial evidence standard. For reasons not appearing in the record, the state chose to charge the Defendant and co-defendant Wilson [o]nly as principals. By [i]ndicting them [o]nly for murder and not [a]lso indicting them for conspiracy, the state assumed the burden of proving that Defendant and co-defendant Wilson were: (1) [e]ach at the scene of the crime when it happend; and (2) they [e]ach [c]ommitted the criminal act." Id

Martin, Supra "Also, the prosecution failed to [p]roperly allege [or] prove a [c]onspiracy or [a]ccessory theory under which both defendants could be found guilty of murder. Had the state [c]harged defendant with [c]onspiracy, it could have pursued convictions against both defendant under the "hand of one, the hand of all theory. ." citing State-vs-Woomer, 276 s.c. 258, 277 S.E.2d 696 (1981). To admit evidence under this theory, the existence of the common design and the participation of the accused against whom the evidence is offered should first be shown. Id. However, the state [did not] charge the defendants with conspiracy so this approach was [u]navailable at trial." Id.

Martin, Supra., "Furthermore, the state did not pursue an accomplice liability theory, 'a person must [p]ersonally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act " citing State-vs-Langley, 515, S.E.2d 98, 101 (1999); See also State-vs-Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987) Id

In State-vs-Martin, Opinion No. 00-25093 (filed 3/27/2000), "The state argued that if both men were in the apartment at the time of the murder, it [c]an rely on that showing to hold both defendants guilty of the crime. However, without a [c]onspiracy or [a]complice liability, the state placed itself in the position where it could not meet its burden of proof against [e]ach defendant [unless] it showed participation in the murder by both defendants..."

Applicant submits that underlying problem of the state's case sub-judice was the indictment was defective and or improper to allow evidence of the hand of one theory. Further, the trial court's instructions on the hand of one theory was erroneous and improper, and could not cure the defect of the indictment. The instructions was illegal because there was no basis in law to apply the hand of one theory. Due to the fact applicant was not charged with conspiracy to commit murder, was not charged with accessory to murder. The above charges carry separate and distinctive elements than that of murder. Applicant had to have been charged with either or both to warrant the hand of one charge to the jury.

Applicant was prejudiced by the erroneous instructions because it had a substantial and injurious effect on the jury's verdict. It lessened the state's burden of proving elements of murder beyond a reasonable doubt.

Applicant, like the scenario in State-vs-Martin, Supra., where the solicitor admitted to the trial judge that the state could not meet this burden when he confessed, "We don't know which person actually held [victim's] head in that pan of water" and "your Honor, the whole point is we don't know if they acted in concert.", Even if the state could place both defendants in the apartment, without any evidence of what happened or evidence of the defendants working together, it is [i]mpossible to hold the individual defendants [c]ollectively guilty of victim's murder under the legal theories used by the state [since] neither [c]onspiracy nor [a]ccomplice liability were charged to the jury.

Likewise, applicant submit the state admitted they really don't know who actually did the shooting, and can't be sure if the applicant was working with anyone else or vice-versa.

Counsel's failure to [p]roperly object to the jury instructions on the hand of one, affective the outcome of applicant's trial but for counsel's ineffectiveness the outcome would have been different.

Applicant cites for further support of this issue or erroneous jury instructions a recent United States Supreme Court case; Hedgpeth-vs-Pulido, ____ u.s. ____, U.S. No.07-544, CRL 84, # 10, Page 254 and 276 (2008), "An error in criminal jury instructions that leaves open the possibility of verdict based on an invalid theory of guilty [does not] qualify as 'structural error' that mandates reversal of the conviction in the absence of a showing of prejudice. (per curiam) case below 487 F.3d 699 (2007) Pulido-vs-Chrones

A reviewing court finding such error should ask whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." Brecht-vs-Abrahamson, 507 u.s. 619, 623 (1993).

The U.S. Supreme Court in Hedgpeth, Supra., citing Lara-vs-Ryan, 455 F.3d 1080, 1086 (CA 9th 2006), That instructing a jury on multiple theories of guilt, one of which is legally improper, was "structural" error exempting the instruction as a whole from harmless-error review. Such error instead required setting aside the conviction on habeas unless the reviewing court could determine with "absolute certainty" that the defendant was convicted under a proper theory. Because the instructions "le[ft] open the possibility" that the jury convicted Pulido on the impermissible ground, the court concluded that the verdict must be reversed. See also, Neder-vs-United States, 527 u.s. 1 (1999)(omission of an element); California-vs-Roy, 519 u.s. 2 (1996) (erroneous aider and better instructions).

IN REFERENCE TO ISSUES No's 5 and 6 ABOVE:

(5). "Trial counsel was ineffective for failing to properly object to and argue the use of co-defendant's [r]ecorded testimony from applicant's first trial which ended in mistrial."

(6). "Trial counsel was ineffective for failing to allow applicnat to testify at his second trial, when applicant testified at his first trial which ended in a mistrial."

Applicant contends that it was prejudicial error for trial counsel not to object to and argue the use of co-defendant's recorded testimony from applicant's first trial in which applicant was tried alone and his co-defendant testified as a prosecution witness for the state. The co-defendant was tried along with the Applicant at applicant's second trial, the co-defendant refused to testify at trial [a]fter the state introduced his prior in-court testimony as a witness in applicant's first trial. Applicant, after advice from his attorney, reluctantly declined to testify as well. Although applicant testified at his first trial counsel's advice not to testify was grossly erroneous and prejudicial to the outcome of applicant's trial. See (TR.P. 681, L.9-14).

The only reason that applicant decided not to testify was because his attorney ill advised him, that his co-defendant was not going to take the stand and if he took the stand it would appear to the jury that applicant were trying to point the finger at someone else to escape accountability for being the shooter. Trial counsel informed applicant that the co-defendant had something to hide if he don't get on the stand and was pointing the finger at applicant to avoid being accountable as the shooter.

Trial counsel also advised applicant that the court will not force his co-defendant to testify or to allow him to be questioned about his prior in-court testimony.

The following colloquy took place: (TR.P. 677, L.19 thru. P.687, L. 12)

The Court: Mr. Ward. have you had the opportunity to discuss this matter with your lawyers now?

Defendant Ward: Yes, Sir.

The Court: Do you desire to testify or not testivy?

Defendant Ward: Not testify.

Mr. Butler: Judge, could I ask you to explain one thing to him? I think part of the reason we're having a little bit of difficulty explaining somethings to him, it's not his fault, he's not familiar with the system. We're trying to explain there are different circumstances that allow the state to put in Mr. Washington's testimony that would not extend to Mr. Ward, meaning that I got to cross-examine Mr. Washington.

The Court: Uh-Huh.

Mr. Butler: But that Mr. Runyon where we replayed his testimony from the last trial, would be in violation of his confrontation right. I think that's what has got us a little hung up.

The Court: All right, Sir Let me see if I can explain this to you if it's causing you some confusion. The law normally says a person cannot testify -- does not require a person to testify against themselves. At your first trial back in December you were on trial by yourself. Mr. Washigton was not on trial. He was therefore called by the state. He did not assert his

fifth amendment rights at that time and he testified. there was a mistrial and they have now elected to try both of you at the same time. However, the law says that under certain circumstances, if somebody makes an out-of-court statement or makes an in-court statement, for that matter, and they make a prior statement, it can be used against them. In that case, while the state in this trial cannot force you or Mr. Washington to testify against yourself in this trial, his prior statements came back to haunt him, so to speak, that is the testimony that he gave at his trial. Under our rules of evidence, that makes him an unavailable witness. Normally, if somebody wants to tell the court or the jury something, we bring them in, put them on the witness stand, swear them in and let them tell. That's why we have rules against hearsay. And hearsay is where somebody comes in and says somebody told me something. All right. We want to have that somebody come in here. we want the best possible source of information to be the person telling the jury. All right. So we have rules against what we call hearsay. So the state could not force Mr. Washington to come in and testify against himself in this trial. However, they could use his prior statements that he made because he is in the eyes of the court unavailable to testify. So his own words came back against him in this trial. However, you didn't testify in a prior trial --

Mr. Butler: Yes, he did.

The Court. Oh, you did.

Mr. Butler. He doesn't understand how come the state can offer Mr. Washington's testimony through his prior testimony, but that we can't with him. And I was explaining to him that the reason is is because I got to cross-examine Mr. Washington. But Mr. Runyon didn't get to cross-examine Mr. Ward because Mr. Runyon was not involved in the trial at that point. That's the difference.

The Court. Okay. I did not understand that you didn't testify at your prior trial because judge Dennis tried that one. In this narrow exception to the rule in which we say somebody's prior testimony can come back and be used against them, it has to be in the instance where the lawyer that it's being used against has the right -- had the right to fully cross-examine that witness. Now, Mr Butler had the right to fully cross-examine Mr. Washington in

that prior trial, so they can use Mr. Washington's words against him. All right But in your previous trial, because Mr. Washington was not testifying in that trial, Mr. Runyon didn't have the opportunity to cross-examine you. So, therefore, that tape was not allowed to come in and be used because Mr. Washington didn't have the chance to testify against you So that's --

Mr. Butler Didn't have the chance to cross-examine.

The Court. Cross-examine you at the prior trial. Does that make more sense to you? It's a complicated concept even to lawyers, I will grant you that, but that is the best explanation I can give you to why his words were able to be played at this trial -- his previous testimony was able to be played at this and yours were not. All right?

Defendant Ward Yes, Sir.

(TR.P. 679, L.3 thru. P.681, L.9)

Applicant submits, that the trial court's explanation and counsel's advise not to testify induced applicant not to testify. Applicant reasonably believed that if he testified he would appear to be pointing the finger at someone who could not defend himself, but it was actually was the contrary. Applicant's co-defendant was the one pointing the finger and could not be questioned about it, and applicant was prejudiced by not being allowed to confront his accuser.

Applicant's co-defendant (Mr. Washington), although he chosed not to testify, if his testimony was going to be played by recording, applicant should have had the opportunity to question him as to the veracity of the statement he made accusing applicant of being the shooter.

Counsel should have move to exclude the entire testimony or to have it redacted to exclude reference to applicant (i.e. motion in [L]imine). Counsel also could have called Mr. Washington as a witness and allowed him to either admit or deny the contents of his testimony or to either qualify his response to questions. Beside the fact when Mr Washington testified at applicant's first trial he effectively and expressly [w]aived his right to self-incrimination, and because his testimony was once again published he very well could been called by any party to the witness stand.

The Trial Court mistated the law in reference to self-incrimination and on unavailable witness. In that, Mr. Washington's prior express waiver by testifying and not invoking his right to remain silent, [E]stopped him from denying the content of such Testimony and could have been compelled to testify to its contents, or the prior testimony was inadmissible, if he still retained such a right. Further, any reference to applicant should have been excluded because. it could only be used against Mr. Washington.

As to the law on unavailable witness. Trial Court mistated the law. Under South Carolina Rules of Evidence Ruld 804 Hearsay exceptions (Declarant unavailable) reads as follows ⁴

First, the court presumed Mr. Washington's prior in-court statement fall under the hearsay rules. More specifically, of former testimony by an unavailable witness, and therefore, an exception to the hearsay ruling. SCRE Rule 804 (b)(1) reads as follows: ⁵

The prior in-cort statement was not hearsay because, it was a statement against [p]enal interest made by Mr. Washington to exculpate himself and inculcate Mr. Ward, and under the Rules of Evidence, it is not considered to be hearsay. Rule 801 (d), statements which are not hearsay, a statement is not hearsay if.

801 (d)(1) Prior statement by witness. "The declarant testifies at trial or hearing and [is] subject to cross-examination concerning the statement and the statement is (A) in consistent with the declarant's testimony, and is offered to [r]ebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; Provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose."

801 (d)(2)(A) Admission by party - opponent:

"The party's own statement in either an individual or representative capacity."

801 (d)(2)(E) "Statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

4 804 (A)(1) Definition of Unavailable: "Unavailability as a witness includes situations in which the declarant -- (1) is exempted by [R]uling of the court on the ground of [p]rivilege from testifying concerning the subject matter of the declarant's statement; (2) persist in [r]efusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;... A declarant [is not] unavailable as a witness if [e]xemption [r]efusal, [c]laim of lack of memory, [i]nability, or [a]bsence is due to the procurement or wrong doing of the proponent of statement for the purpose of [p]reventing the witness from attending or testifying."

Mr. Washington's statement was not hearsay, because it was his own statement and he was there present in court and available to testify and was subject to cross examination on the subject matter of his prior statement.

When Mr. Washington's prior testimony was offered against him by the state, his attorney Mr. Runyon, went on record that his client was then and there present in court, subject to the court's jurisdiction. See (TR.P. 494, L. 9-17)

"Mr. Runyon: On behalf of Tremayne Washington, we would not have any questions, Judge. We would also offer to stipulate that Tremayne R. Washington, whose testimony is supposed to be on those tapes is one and the same Tremayne Washington who is sitting here in the courtroom today on trial."

The Trial Court erred by allowing Mr. Washington's prior testimony to be played and to allow Mr. Washington to invoke the right against self incrimination, where Mr. Washington had already expressly waived that right when he took the witness stand in applicant's first trial.

Mr. Washington knew from the time he made the sworn statement to investigators, and signed a waiver of his Miranda Rights that it would, be used against him in a court of law. He waived it then and when he testified.

Mr. Washington was not granted immunity to testify he testified at applicant's trial while still under the charge of murder, freely, voluntarily, and intelligently, being previously warned that anything said will be used in a court of law. Because of his express waiver, he was not entitled to invoke the privilege against self incrimination ~~once he has already~~ freely, voluntarily, and intelligently waived

5. 804 (b)(1) Hearsay Exceptions: "The following [are not] excluded by the hearsay Rule if the declarant is unavailable as a witness: (1) [f]ormer testimony given as a witness at [a]nother hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, [if] the party against whom the testimony is now offered, or in a civil action or proceeding, A predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Therefore, Mr. Washington did not qualify as an unavailable witness, and was subjected to cross examination on his prior statement made pursuant to SCRE Rule 806, once it was admitted in to evidence 6

Applicant submits that assuming arguendo that Mr. Washington retained the right to invoke the privilege against self-incrimination, then by South Carolina Law §19-11-50 the state could only use the prior testimony at trial for perjury, otherwise it was [i]nadmissible See State-vs-Steadman, 216 s.c. 579, 59 S.E.2d 168, cert. denied 340 u.s. 850, 71 S.ct. 78, 95 L Ed.623 (195).

S.C. Code of Law §19-11-50,

"The [t]estimony of a criminal defendant [may not] be used in any subsequent criminal case against him [except] prosecution for [p]erjury founded on that testimony..."

Applicant further submits that Mr. Washington was not granted any immunity from prosecution by definition of immunity.

Immunity -- defined:

"A right of exemption from prosecution, such as that granted a [witness] to compel answers to question he might otherwise refuse to answer on fifth amendment grounds.

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6. S.C.R.E. Rule 806 -- Attacking and supporting credibility of declarant
"When a hearsay statement [or] a statement defined in Rule 801 (d)(2), (C)(D), or (E) [h]as been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain
[If] the party against whom a hearsay statement has been [a]dmitted [c]alls the declarant as a witness, the party [is] entitled to examine the [d]eclarant on the statement as if under cross-examination." Id