

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Berkeley County

Honorable R. Kirk Griffin, Circuit Court Judge

MARQUITA SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000502

APPENDIX

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1 MR. BOLUS: Yes.

2 THE COURT: Mr. Barnwell? Or do you need more time to
3 review what was just handed to you?

4 MR. BARNWELL: Let me see if I can --

5 (Sotto voce discussion between all counsel.)

6 MR. JENNINGS: Your Honor, I'll hand up, and I guess
7 we could make it a Court's Exhibit. A letter was left here
8 in our front office --

9 THE COURT: Uh-huh.

10 MR. JENNINGS: -- or front desk.

11 THE COURT: Uh-huh.

12 MR. JENNINGS: The person that left it didn't identify
13 themselves.

14 THE COURT: Uh-huh.

15 MR. JENNINGS: The letter's not signed.

16 THE COURT: Uh-huh.

17 MR. JENNINGS: It purports to have information
18 involving this case, but we've got ---

19 THE COURT: Do you have the original?

20 MR. JENNINGS: This is what -- this is -- this is the
21 piece that was left in our office.

22 THE COURT: Can you let them see it so they can --

23 It was left when? It was left when?

24 MR. JENNINGS: It was there when we -- we got down
25 when we broke for lunch.

1 THE COURT: Okay.

2 MR. JONES: Your Honor, it claims that ---

3 THE COURT: I'm sorry. I cannot hear you.

4 MR. JONES: May we approach?

5 THE COURT: Uh-huh.

6 (Bench conference.)

7 MS. WILSON: Judge, I thought you said "2:00." I'm
8 sorry we were late.

9 THE COURT: I accept your apology.

10 Do y'all need more time to look over that? I know
11 mine's really not legible, but you all have the original,
12 correct?

13 (Sotto voce discussion between Ms. Wilson and Mr. Bolus.)

14 (Bench conference.)

15 (Pre-marked State's Exhibit No. 83 for identification.)

16 THE COURT: Okay. Is the State ready to proceed?

17 MR. JENNINGS: The State's ready, Your Honor.

18 THE COURT: Is the Defense -- Mr. Bolus, are you ready
19 to proceed?

20 MR. BOLUS: Yes.

21 THE COURT: Mr. Barnwell?

22 MR. BARNWELL: I'm ready, Your Honor.

23 THE COURT: Mr. Jones?

24 MR. JONES: Ready, Your Honor.

25 THE COURT: Please bring in the jury.

(Jury enters at 2:01 p.m.)

THE COURT: You may be seated. Ladies and gentlemen, I hope that you all had a restful lunch and that you are refreshed. We'll now resume with the trial. The State may proceed.

MR. JENNINGS: Your Honor, if we could, the State and the Defense have entered into two stipulations.

THE COURT: Ladies and gentlemen, for purposes of explanation, the State is going to publish what we call "stipulations." A stipulation is an agreement, which means that it -- it is matters that the parties have agreed upon and it requires no further proof.

Mr. Jennings, you may proceed.

MR. JENNINGS: Thank you, Your Honor.

THE COURT: And I apologize I have a mint in my mouth; I didn't expect I was going to have to talk. You may proceed, Mr. Jennings.

MR. JENNINGS: The first stipulation concerns State's Exhibits 63 and 64, which are the swabs of blood taken from Snow Goose Circle and Dutch Fork. The parties stipulate this is in State's Exhibit 79. We will offer into evidence the parties stipulate that State's Exhibit 63, the swabs taken from [REDACTED] Snow Goose Lane, and State's Exhibit 64, the swabs taken from [REDACTED] Dutch Fork Drive, were sent to the South Carolina Law Enforcement Division for DNA testing.

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1 DNA profile for each swab was compared with DNA profile of
2 the victim, Dexter Perry, and each defendant.

3 South Carolina Law Enforcement Division Forensic
4 Scientist Manuel Ortuno determined the DNA profile for each
5 swab matched the DNA profile of Dexter Perry. The
6 possibility of randomly selecting an unrelated individual
7 having the DNA profile matching Dexter Perry and that for
8 each swab is one in 30 quadrillion.

9 The other stipulation which is outlined in a report in
10 State's Exhibit 83, a report done by Investigator Owen with
11 the Charleston County Sheriff's Department. And he
12 processed the silver Pontiac that Mr. Hollins has admitted
13 driving on the night of the robbery. Processed for
14 fingerprints and any forensic evidence and found no latent
15 fingerprints in the car or blood.

16 We would offer State's Exhibit 79 and 83 into
17 evidence.

18 THE COURT: Any objection? Mr. Bolus?

19 MR. BOLUS: None.

20 THE COURT: Mr. Barnwell?

21 MR. BARNWELL: None, Your Honor.

22 THE COURT: And Mr. Jones?

23 MR. JONES: None.

24 THE COURT: Marked and admitted without objection.

25 You may proceed.

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(Marked State's Exhibit No. 79, stipulation.)

(Marked State's Exhibit No. 83, field report.)

MR. JENNINGS: Your Honor, the State calls Agent Dan DeFreese.

DAN DEFREESE, having been first duly sworn, testifies as follows:

COURT OFFICER: Please be seated. State your full name and spell your last name for the record.

A My name is Frank Dan DeFreese. That's capital D-e-capital F-r-e-e-s-e.

THE COURT: E-e-s-e?

DET. DEFREESE: Yes, ma'am.

THE COURT: You may proceed.

DIRECT EXAMINATION BY MR. JENNINGS:

MR. JENNINGS: Thank you, Your Honor.

Q Agent DeFreese, where are you employed, sir?

A I work for the South Carolina Law Enforcement Division in the Forensic Services Laboratory in Columbia.

Q And what are your duties and responsibilities with SLED?

A I'm assigned to the part of the laboratory where we do the analysis of firearm and toolmark evidence. And I have a caseload of firearm and toolmark related evidence that I examine, make reports, and appear in court about.

Q And what training have you received in the field of

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1 firearms and toolmark identification?

2 A My principal training occurred at SLED. But after my
3 employment, I was assigned to the firearm and toolmark
4 department, and I undertook the course of instruction
5 (clears throat) -- excuse me -- that lasted about 2 1/2
6 years. And during that period of time, I studied the
7 technique of firearm and toolmark identification under Lt.
8 Millard Kay. Lt. Kay established the SLED laboratory when
9 SLED itself was established in 1947. After that 2 1/2 year
10 period of time, I began accepting cases on my own and
11 testifying as to my results. I've been doing that since
12 1969.

13 Q And if you had to estimate, p how many opportunities
14 have you had to examine either projectiles or guns in
15 making toolmark identification?

16 A Thousands of times.

17 Q And in those situations, have you had the opportunity
18 to testify as an expert in State and Federal Court?

19 A I have.

20 Q And approximately how many times?

21 A I don't actually know, but I estimate it between six
22 and seven hundred times.

23 MR. JENNINGS: Your Honor, we would offer Agent
24 DeFreeze as an expert in the area of firearms and toolmark
25 identification.

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1 THE COURT: Any objections?

2 MR. BOLUS: No objection.

3 MR. BARNWELL: No objection.

4 MR. JONES: None, Your Honor.

5 THE COURT: So admitted. You may proceed.

6 Q Agent DeFreese, can you explain to the jury what
7 exactly "firearms identification" is?

8 A The -- the principal things that we're asked to do in
9 the field of firearms identification are to identify
10 bullets or ammunition components back to the firearms of
11 which they are fired. In the case of a rifle firearms,
12 it's possible to identify a particular bullet back to the
13 particular gun barrel in which it's fired based on the
14 unique toolmarkings that are left on the bullet at the time
15 the bullet's fired through the barrel.

16 And in the case of cartridge cases, it's possible to
17 identify the unique markings left on those cartridge cases
18 by the guns of which they are fired. These are markings
19 that are left over from the manufacturer of the gun and
20 markings that occur randomly during the life -- the useful
21 life of the gun.

22 And when we recover bullets in sufficiently good
23 condition and cartridge cases that are undamaged, it's
24 possible to associate back -- them back to the firearm in
25 which they were fired.

1 We also do firearm safety analysis, distance
2 determinations in shotgun-related cases, and a host of
3 other allied kinds of examinations. But the -- the
4 principal question we get asked is, "Was this bullet fired
5 by this gun, or were these two bullets fired by the same
6 gun, or this cartridge case?" That sort of thing.

7 Q Okay. And what is it, if you could sort of explain,
8 the process of when a gun fires, how is a mark left on a
9 particular bullet or projectile?

10 A Sure. The firearms we deal with are firearms that use
11 fixed ammunition, that is they use cartridges. When a
12 cartridge is fired in a case of center-fire ammunition,
13 there's a primer at the rear of the cartridge case that's
14 struck by the tip of the firing pin in the firearm.

15 The imperfections that are present on the tip of the
16 firing pin -- if there are any -- can be transferred to the
17 primer or to the back of the cartridge case. After the --
18 the primer goes off and sets off the -- the main charge in
19 the cartridge, an area of really high pressure is built up
20 inside the cartridge case.

21 The cartridge case is being supported by the gun
22 barrel or the cylinder of the gun, which keeps the
23 cartridge case from bursting. But the sides of the
24 cartridge case and the end of the cartridge case are very,
25 very forcefully pressed against the surfaces inside the gun

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1 as a result of the pressure that occurs during the firing.

2 This embosses whatever imperfections are present in the gun
3 onto the cartridge case. In some guns the cartridge case
4 is also marked by an extractor or ejector mechanism in the
5 case of semi-automatic firearms.

6 At some point the pressure inside the cartridge builds
7 up to the point where it seeks to escape, and it does so by
8 driving the bullet down the barrel and out of the gun, or
9 in the case of a failure, by blowing the gun up. But
10 typically it's done so by driving the bullet down and out
11 of the bore.

12 The inside of the bore of a rifle firearm has a series
13 of spiral and grooves. The bullet is a very, very tight
14 fit in the bore, that is, the bullet won't just drop
15 through the barrel. The -- the bullet has an interference
16 fit with the barrel which causes the grooves to grip the
17 bullet and impart a spin on it. This is done for the
18 purpose of enhancing the accuracy of the -- of the bullet
19 in flight. Much in the same way the quarterback puts a
20 spin on a football to keep it from tumbling end over end,
21 the gun imparts a spin on a conical bullet to keep it from
22 tumbling end over end.

23 During the process of making the gun barrel, there are
24 a number of machine operations that have to occur to create
25 the -- the barrel itself and to create the grooves in the

1 barrel. This leaves unique markings on some portions of
2 the inside of the barrel which can be transferred to each
3 and every bullet fired in that barrel. It's those unique
4 markings that we're looking for to identify a particular
5 bullet back to one and only one gun barrel. A great many
6 gun barrels are made with essentially the same class
7 characteristics, that is, the same number of lands and
8 grooves and the same direction of twists. But one and only
9 one gun barrel is going to have that unique set of -- of
10 markings that will permit us to identify a particular
11 bullet back to it.

12 Q And the lands and grooves that you refer to, that's in
13 the actual barrel of the firearm?

14 A Correct. When you look down the barrel of the
15 firearm, which is a tube-like structure, you'll see the
16 rifling appear as swirls which generally go either to the
17 left or to the right. They appear to go to the left or to
18 the right according to the direction which the bullet is
19 spun.

20 Q And it's that rifling that is imparted on the
21 projectile as it travels down the barrel of the gun?

22 A It's the impression of the rifling. It's the damage
23 that the rifling in essence does to the bullet. It's the
24 deformation that occurs to the bullet which appears as a
25 series of striated marks or scratching. As the bullet

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1 moves, the bullet is being scratched by the inside surfaces
2 of the gun barrel.

3 Q And then so that bullet's in sufficient condition, you
4 can look at it and tell the type of rifling and the
5 direction of that rifle?

6 A Yes.

7 Q And when we're talking -- some of the terms you're
8 using with the bullet, if somebody wasn't familiar with the
9 exact scientific terms, the part being -- actual part that
10 comes out of the gun is called the "projectile"?

11 A It's the bullet.

12 Q The bullet. Okay.

13 A What many people refer to as a bullet is a whole
14 cartridge.

15 Q Uh-huh.

16 A Which consists --

17 THE COURT REPORTER: It's a -- I'm sorry. It's a
18 what?

19 AGENT DEFREESE: A cartridge.

20 THE COURT REPORTER: No. You said something before
21 that. A whole cartridge?

22 AGENT DEFREESE: A whole cartridge.

23 THE COURT REPORTER: Thank you.

24 A The unfired cartridge consists of a cartridge case, a
25 primer, the propellant powder, and the bullet itself in the

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1 case of center-fire ammunition.

2 Q And the case, that's the part that the gun -- the
3 firing pin strikes?

4 A The case holds the primer and the primer is that
5 portion that the firing pin strikes. The primer is -- in
6 center-fire ammunition -- is a cup-like structure that
7 contains a percussion-sensitive chemical, that is, when
8 it's struck very smartly, it detonates. And when it
9 detonates, it causes the propellant powder to catch fire
10 and the powder is what drives the bullet out of the gun.

11 Q And in this case, were a number of items submitted to
12 you for your inspection?

13 A Yes.

14 Q Show you what's marked as State's Exhibit 55, 56, and
15 57, and see if you recognize those items.

16 A Yes, sir. I do.

17 Q Okay. And those are all shell casings, correct?

18 A That's correct. They're all three fired .45 auto
19 caliber cartridge cases. Some people call them "shell
20 cases."

21 Q Okay. And were you able to examine those to look at
22 the -- the breach-face impression on each of those items?

23 A I was.

24 Q And were you able to draw any conclusions based on
25 your examination of those three casings?

1 A Yes, sir.

2 Q And what were those?

3 A My conclusion was that all three of them were fired by
4 the same firearm. I found matching breach-face markings
5 which permitted me to conclude that they were all fired by
6 the same gun.

7 Q Okay. And explain to the jury the difference when we
8 use the term "semi-automatic handgun" and a "revolver."
9 What are the significant differences between those two
10 types of firearms?

11 A Both are handguns. A revolver is a manually operated
12 handgun which is characterized by having a cylinder, which
13 is usually in the center of the gun. And that cylinder has
14 a number of separate chambers into which you can put
15 cartridges, 4 or 5, 6 or more cartridges. The cartridges
16 are placed in the cylinder manually and they're removed
17 from the cylinder manually. That is, the gun has nothing
18 to do with the movement of the cartridge cases. After the
19 cartridges are placed in the cylinder, the gun is fired.

20 Some guns are what we call a "double-action revolver,"
21 and that is all you have to do is pull the trigger -- one
22 long pull of the trigger, which will cause the hammer to be
23 cocked. And then at some point, the hammer will be
24 released, resulting in firing.

25 Other revolvers are known as "single-action

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1 revolvers," which require the hammer to be manually cocked
2 and then the trigger to be pulled to fire, much in the way
3 the western-style revolvers are. But in any event, with a
4 revolver, the cartridge cases stay in the gun until the gun
5 is reloaded by hand.

6 Semi-automatic firearms do some of the work for the
7 shooter. That is, a semi-automatic firearm takes
8 cartridges that are loaded into a magazine -- which is
9 usually a spring-loaded box in the grip of the gun -- and
10 then as the cartridges are fired, the gun uses some of the
11 energy of firing to extract and eject the cartridge case --
12 the fired cartridge case from the gun after the bullet
13 leaves the barrel; and then to load the next cartridge from
14 the magazine into the chamber because it only has one
15 chamber. So that with a semi-automatic firearm, each time
16 the trigger is pulled a bullet leaves the barrel and a
17 cartridge case is ejected -- without any work on the part
18 of the shooter -- from the gun. Whereas with the revolver,
19 each time the trigger is pulled the bullet leaves, but the
20 cartridge cases stay.

21 Q So in a crime scene if a semi-automatic weapon is
22 fired, if -- what would you expect to find at the scene,
23 unless they're removed?

24 A I would expect to see -- for each bullet fired there
25 would be one cartridge case. That each time the -- the gun

DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 515

1 fires a bullet, the gun would eject a cartridge case, so
2 long as -- as the gun's working properly.

3 Q And with a revolver, unless the cartridges are
4 manually removed by the shooter, they would not be at the -
5 - they would not be outside of the chamber.

6 A There would be no -- no need for them to be extracted
7 and ejected from the gun until the shooter decided to do
8 so.

9 Q Show you two -- the next two items, which are State's
10 Exhibit 54 and State's Exhibit 60. See if you can identify
11 those, please.

12 THE COURT: Is he going to be referring to that?

13 MR. JENNINGS: I'm just going to write a summary of
14 what he says.

15 THE COURT: Can you do it to the side so that ---

16 MR. JENNINGS: Okay.

17 THE COURT: --- everybody will be able to see it?

18 MR. JENNINGS: All right.

19 THE COURT: Thank you.

20 Q Yes, sir.

21 A Yes, sir. I -- I have examined these before.

22 Q Okay. And State's Exhibit 60, as already been
23 testified -- that is a projectile that was removed from the
24 freezer?

25 A State's Exhibit 60 is a fired bullet core. It's a

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1 part of the bullet, but not a whole bullet.

2 Q Okay. And that was removed from the freezer in the
3 home?

4 A Yeah.

5 Q That's already been testified to.

6 A Right.

7 Q And State's Exhibit 54.

8 A State's Exhibit 54 is a fired .45 caliber full-metal-
9 jacketed bullet.

10 Q And based on your examination, State's Exhibit 60 and
11 State's Exhibit 54, were they both -- did they have the
12 same general characteristics?

13 A No, they do not.

14 Q Okay. What was the -- as for State's Exhibit 60, what
15 type of projectile was that?

16 A State's Exhibit 60 was a -- a fired, plain lead bullet
17 core that was consistent in it's size, weight, and physical
18 characteristics with that of a .38 caliber. And it was
19 fired from a .38 caliber firearm with five lands and
20 grooves. That is, it has a five-groove barrel.

21 State's Exhibit 54 is a somewhat larger .45 caliber
22 bullet. It was fired from a .45 caliber firearm that has
23 six lands and grooves.

24 Q Okay. Was one of the other -- one of the other
25 bullets you were provided was also a .45 caliber?

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1 A Yes.

2 Q Which item was that?

3 A It would be my item 7.

4 Q Okay. Which is -- and I show you what's marked as
5 State's Exhibit 59.

6 A Now, this is my item 8.

7 Q Okay. There you go.

8 THE COURT: What number is that, Mr. --

9 MR. JENNINGS: I'm sorry.

10 MR. DeFREESE: State's Exhibit 58.

11 THE COURT: Thank you.

12 A This is State's Exhibit 58. It's also a fired .45
13 caliber full-metal-jacketed bullet.

14 Q Okay. And that's a bullet as well.

15 A Yes.

16 Q And State's Exhibit 58 was found in the home in front
17 of the dryer. And both State's Exhibit 54 and 58 were both
18 .45 caliber?

19 A They were both .45 caliber; they both had six lands
20 and grooves with right-hand twists; and they also had
21 matching individual characteristics present from which I
22 concluded that both of these bullets were fired from the
23 same gun barrel.

24 Q Okay. So they are both .45 caliber; both had six
25 lands and grooves?

1 A Yes, sir.

2 Q And based on your examination were fired by the same
3 gun?

4 A Correct.

5 Q And State's Exhibit 54 and 58, being .45 caliber,
6 would have been consistent in caliber as having been
7 contained in the casings of State's Exhibit 55, 56, or 57?

8 A They could have been.

9 Q And I'll show you what's marked as State's Exhibit 59.
10 Do you recognize that item?

11 A Yes, sir, I do.

12 Q And what -- that is a bullet?

13 A It is. This is a fired .38 caliber full-metal-
14 jacketed bullet.

15 Q Okay.

16 A This bullet bears six land and groove right-hand twist
17 rifling impressions.

18 Q And that bullet, based on prior testimony, was found
19 under a chair in the living room.

20 I'll show you what's marked as State's Exhibit 61 and
21 62, which were two projectiles removed from the exterior of
22 this home where the incident took place.

23 A Yes, sir. I've seen State's Exhibit 61 and 62 before.

24 Q And what are the general characteristics of -- or what
25 -- what caliber are both of those?

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1 A These are also consistent with .38s and they are also
2 full-metal-jacketed bullets.

3 Q And how many land and grooves are shown on State's
4 Exhibit 61 and 62?

5 A They each have six. Six lands and grooves with right-
6 hand twists.

7 Q Now, were you able to microscopically prepare those
8 three items to make a finding as to whether they were fired
9 by the same gun?

10 A Yes, sir, I was.

11 Q And what were your findings as to those?

12 A I found matching individual markings on all three of
13 these bullets. And it was my conclusion that State's
14 Exhibit 59, 61, and 62 were all three fired by the same gun
15 barrel.

16 Q Okay. Now, we'll go back to State's Exhibit 60, which
17 was the bullet core that was removed from the freezer.

18 A Yes, sir.

19 Q And if we could, if you could tell us again what your
20 -- were you able to make a determination of the -- the
21 caliber of the bullet core?

22 A Yes, sir. In it's size and weight and its
23 construction, it was wholly consistent with that of a .38
24 caliber bullet.

25 Q Okay.

1 A And even though the -- the core is not the part of the
2 bullet that's directly marked by the gun barrel, there is a
3 jacket that covers the outside of the bullet and the core -
4 - the lead core. The softer part of it is in the middle.
5 The impressions of the rifling are transferred through the
6 jacket when the jacket deforms onto the core. So I was
7 able to observe the -- the same five land and groove
8 rifling impressions on State's Exhibit 60.

9 Q So it had five lands and grooves?

10 A Yes, it had five land and groove impressions on it.
11 Of course, since it never actually came into contact with
12 the gun barrel, it had no striated markings that would be
13 suitable to identify it to a particular gun.

14 Q Now, based just on that single class characteristic
15 that there were only five lands and grooves, in your
16 opinion, is it possible that the gun that fired State's
17 Exhibit 60 -- is there any way that that gun fired State's
18 Exhibit 59, 61, or 62?

19 A No, sir.

20 Q Okay. And that's because --

21 A They're the wrong class characteristics.

22 Q Yes, sir. And that automatically excludes --

23 A Yes, sir.

24 Q Okay. State's Exhibit 53.

25 A Yes, sir. I've -- I've seen this before. State's

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1 Exhibit 53 is a fired .38 caliber. This is an aluminum-
2 jacketed hollow-point bullet. It's a type of bullet that
3 used to be made by the Winchester Company that was sold
4 under the name of "Silvertip." They no longer make this
5 bullet in this way, that they've discontinued the aluminum-
6 jacket in favor of more traditional materials. So it's a -
7 - a relatively characteristic bullet has not been made for
8 some years.

9 The -- the core portion of -- of this bullet, State's
10 Exhibit 53, has the same observable characteristics as the
11 core in State's Exhibit 50. That is the way it's base
12 structure and certain other physical characteristics of it
13 are similar in construction to the bullet in State's
14 Exhibit 53.

15 Q And State's Exhibit 60?

16 A Sixty and -- the core of 60 is made just like the core
17 of 53.

18 Q Yes, sir. And 53 was removed from the victim during
19 the autopsy.

20 THE COURT REPORTER: I'm sorry. What did you say, Mr.
21 Jennings?

22 MR. JENNINGS: That was removed from the victim's
23 esophagus during the autopsy.

24 Q How -- on State's Exhibit 53, how many lands and
25 grooves are shown on -- on that bullet?

1 A It has five.

2 Q Okay. And in the -- in this case, of the evidence
3 that was submitted to you, there were five .38 caliber
4 bullets. State's -- well, we've already gone over State's
5 Exhibit 59 that was recovered under the chair; State's
6 Exhibit 61 and 62 that were found in the outer wall of the
7 home. Each -- State's Exhibit 59, 61, and 62 each had six
8 lands and grooves and right-hand twists.

9 A Correct.

10 Q And State's Exhibit 60 and 53 were also .38 caliber.
11 State's Exhibit 60 was recovered from the freezer; State's
12 Exhibit 53 was recovered from the victim at the time of the
13 autopsy. Both of those items have five lands and grooves.

14 A Correct.

15 Q Based on -- in your opinion, is there any way that the
16 gun that fired State's Exhibit 60 or 53 also fired State's
17 Exhibit 59, 61, and 62?

18 A No, sir.

19 Q And that's based on the general class characteristics
20 of the lands and grooves?

21 A Correct.

22 Q Based on -- on these items that were submitted, then
23 we would -- we would at a minimum have had three guns
24 firing these projectiles.

25 A No less than three.

1 Q A .45 caliber.

2 A Correct.

3 Q One .38 caliber with six lands and grooves.

4 A Correct.

5 Q And the other .38 caliber ammunition with five lands
6 and grooves.

7 A Correct.

8 Q Can -- .38 caliber ammunition can obviously be fired -
9 - fired from a .38 caliber handgun?

10 A Yes, sir.

11 Q Could it also be fired from a -- a .357?

12 A Yes, sir. There's a one-way interchange between .38
13 special ammunition and .357 magnum. That is, you can fire
14 .38 special cartridges and .357 magnum caliber cartridges
15 in a .357 magnum caliber firearm. But you can only fire
16 .38 special caliber cartridges in a .38 special. The
17 magnum cartridge is somewhat longer to prevent you from
18 putting it into a .38 special.

19 Q And finally, of the items submitted to you, there were
20 two of bullets that were removed from the victim's body:
21 State's Exhibit 54, that was a .45 caliber --

22 A Correct.

23 Q -- and State's Exhibit 53, that was a .38 caliber with
24 five lands and grooves.

25 A Yes, sir.

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON

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1 Q And based on your testimony, the same gun that fired
2 59, 61, and 62 could not have fired the bullet -- either of
3 State's Exhibits 54 or 53.

4 A That's correct.

5 Q That's all I have. If you'd answer any questions of
6 the Defense attorneys, please.

7 MR. BOLUS: None.

8 THE COURT: Mr. Barnwell?

9 MR. BARNWELL: None, Your Honor.

10 MR. JONES: None, Your Honor.

11 THE COURT: Any objection to the witness being
12 excused? From the State?

13 MR. JENNINGS: No, Your Honor.

14 THE COURT: From the Defense?

15 MR. BOLUS: None.

16 MR. BARNWELL: None, Your Honor.

17 MR. JONES: None, Your Honor.

18 THE COURT: Sir, you're excused.

19 AGENT DEFREESE: Thank you.

20 THE COURT: You're welcome.

21 Ladies and gentlemen, while we're calling our next
22 witness, why don't y'all stand up and stretch a little bit.

23 All right. You may call your next witness.

24 MR. JENNINGS: Thank you, Your Honor. The State calls
25 Lt. Mark Mason.

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON

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1 **MARK MASON**, being first duly
2 sworn, testified as follows:

3 COURT OFFICER: Please be seated, state your full
4 name, and spell your last name for the record.

5 LT. MASON: Mark Mason. M-a-s-o-n.

6 THE COURT: You may proceed.

7 DIRECT EXAMINATION BY MR. JENNINGS:

8 Q Lt. Mason, you're employed with the sheriff's
9 department?

10 A Yes, sir.

11 Q And you are lieutenant over the investigative
12 division?

13 A Yes, sir.

14 Q And you and Sgt. Merrithew were essentially active as
15 the lead detectives in this case?

16 A Yes, sir.

17 Q Did you become involved on the early morning of August
18 the 2nd?

19 A I did.

20 Q And I believe through all the testimony that's come
21 out, immediately that night the victim said that Manny had
22 been involved.

23 A That morning. Yes, sir.

24 Q Okay. So was that the first bit of information y'all
25 had that you began trying to track down?

1 A Yes, sir.

2 Q And based on your investigation, were you able to come
3 up with a possible ID of -- of a person named "Manny"?

4 A Yes, sir.

5 Q And what was that person's name?

6 A Mr. Hartwell, Jermaine Hartwell.

7 Q And once -- you know, once you had that information,
8 what did you do to try to -- to clarify whether y'all were
9 talking about the same person?

10 A I took the information we had, obtained a driver -- it
11 was either a driver's license or a South Carolina ID card,
12 e-mailed that information to SLED so they could do a photo
13 lineup for us. They utilize the DMV database. So they
14 pulled his driver's license photo and also five other
15 photos, and prepared that photo lineup for us.

16 Q And when you're getting the photo lineup together, you
17 will try to get people of the same race?

18 A Yes, sir.

19 Q Same general facial features?

20 A Yes, sir.

21 Q Facial hair?

22 A Yes, sir.

23 Q Complexion?

24 A Yes, sir.

25 Q And were you able to get a photo lineup that contained

1 a picture of Jermaine Hartwell?

2 A Yes, sir. That -- that day SLED did e-mail me back a
3 photo lineup containing Jermaine Hartwell and five other
4 males.

5 Q I'm going to show you what's marked as State's Exhibit
6 No. 4. Do you recognize that?

7 A Yes, sir.

8 Q Is that the photo lineup that was put together?

9 A That is.

10 Q And which picture was Jermaine Hartwell?

11 A Number 5.

12 Q And on the back of this document -- you showed this to
13 Joe Husser?

14 A Yes, sir.

15 Q And he was a witness in the case?

16 A Yes.

17 Q When did you show it to him?

18 A It would have been August 2nd, 2006. Time dated was
19 14:24, which would have been 2:24 in the afternoon. So it
20 would have been just a little bit before 2:24 in the
21 afternoon.

22 Q And that would have been on the same day as the
23 incident ---

24 A Yes, sir.

25 Q --- just later on?

1 A Yes, sir.

2 Q And when you met with Mr. Husser, where did you meet
3 with him?

4 A It was on the main drive into the trailer park, right
5 outside the Cobb [sic] residence, and we were in my
6 vehicle. I was in the driver's front seat, and Mr. Husser
7 was in the front passenger seat.

8 Q And when you spoke with Mr. Husser, did you give him
9 any instructions prior to him looking at the photographs?

10 A There is a little paragraph on the back of the folder
11 that I read to him.

12 Q And can you read it to the jury as you read it to Mr.
13 Husser?

14 A (As read) "You will be asked to look at a group of
15 photographs. The fact that the photographs are shown to
16 you should not influence your judgment. You should not
17 conclude or guess that the photographs contain the picture
18 of the person who committed the crime. You are not
19 obligated to identify anyone. It is just as important to
20 free innocent persons from suspicion as to identify guilty
21 parties. Please do not discuss the case with other
22 witnesses or indicate in any way that you have identified
23 someone."

24 Q And those were the only instructions you gave to him?

25 A I told him to take his time and look at the photo

1 lineup.

2 Q Okay. And was he able to select any photograph?

3 A He was.

4 Q And which picture did he identify?

5 A He identified number 5.

6 Q Okay. Did he indicate to you there was any doubt?

7 A No doubt.

8 Q And who was he identifying Mr. Hartwell as being?

9 A One of the people that was in the residence holding
10 onto the -- to Dexter Perry.

11 Q And -- and he indicated that he was armed?

12 A Yes, sir.

13 Q And in fact, you had him memorialize his selection in
14 State's Exhibit No. 52?

15 A Yes, sir.

16 Q Okay. That day you -- obviously as things progressed,
17 you received some more information concerning other
18 potential suspects?

19 A Yes, sir.

20 Q And did you -- were other further lineups compiled
21 with these suspects in them?

22 A Yes, sir.

23 Q And Mr. Gary Grant was one of those?

24 A Yes, sir.

25 Q And who prepared -- let me show you these State's

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON
Exhibit No. 1 and No. 2. Do you recognize those

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photographs?

A Yes, sir.

Q And based on the -- the way Mr. Grant looked, five other photos were selected with the same race, same general facial features?

A Yes, sir.

Q And who were these State's Exhibit No. 1 and No. 2 shown to?

A It was Ms. Birdie Cobb and Mr. Cobb.

Q Okay. And where were you when the lineups were shown to them?

A At their residence in Silver Fox Mobile Home Park.

Q And were they together or separate when they were shown?

A They were separate.

Q And what -- were any different instructions given to them than were given to Mr. Husser?

A We had been down at Charleston County Sheriff's Office at this time when we got these photo lineups, so we didn't have the folder with us. So we just presented them like it is here, but I still gave Ms. Cobb the instructions. I didn't have it verbatim from the folder, but I said, "The person may or may not be in here. We are conducting an investigation. Take your time. You're not obligated to

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON

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1 pick anybody out, but if you recognize anybody, let me know
2 it."

3 Q Okay. And did they look at both of these lineups?

4 A I -- I showed it to Ms. Birdie.

5 Q Okay. And did she make a selection?

6 A She did.

7 Q And whose picture did she select?

8 A Mr. Grant's.

9 Q Okay. And was she -- indicate any hesitation to you
10 that Mr. Grant?

11 A No. She -- she was positive about picking him out,
12 she said, "But -- but that's not his hair. He's got hair
13 now."

14 Q Okay. But no doubt in her mind that he was in her
15 home armed with a weapon?

16 A Yes. Yes, sir.

17 MR. JENNINGS: Your Honor, we'd offer State's Exhibit
18 No. 2 into evidence.

19 THE COURT: Any objection?

20 MR. BOLUS: No, ma'am.

21 MR. BARNWELL: No objection.

22 MR. JONES: No objection.

23 THE COURT: Marked and admitted without objection.

24 (Marked State's Exhibit No. 2, Photo lineup.)

25 Q And State's Exhibit No. 1, that was shown to Mr.

DIRECT EXAMINATION BY MR. JENNINGS / MARK MASON
Cobbs?

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A Yes. Detective Merrithew showed that to Mr. Cobb.

Q Okay. Defense Exhibit No. 1 was a photograph or a
lineup involving Kerry Hollins?

A Yes, sir.

Q Did you also show that to Mr. Husser?

A There was another one there. I was with Det.
Merrithew when that was shown to Joe Husser and he picked
out Mr. Hollins.

Q Okay. And indicated to you that he saw him in the
house as well?

A Yes, sir.

Q That's all the questions I have. Thank you.

MR. BOLUS: No questions.

MR. BARNWELL: No questions.

THE COURT: Mr. Jones?

MR. JONES: I don't have any questions.

THE COURT: Any objection to the witness being
excused? From the State?

MR. JENNINGS: No, Your Honor.

THE COURT: From the Defense?

MR. BOLUS: None.

MR. BARNWELL: None.

THE COURT: Mr. Jones?

MR. JONES: No, Your Honor.

RE-DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 533

1 THE COURT: Sir, you're excused.

2 LT. MASON: Thank you.

3 MR. JENNINGS: Your Honor, we call Sgt. Gerry
4 Merrithew.

5 Your Honor, if we could -- I left out one thing with
6 Agent DeFreese. If I could briefly recall him.

7 THE COURT: Is there any exception? Please approach.

8 MR. BOLUS: I don't have any objection.

9 MR. BARNWELL: No objection.

10 MR. JONES: No objection.

11 THE COURT: You may recall that witness.

12 Mr. DeFreese, if you would retake the stand. I'll
13 remind you're still under oath. If you would state your
14 name for the record.

15 MR. DeFREESE: Frank Dan DeFreese.

16 THE COURT: You may proceed.

17 MR. JENNINGS: Thank you.

18 THE COURT: You're welcome.

19 RE-DIRECT EXAMINATION BY MR. JENNINGS:

20 Q Agent DeFreese, I forgot to show you a -- a firearm
21 that was submitted under a different case number that --
22 that was found in the vicinity of this scene. This -- this
23 firearm is State's Exhibit 80.

24 A Yes, sir.

25 Q And did you examine that firearm as well?

RE-DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 534

1 A I did.

2 Q And what type of handgun is that?

3 A This is a Smith and Wesson military and police
4 revolver. It's a .38-special caliber firearm.

5 Q All right. And did you compare that gun with the
6 bullets that were submitted in evidence in this case?

7 A Yes, sir. I test-fired this revolver and -- and I
8 compared my test bullets with the -- some of the bullet
9 specimens submitted.

10 Q Yes, sir. And what were your findings as to -- as to
11 that testing?

12 A My findings were inconclusive with respect to two of
13 the specimens, and I don't recall the exact numbers. But
14 one of the two bullets removed from the -- the body would
15 be bullet No. 3, item -- I believe it's State's Exhibit 55.
16 Excuse me. Yes, sir. State's Exhibit 53 has five lands
17 and grooves with right-hand twists. The barrel in this
18 revolver, State's Exhibit 80, has five lands and grooves
19 with right-hand twists.

20 My comparison of test bullets fired by State's Exhibit
21 80 with this bullet were inconclusive. That is, I couldn't
22 tell whether this bullet was fired by that gun to the
23 exclusion of all other similar guns. Part of the reason
24 for that is this aluminum bullet jacket present on the old
25 style Winchester Silvertip ammunition.

RE-DIRECT EXAMINATION BY MR. JENNINGS / DAN DeFREESE Page 535

1 When I tried -- as a part of my test, I test-fire the
2 weapon with various different kinds of ammunition,
3 including ammunition like the ammunition in question. I
4 could not identify my test-fire ammunition bullets that I
5 knew this revolver had fired. I could not identify my
6 tests with each other. That is, the gun just did not
7 impart sufficient unique, repeatable markings, even on test
8 bullets. And consequently I was not able to identify
9 State's Exhibit 53 as -- as being fired by this gun, but it
10 could have been fired by this gun.

11 Now, the other .38-special caliber bullets that have
12 six lands and grooves --

13 Q Yes, sir.

14 A -- with right-hand twists could not have been fired by
15 this gun. That is, they're class negative. The bullet
16 core from the freezer that has five land and groove rifling
17 impressions could have been fired by this gun. I can't say
18 that they were, but it could have been.

19 Q So the two bullets that were removed from the front of
20 the trailer and the bullet under the chair that had six
21 lands and grooves could not have been fired by this gun?

22 A No way.

23 Q And of course the .45 caliber specimens -- the
24 cartridge cases, any of those could not have been fired by
25 this?

1 A Yes, sir.

2 Q All right. Thank you.

3 MR. JENNINGS: That's all I have, Your Honor.

4 MR. BOLUS: No questions.

5 MR. BARNWELL: None, Your Honor.

6 MR. JONES: None, Your Honor.

7 THE COURT: Any objection to the witness being
8 excused? From the State?

9 MR. JENNINGS: No, Your Honor.

10 THE COURT: From the Defense?

11 MR. BOLUS: None, Your Honor.

12 MR. JONES: None, Your Honor.

13 THE COURT: Mr. Barnwell? Any exception to the
14 witness being excused?

15 MR. BARNWELL: No. No, Your Honor.

16 THE COURT: Sir, you're excused.

17 AGENT DEFREESE: Thank you.

18 THE COURT: You're welcome. The State may proceed.

19 MR. JENNINGS: The State calls Det. Gerry Merrithew.

20 **GERALD DALE MERRITHEW**, being first
21 duly sworn, testifies as follows:

22 COURT OFFICER: Please be seated. State your full
23 name for the record and spell your last name.

24 DET. MERRITHEW: It's Gerald Dale Merrithew. And
25 that's M-e-r-r-i-t-h-e-w.

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 537

1 THE COURT: You may proceed.

2 DIRECT EXAMINATION BY MR. JENNINGS:

3 Q Det. Merrithew, where are you employed, sir?

4 A Berkeley County Sheriff's Office.

5 Q And you are a detective in the investigations ---

6 A I am.

7 Q --- division? Are you assigned to any particular type
8 of crime?

9 A I do persons crimes.

10 Q And how -- when -- on the night such as August the
11 2nd, when you had a burglary and kidnaping at one scene,
12 and then a homicide at another scene, were you or somebody
13 in your capacity called out?

14 A Yes, sir. I was.

15 Q And were you assigned to this case?

16 A I was.

17 Q Where did you proceed first, when you were first
18 notified of it?

19 A I actually got called out. I was duty detective and
20 it sounded as though we had a kidnaping and a burglary at
21 Snow Goose. While on the way to Snow Goose, I heard the
22 call that there had been a shooting at Dutch Fork. So I
23 diverted over to Dutch Fork.

24 Q And then obviously when you got to Dutch Fork, the
25 crime scene was processed by Sgt. Kokinda and Ms. Spence?

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 538

1 A That's correct. The crime scene did the -- did the
2 scene itself.

3 Q And y'all sort of launched your investigation from
4 there?

5 A That's correct.

6 Q And you were aware of the dying declaration from
7 Dexter Perry, where he identified one of the people
8 involved?

9 A I was.

10 Q And he was identified as "Manny"?

11 A Correct.

12 Q And as Lt. Mason just testified, Manny was later
13 identified as Jermaine Hartwell?

14 A That's correct.

15 Q By Mr. Husser.

16 A (Nods head up and down.)

17 Q You were familiar with Marquita Smith?

18 A I was. Yes, sir.

19 Q Okay. And you, I guess, had spoken with Deputy
20 Crumley at the time?

21 A Yes, sir.

22 Q And he -- as he's testified, he had had an opportunity
23 to talk with her that morning.

24 A He did. He did at the scene there on Snow Goose.

25 Q All right. You knew that she had provided a written

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 539
1 statement, which is in evidence in State's Exhibit No. 50?

2 A That's correct, sir.

3 Q In that statement that she related to Det. Crumley,
4 did she have any knowledge concerning what happened to
5 Dexter Perry?

6 A No, sir.

7 Q Any knowledge concerning who might have been involved?

8 A No, sir.

9 Q Later as your investigation progressed, did you
10 develop information that was to the contrary of that?

11 A I did, sir.

12 Q And in fact it -- developed information that she may
13 have had some involvement in this incident?

14 A That's correct, sir.

15 Q On August the 3rd, the next day by nine o'clock, did
16 you have an opportunity to come back into contact with Ms.
17 Smith?

18 A I did.

19 Q And where was that?

20 A That was at the Berkeley County Sheriff's Office.

21 Q And how did she get to the sheriff's office?

22 A I called her and asked her if she would meet with me
23 and -- at the Berkeley County Sheriff's Office.

24 Q And did she indicate to you if she had any problem
25 coming and meeting with you?

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 540

1 A Oh, no, sir. She came right up. Well, she came up
2 within a hour or so.

3 Q And tell us what happened when y'all sat down to talk.

4 A Through investigation I -- we realized that she was
5 connected to Kerry Hollins and was -- at one time had
6 dated. So acting on a -- basically acting on a hunch, I
7 told her that Kerry Hollins had confessed to the crime and
8 implicated her.

9 Q And did you advise her of -- when you started talking
10 with her, did you advise her of her constitutional rights?

11 A I did, sir.

12 Q I'm going to show you what's marked as State's Exhibit
13 51. It's a copy of a document I believe you're familiar
14 with. Do you recognize that?

15 A Yes, sir.

16 Q What's that?

17 A That is a defendant's form from Berkeley County
18 Sheriff's Office. It has *Miranda* rights on it. It also
19 has information -- the person being given their rights.
20 And it also starts a statement.

21 Q Okay. And -- and how did you -- what rights did you
22 advise Ms. Smith of?

23 A We advised her that she has the right to remain
24 silent, and she didn't have to answer any questions or give
25 any statements. And we can't use against her if she

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 541

1 decides not to. That if -- if she does answer any
2 questions or any statements, anything that she says can be
3 used against her in a court of law.

4 That she has a right to counsel -- have a lawyer with
5 her of her choice while answering any questions or giving
6 any statements. And also she has a right to have him
7 present during any questioning. That if she wishes to talk
8 to a lawyer -- have him present -- is unable to afford one,
9 one will be appointed for her free of charge. That if she
10 decides to answer any questions or give any statements
11 without a lawyer present, she has the absolute right to
12 stop interviewing at any time and remain silent.

13 And then we -- we asked her if she fully understood
14 her rights and told her that we wanted to talk to her about
15 the murder of Dexter Perry. And we had her initial by each
16 right that she understood it. And then at the bottom of
17 the page, we had her -- if she understands her rights all
18 the way down and she doesn't mind talking with us, we have
19 her sign it.

20 Q And did she indicate to you that she understood each
21 of her rights?

22 A She understood each of her rights and initialed by
23 them.

24 Q Okay. And -- and initialed each one, signifying she
25 understood that.

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 542

1 A That's correct.

2 Q At -- at any point did she indicate to you she did not
3 want to talk to you?

4 A No.

5 Q And at any point did she indicate she wanted to have
6 an attorney prior to talking with you?

7 A No.

8 Q Have you -- how long have you been involved in law
9 enforcement?

10 A I started in 1985, so that puts me at 23 years.

11 Q And I'm assuming in that 23 years you've had numerous
12 opportunities to come in contact with people that were
13 under the influence of alcohol or drugs?

14 A More than I can count.

15 Q Did Ms. Smith give you any indication that night that
16 she was under the influence of any substance?

17 A No, she did not.

18 Q Did you -- was there anybody else present when you
19 talked with her?

20 A Lt. Mark Mason.

21 Q Did you or Lt. Mason threaten her in any way?

22 A No.

23 Q Did -- did you make her any promises in return for her
24 providing you a statement?

25 A No, we sure didn't.

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 543

1 Q Okay. And while you were talking with her, was what
2 she was saying memorialized in writing?

3 A That's correct. Yes, sir.

4 Q And that's in State's Exhibit 51?

5 A That's correct. Yes, sir.

6 Q And whose writing is this?

7 A That's mine.

8 Q Okay. And whose words were you writing down?

9 A Hers.

10 Q All right. Did you sort of put your interpretation on
11 it, or did you write it down exactly as she said it?

12 A What -- what we do is we write it as they tell us, and
13 then at the end, you -- you tell them to read it over and
14 make any corrections or deductions or anything. They may
15 not like it at all. They can do anything they want to with
16 it and start over again.

17 In this particular case, I gave it back to her, asked
18 her to read it over. Anything that she wanted to that, you
19 know, to -- to take out, she could scratch through it and
20 you can initial over it. Or you can go and add at the end
21 anything you want to.

22 I don't -- I remember her reading it over, but I don't
23 remember if she made any corrections or not. I'd have to
24 look it over to see if she did, if she decided that she
25 wanted to add to or take from. I don't remember; I'd have

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 544

1 to look at it.

2 Q There on each page of the statement that says, "I've
3 read the foregoing ---

4 A Uh-huh.

5 Q --- statement or had it read to me and it is true and
6 correct to the best of my knowledge."

7 A That's correct. And then she -- if -- if it's correct
8 and they agree with it, then they sign at the bottom of
9 each page and it's witnessed.

10 Q And did she sign every page?

11 A She did.

12 Q All right.

13 MR. JENNINGS: Your Honor, we'd offer State's Exhibit
14 51 into evidence.

15 THE COURT: Any objection?

16 MR. BOLUS: Is that the redacted one?

17 THE COURT: Yes.

18 MR. JENNINGS: It is.

19 MR. BOLUS: No objection.

20 THE COURT: Mr. Barnwell?

21 MR. BARNWELL: No objection.

22 THE COURT: Mr. Jones?

23 MR. JONES: No objection.

24 THE COURT: Marked and admitted without objection.

25 (Marked State's Exhibit No. 51; Defendant Smith,

DIRECT EXAMINATION BY MR. JENNINGS / GERALD MERRITHEW Page 545
1 written statement.)

2 MR. JENNINGS: Thank you, Your Honor.

3 Q And based on some rules of court, some language has
4 been taken out of the statement.

5 A Yes, sir.

6 Q Okay. If you would please, publish that to the jury.

7 A It says (as read): "I've lived in Berkeley County " -
8 - this is -- this would be her words. "I lived in Berkeley
9 County all my life. I met Kerry Hollins -- or Kerry in
10 2003. We dated off and on. At one point, we lived -- I
11 lived with Kerry and his mother. And Dexter was part of my
12 family. The whole time we have been together, Kerry has
13 been in and out of trouble. I love Kerry, but I am also
14 afraid of him.

15 "On Sunday, 7/31/2006, Kerry called me and asked me if
16 I knew someone we could rob. At first I told him I didn't
17 know anyone. Then Dexter came to my mind. I told Kerry
18 Dexter is the only person I know who flashes money around.
19 He asked me about how much money did I think he has. I
20 told him a lot. Try to find out how much. I called
21 Dexter's phone and got Chris's number. Chris is Dexter's
22 friend who likes me. Chris is always bragging about how
23 much he and Dexter had. After talking with Chris, I told
24 Kerry that Chris -- I told Kerry what Chris said.

25 "On the next day, Monday, 7/31/2006, Kerry called me

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1 and asked me to set -- set it up so -- so they could rob --
2 so he could rob Dexter and Chris. I called Chris back and
3 while we were talking, he asked me to go out with him that
4 night. But I told him 'no' because I didn't feel like it.
5 I told Chris I would call him back later.

6 "On Tuesday, 8/1/2006, Kerry called me. 'Did you find
7 out anything else?' I told Kerry that Chris said Dexter
8 was back in town with a big pickup. Chris and Dexter,
9 Tawana and I made plans to go out to dinner. I told Kerry
10 about the plans. Kerry told me that Dexter would not get
11 hurt. Kerry told me to call him when we got to the place
12 where we -- "we" being Chris, Dexter, Tawana, and I -- were
13 going to eat, at Red Lobster.

14 "I called Kerry when Tawana and I got to Red Lobster.
15 I told -- I told that we were there, but Chris and Dexter
16 were not. Tawana and I waited inside, but Chris and Dexter
17 never showed up. Tawana and I called Chris and Dexter and
18 told them Red Lobster was closed. They and we decided to
19 meet at Ruby Tuesdays on Ashley Phosphate Road. I called
20 Kerry and told him that we were meeting Dexter and Chris at
21 Ruby Tuesdays. Kerry said, 'Okay. We are coming there.'

22 "After we met with Chris and Dexter while we were
23 eating, Kerry called me and asked me if Dexter had a lot of
24 money. I told him 'yes.' Chris and Dexter and Tawana and
25 I stayed at Ruby Tuesdays for about an hour or so.

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1 "When we left out of Ruby Tuesdays, Kerry and them
2 went on to follow Dexter and Chris, and then robbed them.
3 But something happened and they missed Dexter leaving.
4 Kerry called me and asked me to show them where Dexter and
5 Chris -- Chris's hole was -- in parenthesis -- where he
6 keep the drugs. I called Dexter and told him that Tawana
7 wanted me to check and see if he was in another -- if he
8 was with another girl. So he gave me directions to where
9 he was, at the Silver Fox trailer park.

10 "I called Kerry and told him the directions. He told
11 me to go over there and he would follow me. I drove to the
12 Silver Fox mobile home park and met with Dexter. We called
13 Tawana, but she didn't answer the phone. Dexter told me he
14 was going to Tawana's house, so I left.

15 "I called Tawana and told Dexter -- and told her
16 Dexter was coming to her house and let him in. When Kerry
17 called me, I told him Dexter had gone to Tawana's. I did
18 not want to, but he talked me into coming to the Hess Mart
19 on 78 and meeting with him.

20 "I went inside Tawana's and -- and Dexter's. We were
21 there about 10 minutes when Chris called Dexter and told
22 him to come pick him up. Dexter and I were going to leave
23 at the same time, but I walked out first. I got afraid and
24 had -- and had second thoughts about it, so I told Dexter,
25 'Someone's out there.'

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1 "Tawana told us -- Tawana told us it was probably one
2 of her brothers, so Dexter went out anyway. As soon as he
3 stepped out, they came running after him. Dexter made it
4 back inside and tried to shut the door, but they got in
5 anyway. They pushed him down in the hallway -- they pushed
6 me down on the way in." Sorry y'all. "They pushed me down
7 on the way in.

8 "I got up and ran away and did not look back. I was
9 running behind the apartments and so was Tawana. Tawana
10 called the police. Later we spoke to the police. Kerry
11 called me right after it happened, and Kerry could hear
12 Tawana on the phone with the police. I hung up.

13 "Kerry kept calling me, asking me what the police were
14 doing. After I found out Dexter had been shot, I tried to
15 call Kerry, but it went to his voice mail."

16 Q And those were whose words?

17 A Marquita Smith.

18 Q And do you see her in the courtroom today?

19 A I do.

20 Q Can you point her out to the jury, please?

21 A She's in the jacket with the white shirt.

22 Q And what she had to say in State's Exhibit 51 is -- is
23 a far cry from what she said in State's Exhibit 50.

24 A That's correct.

25 Q And did you or Lt. Mason put any of these words into

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1 her mouth?

2 A No.

3 Q So when she was saying that she was talking with Kerry
4 Hollins about setting up a robbery of Dexter Perry, whose
5 words were those?

6 A Those were her words.

7 Q And when she talked about talking to Kerry Hollins
8 about this plan over essentially three days, whose words
9 were those?

10 A Those were her words.

11 Q And as she called Kerry Hollins and his crew and
12 updated them on where Dexter Perry was on the night of
13 August the 1st, who told you that?

14 A She did.

15 Q And who told you that she drove out to Highway 78 to
16 meet Kerry Hollins and his crew and to show them -- to get
17 directions to -- to where Dexter was?

18 A She did.

19 Q And who told you that they led these men back to Snow
20 Goose Circle to where Dexter Perry was?

21 A She did.

22 (Sotto voce discussion between State Counsel.)

23 Q I believe that based on the date of this statement,
24 August the 3rd at nine o'clock, had you talked to any of
25 the suspect -- other suspects at the time you talked with

1 Ms. Smith?

2 A I had not.

3 Q Okay. Kerry Hollins provided any information --
4 provided his statement?

5 A No, sir.

6 Q So when you spoke with Ms. Smith, did you -- did y'all
7 really know anything about the plan?

8 A No.

9 Q Other than you knew Jermaine Hartwell was involved,
10 based on Joe Husser?

11 A That's correct.

12 Q And who provided you the details as to who set up this
13 robbery?

14 A She did.

15 Q And she was ---

16 A Marquita Smith.

17 Q --- the first person to do it?

18 A That's correct.

19 Q The silver car that we've heard testimony about that
20 Mr. Hollins was driving, that was shown in State's Exhibit
21 18 --

22 A Yes, sir.

23 Q You've -- through the course of your investigation,
24 were you able to determine when that car had actually been
25 rented?

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1 A It was rented on the first.

2 Q On the day of this incident?

3 A Correct.

4 Q And the highway patrol when -- when Mr. Hollins was
5 pulled over, the highway patrol had the car?

6 A That's correct.

7 Q And then that was how y'all found out that Ms.
8 Chisholm had rented it?

9 A That's correct.

10 Q And it was processed by the Charleston County
11 Sheriff's Department?

12 A That's correct.

13 MR. JENNINGS: Beg the Court's indulgence one minute.

14 THE COURT: Uh-huh.

15 (Sotto voce discussion between the Court Reporter and
16 Mr. Jennings.)

17 Q Let me just show you these two photographs of the
18 State's Exhibit 16 and 17, already in evidence. That's the
19 -- Amber Cobbs' car?

20 A That's correct.

21 Q That Kerry Hollins was driving that night?

22 A Yes, sir.

23 MR. JENNINGS: We would offer State's Exhibit 16 and
24 17 into evidence, Your Honor.

25 THE COURT: Please show them to Defense counsel.

1 (Sotto voce discussion between Mr. Jennings and
2 defense counsel.)

3 THE COURT: Any objection? Mr. Bolus?

4 MR. BOLUS: None.

5 THE COURT: Mr. Barnwell?

6 MR. BARNWELL: No, Your Honor.

7 THE COURT: Mr. Jones?

8 MR. JONES: None.

9 THE COURT: Marked and admitted without objection.

10 (Marked State's Exhibit Nos. 16 and 17, photos.)

11 (Sotto voce discussion between Mr. Jennings and
12 defense counsel.)

13 MR. JENNINGS: Your Honor, we'd offer State's Exhibit
14 84 into evidence.

15 THE COURT: Any objection?

16 MR. BOLUS: None, Your Honor.

17 MR. BARNWELL: None, Your Honor.

18 MR. JONES: None, Your Honor.

19 THE COURT: Marked and admitted without objection.

20 (Marked State's Exhibit No. 84, photo.)

21 Q Sgt. Merrithew, you've seen this picture of Berkeley
22 County?

23 A Yes, sir.

24 Q And this shows the general area that we're talking
25 about.

1 A Yes, sir.

2 Q With Snow Goose Circle -- the apartment complex ---

3 A Yes, sir.

4 Q --- is down here?

5 A Uh-huh.

6 Q And this is in Goose Creek?

7 A Yes, sir.

8 Q You've got College Park Road here as it crosses I-26?

9 A Yes, sir.

10 Q This is the shopping center with the ---

11 A Trailer park.

12 Q This trailer park is behind it.

13 A Uh-huh.

14 Q And these were the two areas that we're talking about.

15 A Uh-huh.

16 Q All right. Thank you. Do you know roughly how -- how
17 far -- what the distance is between those?

18 A I -- I haven't measured it out, but it's -- it's not
19 very far. I've, you know, I've drove it a hundred times
20 back and forth when I was with the sheriff's office.

21 Q Okay.

22 A On -- on patrol with the sheriff's office.

23 Q That's all I have. If you'd answer any questions from
24 the defense.

25 MR. BOLUS: No questions.

1 THE COURT: Mr. Barnwell?

2 MR. BARNWELL: No questions.

3 THE COURT: Mr. Jones?

4 MR. JONES: Just a couple.

5 THE COURT: You may proceed.

6 CROSS-EXAMINATION BY MR. JONES:

7 Q Real quick. With regard to -- let's see if I can find
8 the statement she gave to Deputy Crumley.

9 A Crumley?

10 Q Crumley? All right. Just a couple of things. Y'all
11 didn't have to go pick her up or anything?

12 A No. She came in as soon as I called her. Well,
13 within an hour or so.

14 Q Did -- did -- when y'all sat down and talked and you
15 read her everything, she didn't ask for a lawyer or
16 anything?

17 A Never asked for a lawyer.

18 Q And just a small thing: She talked about over a
19 period of this -- this was over a -- these conversations
20 between she and Kerry were over a period of three days,
21 correct?

22 A I think it was from the 30th or 31st through the --
23 the 1st.

24 Q I think -- yeah, I think. And Kerry said that day
25 really, in essence when he testified earlier, he said "one

1 day" really; is that correct?

2 A I don't -- I don't remember. I can look back. I
3 don't remember off the top of my head.

4 Q Nothing further.

5 THE COURT: Any re-direct of the witness?

6 MR. JENNINGS: No, Your Honor.

7 THE COURT: Any objection to the witness being
8 excused? From the State?

9 MR. BOLUS: None.

10 MR. BARNWELL: None.

11 THE COURT: From the State?

12 MR. JENNINGS: No, Your Honor.

13 THE COURT: Sir, you're excused.

14 You may call your next witness. State may proceed.

15 MS. WILSON: Beg the Court's indulgence.

16 MR. JENNINGS: Your Honor, at this time the State
17 rests its case.

18 THE COURT: Mr. Foreman, ladies, and gentlemen, the
19 State has rested their case. There are certain matters of
20 law I need to take up with the attorneys, and it probably
21 will take somewhere probably close to 20, maybe 25 minutes.
22 We apologize in advance for you all having to wait. It may
23 take a shorter time than that. I -- I'm just
24 guesstimating.

25 I'm going to tell your caretakers that anyone that --

1 that would like to smoke or anyone who would just like to
2 maybe walk around and get some air, that you'll be free to
3 do that.

4 Please, however, abide by my instructions and have no
5 discussion regarding the case among yourselves. Please
6 leave your note pads in your seats, and if you need
7 anything, please let your caretakers know. You need to go
8 with Mr. Hutto.

9 (Jury exits at 3:19 p.m.)

10 THE COURT: You may be seated. We're still in
11 session. I would ask that everyone --

12 Are there any motions?

13 MR. BARNWELL: Your Honor, I would move for a directed
14 verdict at this time based upon insufficient evidence.

15 THE COURT: Would the State like to respond?

16 MR. JENNINGS: I think there's an abundance of
17 evidence, Your Honor, linking each defendant. The evidence
18 that Mr. Hollins in this -- this statement as to the plans
19 of the robbery. And certainly from that point, the
20 evidence of the door being kicked in at Snow Goose Circle.

21 Ms. Dees testified no individuals had permission to
22 enter her home. As to the burglary first, the DNA at the
23 scene linking that Mr. Perry was injured there. It
24 certainly goes to the kidnaping as well.

25 Testimony of the Cobbs as to the people bursting in

1 their home at Dutch Fork -- did not have consent to enter.
2 Each -- Mr. Cobbs', Ms. Cobbs', Mr. Husser all testified to
3 being held at gunpoint, did not feel that they were free to
4 -- to move or to leave that location as to kidnaping of
5 each of them.

6 And then certainly there is evidence from which the
7 jury could find the defendants guilty of murder from being
8 shot inside the -- of the home during the commission of all
9 of these felonies, certainly would provide malice in
10 addition to the inference from the defendants using
11 weapons.

12 There's testimony in the record as to both Mr. Grant
13 and Mr. Hartwell being armed with handguns while they were
14 in the home at [REDACTED] Dutch Fork. And certainly in light of
15 viewing that evidence and in light most favorable to the
16 State, I would submit to the Court there is more than
17 sufficient evidence to -- to deny the motion for a direct
18 verdict.

19 THE COURT: Anything further, Mr. Barnwell?

20 MR. BARNWELL: I just ask that my motion be noted for
21 the record, Your Honor.

22 THE COURT: It is noted. Are there any other motions?

23 MR. BOLUS: Yes, ma'am. Judge, I move for a directed
24 verdict on the indictment for armed robbery. It says that
25 the defendants took from the presence of Dexter Perry goods

1 or monies or whatever. They don't allege anything else
2 being taken from anybody else, and there is a minimal --
3 there's no direct evidence showing anything was taken from
4 Dexter Perry. We got this one Kerry Hollins saying that
5 Grant made a statement to that effect, but it's not in his
6 statement. It's -- he testified to that, but the rule
7 would be they have not recovered any evidence. Dexter
8 Perry's own people testified that nothing was missing.
9 There's been no proof that any money was taken, any goods
10 from Mr. Perry. You don't -- there's no direct evidence.
11 It's such a scintilla of circumstantial evidence. There's
12 only one little itty-bitty piece of evidence, and that's
13 from Mr. Hollins, who says that Gary said he took a -- a
14 ring and a bracelet.

15 I submit that that is not enough to satisfy even the
16 indictment going to the jury to make a decision. There's
17 no -- there's no way they could find reasonable -- men and
18 women could find anybody guilty beyond a reasonable doubt
19 of -- of this indictment, and they shouldn't even consider
20 it. There's no evidence. It just fails. And that would
21 be my motion insofar as the armed robbery as for my client.

22 THE COURT: Is that the extent of the entirety of your
23 directed verdict motion?

24 MR. BOLUS: Well, I'd probably make it just for, you
25 know --

1 THE COURT: You need --

2 MR. BOLUS: -- CYA purposes.

3 THE COURT: You need to argue the full extent of any
4 motions you're seeking before you consider --

5 MR. BOLUS: Well, I make a directed verdict motion for
6 all the other charges, too, but on the same grounds that
7 Mr. Barnwell made his: insufficient evidence. But
8 particularly the armed robbery, I would ask Your Honor to
9 consider that seriously.

10 THE COURT: Mr. Barnwell, did you argue the entirety
11 of your directed motion?

12 MR. BARNWELL: Yes, Your Honor.

13 THE COURT: Mr. Jones, any motions for the record?

14 MR. JONES: Your Honor, also with regard to the armed
15 robbery, again, the only evidence of any -- the element of
16 the taking away was the statement. Clearly there's
17 credibility -- substantial credibility issue. He may have
18 been there in the house and -- and there was no attempt to
19 even ascertain the credibility. They knew that way back
20 when the identification came up.

21 Secondly, there was no attempt to -- to in any way
22 corroborate anything was taken. It's a necessary element
23 of this. And second would be -- I also ask to -- again,
24 that's to the accessory of the armed robbery of my client
25 with the same basic grounds and also to the accessory of

1 the murder and -- and the probable and natural -- a
2 probable and natural consequence of this matter. I'm not
3 sure if I'm using the exact phrase of the -- of the
4 accessory and all, but a common plan and a scheme.

5 But again, would -- there's no common -- there's no
6 evidence of a common plan and scheme to commit armed
7 robbery or to the murder. And it doesn't appear to be
8 evidence that it was a probable and natural consequence
9 that the murder would occur.

10 She -- she did try to warn and -- and I would -- I
11 would argue that that's just too far removed from the
12 circumstances. She couldn't even set it up at the
13 restaurant in the right place, let alone for it to go
14 further beyond that.

15 But I would ask on those grounds for the directed
16 verdict.

17 THE COURT: Would y'all like to respond?

18 MR. JENNINGS: The only thing I'll add is to the armed
19 robberies. Mr. Hollins did testify that Mr. Grant told him
20 he took a bracelet and ring. Certainly that is evidence
21 and direct evidence that -- that items were taken from the
22 victim. That alone would satisfy the standard on -- on a
23 directed verdict motion. Any weight given to Mr. Hollins's
24 testimony will be the function for the jury to determine
25 whether they either believe some of what he said, all of

1 what he said, or none of what he said.

2 But for the purposes of this motion, as I understand
3 the standard of the Court, viewing the evidence in light
4 most favorable to the State, certainly there is evidence in
5 the record to support the armed robbery charge.

6 As to the foreseeability of -- of murder extending from
7 the armed robbery, our Supreme Court for dozens and dozens
8 of years has upheld convictions of "the hand of one is the
9 hand of all" for cases wherein the original plan was armed
10 robbery and somebody was killed in the course of it. And
11 when weapons are involved, that it is a natural and
12 probable consequence of that act that somebody may be
13 killed. So I believe that there -- within the standard the
14 Court should employ there is evidence and ample evidence to
15 support every element of the charges.

16 MR. BOLUS: Your Honor?

17 THE COURT: Uh-huh?

18 MR. BOLUS: I -- I differ from my learned colleague.
19 I -- I -- I still consider that circumstantial. There is
20 no direct evidence: No goods being found; no one saw
21 anything; no one's testified that anybody took anything.
22 There's just no evidence here and it should be either a
23 substantial amount of circumstantial evidence to -- in the
24 -- in the record, or any direct evidence. I don't consider
25 that really direct evidence.

1 Some -- basically it's a hearsay statement. Let's say
2 t comes in. If you believe Mr. Hollins, it comes in
3 because of being admission against interest. But it's so -
4 - it's so minimal. I don't know how this indictment can be
5 supported just based on that alone. There's no testimony
6 of anybody that says that Dexter owned anything or anything
7 was taken. No police officer, no witnesses, no anything.

8 THE COURT: Anything further?

9 MR. JONES: No, Your Honor.

10 MR. BARNWELL: Nothing I can think of.

11 THE COURT: I think that I can handle each of the
12 motions collectively because they are basically the same
13 motion, because each of the defendants is charged under
14 accomplice liability. And the rules are very clear and the
15 case law is very clear that when considering a motion for
16 directed verdict, the Court is required to view the
17 evidence and all reasonable inferences in light most
18 favorable to the State.

19 Court is concerned with the existence or nonexistence,
20 and not its weight, because the Court is not a fact-finder.
21 The Court has to, however, determine that the evidence
22 rises above merely a suspicion that an accused is guilty.
23 A suspicion is one that implies a belief or opinion as to
24 guilt based upon facts or circumstances which do not amount
25 to proof. However, the Court is not required to find that

1 the evidence infers guilt to the exclusion of any other
2 reasonable hypothesis.

3 As regards Mr. Grant and as regards indictments 2007-
4 315, 316, 317, and 318, which are all kidnaping; 319, which
5 is murder; 343, 347, which is burglary in the first degree:
6 The Court would find that there is direct and substantial
7 circumstantial evidence reasonably tending to prove guilt
8 of the accused, and therefore directed verdict is not
9 appropriate and is denied.

10 As regards Mr. Hartwell on indictments 2007-308, 309,
11 310, 311, which are indictments for kidnaping; 312, which
12 is an indictment for murder; and 342 and 345, which are
13 indictments for burglary in the first degree: The Court
14 would find likewise that the Court is concerned with the
15 existence or nonexistence of evidence and not its weight.
16 And therefore, viewing the evidence in light most favorable
17 to the State, there is substantial circumstantial evidence,
18 as well as direct evidence reasonably tending to prove the
19 guilt of the accused; and therefore, the directed verdict
20 motion is denied.

21 Many of the issues raised by Defense counsel deal with
22 the weight afforded the evidence and -- though they are,
23 however, matters appropriately argued to the jury.

24 As it regards Marquita Smith, an indictment for --
25 2007-1748, accessory before the fact of felony murder, the

1 Court would find that likewise there is direct as well as
2 substantial circumstantial evidence reasonably tending to
3 prove her guilt, and the motion is denied.

4 I need to think about the armed robbery a little bit
5 more. I'm concerned about it. I need to -- I need to roll
6 that over in my mind a little bit and look back over my
7 notes. And I'll reserve ruling on that.

8 MR. BOLUS: Your Honor?

9 THE COURT: Yes?

10 MR. BOLUS: There is also a matter of some importance
11 I've just discovered in this almost illegible copy of a
12 letter that was found by the prosecutor.

13 THE COURT: Yes, sir.

14 MR. BOLUS: I don't know if you want to it --

15 THE COURT: And just so the record is very clear,
16 there was a statement -- a two-page handwritten statement
17 as I believe Mr. Jennings represented to the Court. It was
18 basically a copy, correct, Mr. Jennings?

19 MR. JENNINGS: That's correct.

20 THE COURT: And it was left at your -- at your
21 receptionist's desk or something?

22 MR. JENNINGS: That's correct.

23 THE COURT: Before the lunch and recess?

24 MR. JENNINGS: Yes.

25 THE COURT: And after lunch you shared that copy with

1 Defense counsel in the outside chance that it might prove
2 to have some exculpatory information; is that correct?

3 MR. JENNINGS: Correct.

4 THE COURT: Okay.

5 MR. BOLUS: But we discovered -- I think that it might
6 -- I can't hardly read some of it, but ---

7 THE COURT: Okay.

8 MR. BOLUS: --- you want me to present what I think
9 this is?

10 THE COURT: Sure.

11 MR. BOLUS: It appears -- according to some people
12 that I've talked to -- that this is a letter written by
13 Kerry -- is it Kerry Hollins? Kerry Hollins to --

14 (Sotto voce discussion with Mr. Barnwell.)

15 -- to Manny Hartwell and it's about making up a story --
16 sticking to his story. And the problem is you can hardly
17 read it, but it does say things about, "We going to sign
18 statements on Gary, saying he had a .45 and .357." It goes
19 on and curses a lot and all that. But it's -- it's a
20 letter written from one defendant, who is ---

21 THE COURT: Well, it purports because we don't have a
22 handwriting expert. We don't know who wrote it; it's
23 unsigned. And it well could have been contrived and
24 written by someone and left in ---

25 MR. BOLUS: That's true, but ---

1 THE COURT: --- the solicitor's office. I don't know
2 who it's from.

3 MR. BOLUS: But the point I'm making is ---

4 THE COURT: Uh-huh?

5 MR. BOLUS: --- this is something that was just handed
6 to me ---

7 THE COURT: Uh-huh.

8 MR. BOLUS: --- an hour ago. I still can't read much
9 of it, but I read enough to know that if -- if there is
10 something to it, that certainly impugns Mr. Hollins's
11 credibility as a witness ---

12 THE COURT: Uh-huh.

13 MR. BOLUS: --- if he wrote this. He may deny writing
14 it, but it seemed to me with the prosecution ---

15 THE COURT: Are you asking to recall him? You haven't
16 presented your case, have you?

17 MR. BOLUS: I haven't presented a case.

18 THE COURT: So there's nothing to preclude you from
19 recalling Mr. Hollins if you want to inquire into those
20 matters, correct?

21 MR. BOLUS: I guess not. I thought -- I was kind of
22 counting on the prosecutor to find out if he even wrote the
23 thing. If he didn't write it, then I'd like to know. I
24 mean ---

25 THE COURT: We can do that. Is he still here? Or has

1 he been -- he's next door?

2 THE BAILIFF: Correct.

3 THE COURT: Can we bring him over?

4 My concern is that it is a copy that was delivered to
5 the solicitor's office. My other concern is that it's not
6 signed. And ---

7 MR. BOLUS: Somebody writing a letter like this
8 probably wouldn't say "your friend, so-and-so."

9 THE COURT: Well, it's been my experience that they
10 do, Mr. Bolus.

11 MR. BOLUS: Okay.

12 THE COURT: Yeah. Pretty much.

13 MR. BOLUS: Okay.

14 THE COURT: It's been my experience that they do sign
15 them and that they do use -- albeit sometimes slang that
16 only they understand --

17 (To Mr. Barnwell) He needs to go to the restroom?

18 THE BAILIFF: We can help you.

19 THE COURT: Yeah. They'll help you.

20 My concern would be with the issue of authenticating
21 the document. I have no problem, however, giving you all
22 access to him in determining whether he -- he may tell you
23 who did write it, you know? I don't know.

24 MR. BOLUS: I'm thinking maybe Marquita Smith might
25 recognize his handwriting.

1 THE COURT: I don't know that Mr. Jones is going to
2 allow you to talk to his client ---

3 MR. BOLUS: That's what I'm saying.

4 THE COURT: --- for that purpose.

5 MR. BOLUS: The only reason I'm bringing it up is
6 because if something's handed to you and you can't make
7 heads or tails out of it and all of a sudden you start ---

8 THE COURT: I agree. And if you want more time, yes,
9 indeed, I certainly will give you that. I have read as
10 much of the statement as is legible because of the
11 faintness of the copy, and it would seem to me that if that
12 were Mr. Hollins' intent, he certainly did not follow
13 through on it when he testified.

14 MR. BOLUS: He didn't, did he?

15 THE COURT: If that were the intent expressed in the
16 letter, he certainly did not act in conformance with that
17 when he testified.

18 MR. BOLUS: That's right.

19 THE COURT: Because I believe the letter indicates
20 that they're going to stick together and blame and absolve
21 one another, but that's not what he did.

22 MR. BOLUS: I have an inquiring mind --

23 THE COURT: You need to.

24 MR. BOLUS: Not only ---

25 THE COURT: You need to -- you need to advocate for

1 your client, and I -- and I don't have a problem with you
2 having additional time to look into it if you would like
3 to. And I'm not going to, you know, restrict you in any
4 way in doing that. If you want to have access to him to
5 talk to him, you'd have to ask Ms. Kennedy, actually,
6 because that's his lawyer.

7 Ms. Kennedy, how are you?

8 MS. KENNEDY: (No audible response.)

9 THE COURT: What has happened -- I don't know if
10 you're aware of it, but ---

11 MS. KENNEDY: I just became aware of it, Your Honor.
12 Thank you.

13 THE COURT: A -- a letter was dropped off by the
14 solicitor's office at lunch -- at lunch break, which
15 purports to have been authored potentially by your client.
16 And Mr. Bolus wanted to make inquiry as to whether, in
17 fact, he wrote that or not. And what I have indicated to
18 all parties concerned is I'm concerned with the
19 authenticity of the document. You know, I'm jaded. I've
20 been doing this too long. When, you know, eleventh-hour
21 things that just fall out of the sky, it's just lack an
22 addition for my ability.

23 However, Ms. Kennedy, if you would like -- do you have
24 any problem discussing with Mr. Hollins whether that ---

25 MS. KENNEDY: No, Your Honor. I'd be happy to do

1 that.

2 THE COURT: Why don't you? And then I've instructed
3 them to bring him back over and then we'll see where we --
4 where the trail leads us.

5 MR. JONES: Judge, if we have a minute, could we have
6 a bathroom break?

7 THE COURT: We are as soon as I'm done taking care of
8 some housekeeping matters, yes. I plan to give everyone a
9 break.

10 'Why don't we go ahead and take a quick restroom break
11 so that I can have colloquy with the defendants regarding
12 their right to testify, and then let's see where we are
13 after that. Let's take about -- let's do it as quickly as
14 possible, because time is ticking.

15 THE COURT: You may be seated. Is Ms. Kennedy
16 present? Okay.

17 Ms. Kennedy, and of course without breaching any
18 attorney/client privilege, have you -- have you had an
19 opportunity to speak with your client?

20 MS. KENNEDY: Yes, Your Honor, I have.

21 THE COURT: And again, I guess I'm -- I'm trying to
22 handle this as delicately as possible. Did he indicate to
23 you whether he had written a statement or not?

24 MS. KENNEDY: Your Honor, he indicated to me that that
25 was not his statement.

1 THE COURT: And it was not his handwriting?

2 MS. KENNEDY: No, Your Honor.

3 THE COURT: Does that satisfy your curiosity, Mr.
4 Bolus?

5 MR. BOLUS: I would like to -- yes, ma'am, but I'd
6 like to put this in as a Court's Exhibit.

7 THE COURT: Certainly.

8 MR. BOLUS: For future PCR purposes and -- and it
9 reflect that I think you got this statement around three
10 o'clock today, or 2:30? Just for the record.

11 THE COURT: Actually, it was about ten of two.

12 MR. BOLUS: Ten of two?

13 THE COURT: We were scheduled to resume at 1:45 and I
14 was waiting on a juror and I took the bench at 1:50, I
15 believe, which would have been ten of two. And then about
16 five of two is when Mr. Jennings came in with the
17 statement.

18 MR. BOLUS: And the reason I say that is because my
19 client says certain things about this statement would be --
20 if it was written by Mr. Hollins, it'd impugn his
21 credibility.

22 THE COURT: Well, I don't ---

23 MR. BOLUS: But I'm not going to put him there and he
24 can say he didn't do it and that's the end of that anyway.
25 But I'd like to make this part of the Court's Exhibit for

1 whoever gets this case after this.

2 THE COURT: Okay. And I -- I think certainly -- I
3 would imagine no one has any exception to the statement
4 being marked as a Court's exhibit, correct?

5 MR. JENNINGS: No, Your Honor. Just so it's on the
6 record. I don't know what's been on the record and off the
7 record. When we broke for lunch, I went down to my office
8 and it was after one, probably ten after one, and my
9 receptionist, Ms. Gentry, told me she needed to talk to me.
10 And she had that piece of paper, said that a woman had come
11 into our lobby and just basically dropped that at the front
12 desk and refused to provide her name or any information,
13 and then left. And turned that over to me.

14 Based on what we read, there was obviously -- it was
15 unsigned and there was no way to attribute that to anybody.
16 But based on the content and the potential exculpatory
17 value, we provided a copy to each defense counsel and Your
18 Honor.

19 THE COURT: And I've given my copy to the court
20 reporter to be marked as Court's Exhibit.

21 (Marked Court's Exhibit No. 4, unsigned hand-written
22 statement.)

23 MS. KENNEDY: And -- and Your Honor, just for purposes
24 of the record, I would just like to advise the Court I have
25 been representing Mr. Hollins for well over a year. As a

1 result of that representation, I received numerous letters
2 from him. The grammar and the syntax in that letter is
3 totally inconsistent with any written communication that I
4 have ever received from him.

5 THE COURT: Okay. And I would imagine inconsistent
6 with his actual handwriting.

7 MS. KENNEDY: Yes, Your Honor.

8 THE COURT: Okay. I need the record, however, to
9 reflect that there is nothing that precludes you from
10 calling him if you would like to inquire into the substance
11 of any of the statements and any efforts to deal with the
12 issues of his credibility. But I think you can still ask
13 him about the substance of the statement without making
14 reference to it.

15 MR. BOLUS: I think I can pass on that. I think I'd
16 probably get the same kind of answers on ---

17 THE COURT: Which is a denial.

18 MR. BOLUS: Yes, ma'am. Thank you.

19 THE COURT: And you -- I would imagine that that is a
20 matter of strategy that you fully discussed with your
21 client, that that is the conclusion that the two of you
22 have reached.

23 MR. BOLUS: Yes.

24 THE COURT: Regarding any value the statement might
25 give you; is that correct?

1 MR. BOLUS: My personal feeling -- yes, ma'am. My
2 personal is I did enough cross-examination of the guns and
3 all that that, you know, the jury decides he's making up
4 something and they got enough there to do it, they're going
5 to do it.

6 THE COURT: Okay. But again, that is a matter of
7 strategy you fully disclosed to your client, and discussed
8 with him the statement and the strategy in not recalling
9 the witness, correct?

10 MR. BOLUS: (To Mr. Grant) Do you agree? He said
11 "yes."

12 THE COURT: Okay.

13 MR. JENNINGS: Your Honor, as to the armed robbery,
14 we've talked and reviewing the Statute 17-19-100 dealing
15 with the amended indictments, states that (as read) "If the
16 trial indicates there shall appear to be any variance
17 between the allegations of the indictment and the evidence
18 offered in prove thereof, the Court before which the trial
19 shall be had may amend the indictment according to the
20 proof, if such amendment does not change the nature of the
21 offense charged."

22 We've spoken and I think we're all in agreement if
23 Your Honor had a -- or if the jury has a question as to the
24 level of proof as to whether any items were taken, it would
25 still rise to the level of an attempted armed robbery,

1 which would then be proper under this statute.

2 THE COURT: Are you all then -- you all want to amend
3 the indictments to attempted armed robbery?

4 MR. JENNINGS: We just agreed to charge arm robbery
5 and attempted armed robbery, and then it would be a jury
6 decision as to the level of proof of -- of whether the
7 items were taken.

8 THE COURT: The problem is attempted armed robbery is
9 not -- well -- Mr. Bolus?

10 MR. BOLUS: My feeling was if Your Honor dismissed the
11 indictment of armed robbery -- and I kind of agree with the
12 prosecutor -- that just like us, we get a charge on a
13 lesser, then you could amend to an attempted. So I'm
14 satisfied that if the jury is charged with the armed
15 robbery and attempted armed robbery, that satisfies the
16 goal of my mission. I'm not sure it satisfies everybody
17 else.

18 THE COURT: Mr. Barnwell?

19 MR. BARNWELL: I -- I think that would satisfy me.

20 THE COURT: Mr. Jones?

21 MR. JONES: (No audible answer.)

22 THE COURT: I guess what I'm asking is are you all
23 asking for a motion to conform to proof to reflect the
24 charge of attempted armed robbery?
25

1 MR. JENNINGS: No, Your Honor

2 THE COURT: Or are you simply asking that the Court
3 charge both?

4 MR. JENNINGS: I -- I guess what I ---

5 THE COURT: Because if I grant the directed verdict,
6 that's going to be the end of all -- all of it.

7 MR. JENNINGS: Exactly. But I think ---

8 THE COURT: So what I think -- and I -- I guess my
9 comments earlier were to get you all to engage in some
10 conversation about it.

11 MR. BOLUS: Well, now ---

12 THE COURT: To some extent.

13 MR. BOLUS: I need to understand this. You're --
14 you're ---

15 THE COURT: You've made a motion for a directed
16 verdict on the armed robbery. If I grant it, that's the
17 end of it.

18 MR. BOLUS: And you're just -- is the Court saying you
19 would not grant -- you would not do the attempted --
20 amended indictment or anything to attempted armed robbery?
21 Because I -- I -- obviously, I thought the Court could do
22 that, but you're saying you're ---

23 THE COURT: No. I think I have the discretion to do
24 it. I just said what I've said, however, is that you made
25 a motion to dismiss at the directed verdict stage, where

1 you've made a motion for directed verdict on armed robbery.
2 And your argument is that the State has failed to provide
3 the Court -- or the jury with substantial circumstantial
4 evidence or direct evidence that in fact an armed robbery
5 took place. And what I'm saying is that in my estimation,
6 if I grant the motion, that there -- the charge of armed
7 robbery is dismissed.

8 MR. BOLUS: Well, I'm going to stick with the original
9 then, and I hate to backtrack, but -- but now the more I --
10 I'll take my chances with Your Honor's ruling then.

11 MR. BARNWELL: I think I agree with Mr. Bolus.

12 THE COURT: But if I deny the motion, then what you
13 all are saying is that you agree -- as I understand it,
14 that you agree that the Court then charge the lesser
15 included offense of attempted armed robbery.

16 MR. BOLUS: With -- I think the prosecutor would
17 disagree, but I think Your Honor -- the Court would have to
18 ---

19 THE COURT: That's what I understand him to say.

20 MR. BOLUS: --- because if the jury doesn't believe
21 any items were taken there, and there's evidence that none
22 -- none was taken, there's some little tiny iota that maybe
23 there was, I think we would have a right then to get an
24 attempted armed robbery charge. But that wasn't our
25 agreement; I thought we'd do it right now. But if you're

1 going to consider ---

2 THE COURT: Well, you all are confusing me because I
3 need to know if you've reached an agreement.

4 MR. JONES: Your Honor, for our purpose, we -- you
5 know, we're in a little bit different situation sort of.
6 But, I mean, we'd like you to make a ruling on the ---

7 THE COURT: Well, as an accessory, your client
8 basically is charged as a principal.

9 MR. BOLUS: Sure. Sure.

10 THE COURT: The only difference is that her behavior
11 is alleged to have happened in concert prior to the actual
12 event taking place and her not being present for the actual
13 event. It doesn't make her any less culpable and the
14 penalty is the same.

15 MR. JONES: And I certainly -- I certainly -- I just
16 don't know that, and I don't know if there's any benefit to
17 agreeing to -- and I think we just see what it is. I
18 think, you know, we've got a decent argument. And I feel
19 like seeing it through and if it doesn't, then we'll, you
20 know, have to ---

21 MR. JENNINGS: Let me -- could I make one statement,
22 Your Honor?

23 THE COURT: Sure.

24 MR. JENNINGS: Under *State vs. Hiott*, which is 276 ---

25 THE COURT: I'm sorry. I didn't hear you.

1 MR. JENNINGS: *State vs. Hiott*, H-i-o-t-t, 276
2 Southeastern 2nd, 163; 1981 decision. (As read) "Attempted
3 armed robbery is a lesser included offense of armed
4 robbery."

5 THE COURT: It is.

6 MR. JENNINGS: And an indictment for the lateral
7 supported conviction was performed.

8 THE COURT: That's correct.

9 MR. JENNINGS: But the evidence in this case, I
10 believe is overwhelming that the plan was to commit ---

11 THE COURT: I think that there is more than
12 substantial circumstantial evidence or direct evidence that
13 the -- that the act for which they acted in concert was to
14 rob Mr. Perry.

15 MR. JENNINGS: Yes.

16 THE COURT: Now, whether that ever actually took place
17 or not, I have to determined whether there's evidence in
18 the record to rise at the appropriate level, whether that
19 be submitted to the jury.

20 MR. JENNINGS: So all we would ask for ---

21 THE COURT: Frankly, I think the best case scenario
22 would be for all of you to agree to amend the indictment to
23 an attempted armed robbery, is what I think you should do.
24 Because I think that that's really what the evidence
25 supports.

1 MS. WILSON: Well, Your Honor, the evidence from the
2 co-defendant ---

3 THE COURT: I understand his statement. I have to
4 determine whether that rises above mere suspicion, however.

5 MS. WILSON: Right. But -- but in the defendants'
6 arguments, they have all conceded that there is evidence
7 that there was an armed robbery, that this jewelry was
8 taken. They're just arguing ---

9 THE COURT: Well, that's not what they -- that's not
10 what they conceded on. They concede that nothing was
11 taken. They said the only thing I have before me is the
12 word of a ---

13 MS. WILSON: They have --

14 THE COURT: --- co-defendant who says that ---

15 MS. WILSON: They have conceded that there's evidence,
16 not that it happened, but that there is evidence that it
17 happened, and they said that it's just a shred of evidence.
18 And what I'm saying is that gets into the weight of the
19 evidence.

20 THE COURT: I -- I agree. I still have it under
21 advisement. All I said was I was thinking about it.

22 MS. WILSON: Yes, ma'am.

23 THE COURT: Which I think is appropriate. The longer
24 I do this job, the more I realize I need to take more time
25 to think about some things. I'm going to think through

1 this and I'm going to think through the elements. I'm
2 going to go back through my notes and see exactly what --
3 what evidence there is in the record to support it.

4 As -- as my memory is not infallible, however, the
5 only evidence as I understand it that is in the record is
6 the testimony of Kerry Hollins, who says that Mr. Grant
7 told him that he took certain pieces of jewelry from Mr.
8 Perry. And what I am looking at right now is whether that
9 rises above mere suspicion. And there is a great argument
10 that that goes to the weight of the testimony according to
11 Mr. Hollins. And whether in fact Mr. Grant's statement was
12 an admission against interest and whether -- and of course
13 if I believe that to be the case and it to be a weight
14 issue, and if I determine that is substantial
15 circumstantial evidence, then they're all on the hook
16 because it's accomplice liability: Hand of one is the hand
17 of all. They were acting in concert, viewing the evidence
18 in the light most favorable to the State to rob Mr. Perry.

19 MR. BOLUS: It's complicated. So I have an inquiring
20 mind. I'd like to find out what's going to happen, so I'm
21 going to stick with my original motion.

22 THE COURT: Okay, Mr. Bolus. That's fine. And I'll
23 have an answer for you before we adjourn today.

24 Now, could all three defendants please stand for me
25 and raise your right hands to be sworn.

1 (All three defendants stand.)

2 Do you swear or affirm the testimony you give will be
3 the truth? Mr. Grant?

4 MR. GRANT: Yes, ma'am.

5 THE COURT: Mr. Hartwell?

6 MR. HARTWELL: Yes, ma'am.

7 THE COURT: And Ms. Smith?

8 MS. SMITH: Yes, ma'am.

9 THE COURT: You can all put your right hands down. I
10 need you to remain standing. At this time I'm going to
11 explain to you certain of your rights. If you do not
12 understand anything that I say, please let me know. If you
13 want me to explain anything in more detail, please let me
14 know. Do you understand? Mr. Grant?

15 MR. GRANT: Yes, ma'am.

16 THE COURT: Mr. Hartwell?

17 MR. HARTWELL: Yes, ma'am.

18 THE COURT: And Ms. Smith?

19 MS. SMITH: Yes, ma'am.

20 THE COURT: And I need you all to speak loudly and
21 clearly for me. The acoustics in this courtroom are
22 horrible, and I need to make sure that I can hear you, as
23 well as the court reporter being able to take down each of
24 your responses.

25 We have now reached the state of the trial where you

1 may present your defense. You have the right to claim the
2 protections given to you by the Fifth Amendment to the
3 Constitution of the United States. This amendment states
4 in part that no person shall be compelled in any criminal
5 case to be a witness against himself. This means that you
6 cannot be required to testify in this case. You have the
7 right to testify in your own behalf; however, no one can
8 make you testify. This is a personal right and no one can
9 waive this right except you.

10 If you decide to testify, you will be subject to the
11 same rule -- rules that govern other witnesses. And you
12 may be examined and cross-examined on any relevant issue in
13 this case. In addition, if you have any convictions
14 involving dishonesty, or a false statement, or for crimes
15 punishable by imprisonment for more than one year, and this
16 Court determines that the probative value of admitting this
17 evidence outweighs its prejudicial effect to you, the
18 solicitor will be able to introduce your record to attack
19 your credibility.

20 If you decide to testify, this decision on your part
21 must be freely, voluntarily, and intelligently made, with
22 knowledge of the protections given to you by the Fifth
23 Amendment and the consequences of your decision to testify.

24 If you decide not to testify, I will instruct the jury
25 that they cannot give the fact that you did not testify any

1 consideration whatsoever, and that there is to be
2 absolutely no prejudice to you because you did not testify.
3 In fact, I will instruct them that it is not to be
4 discussed in any way during the process of deliberations.
5 I will instruct them that you have no burden of proof in
6 this case, and that the burden remains on the State to
7 prove each and every element of the offense that you've
8 been accused of, and that you're entitled to a presumption
9 of innocence.

10 It is left entirely up to you whether or not you
11 testify. You may talk with your attorney, your family and
12 friends, or anyone else. But the final decision will be
13 left entirely up to you. Do you understand your rights as
14 I have just explained them to you? Mr. Grant?

15 MR. GRANT: Yes, ma'am.

16 THE COURT: Mr. Hartwell?

17 MR. HARTWELL: Yes, ma'am.

18 THE COURT: And Ms. Smith?

19 MS. SMITH: Yes, ma'am.

20 THE COURT: Do you have any questions about what I've
21 just explained to you? Mr. Grant?

22 MR. GRANT: No, ma'am.

23 THE COURT: Mr. Hartwell?

24 MR. HARTWELL: No, ma'am.

25 THE COURT: Ms. Smith?

1 MS. SMITH: No, ma'am.

2 THE COURT: Have you discussed with your lawyer
3 whether you should or should not testify? Mr. Grant?

4 MR. GRANT: Yes, ma'am.

5 THE COURT: Mr. Hartwell?

6 MR. HARTWELL: Yes, ma'am.

7 THE COURT: And Ms. Smith?

8 MS. SMITH: Yes, ma'am.

9 THE COURT: And just so that we're clear for the
10 record, we've already published that the State would not be
11 seeking any records for the purposes of impeaching your
12 credibility. Do you understand that? Mr. Grant?

13 MR. GRANT: Yes, ma'am.

14 THE COURT: Mr. Hartwell?

15 MR. HARTWELL: Yes, ma'am.

16 THE COURT: And Mr. -- Ms. Smith. I'm sorry.

17 MS. SMITH: Yes, ma'am.

18 THE COURT: Do you wish to talk with your lawyers
19 anymore at this time? Mr. Grant?

20 MR. GRANT: No, ma'am.

21 THE COURT: Mr. Hartwell?

22 MR. HARTWELL: No, ma'am.

23 THE COURT: Ms. Smith?

24 MS. SMITH: (Shakes head from side to side.)

25 THE COURT: I need you to tell me "yes" or "no."

1 MS. SMITH: No, ma'am.

2 THE COURT: Mr. Grant, do you wish to testify?

3 MR. GRANT: No, ma'am.

4 THE COURT: Mr. Hartwell, do you wish to testify?

5 MR. HARTWELL: No, ma'am.

6 THE COURT: And Ms. Smith, do you wish to testify?

7 MS. SMITH: No, ma'am.

8 THE COURT: You may be seated.

9 Mr. Bolus, will Mr. Grant be presenting any case as we
10 move forward?

11 MR. BOLUS: Any --

12 THE COURT: Any witnesses?

13 MR. BOLUS: No.

14 THE COURT: Okay. Mr. Barnwell?

15 MR. BARNWELL: No, Your Honor.

16 THE COURT: And Mr. Jones?

17 MR. JONES: None, Your Honor.

18 THE COURT: What I -- what I would suggest we do then
19 is to bring back in the jury, allow the Defense to rest in
20 their presence. I'll then excuse the jury and then we'll
21 have a charge conference, and we'll plan to have closing
22 and charge in the morning. Is that acceptable to everyone?

23 MR. JENNINGS: Yes, Your Honor

24 MR. BOLUS: Very much so.

25 THE COURT: Okay. You all give me one --

1 Please bring in the jury.

2 (The jury enters at 4:24 p.m.)

3 THE COURT: You may be seated.

4 THE COURT: Mr. Foreman, ladies and gentlemen, we
5 appreciate your patience as we disposed of those matters of
6 law. We will now resume with the trial.

7 Mr. Bolus, you may proceed.

8 MR. BOLUS: Defense rests.

9 THE COURT: Mr. Barnwell, you may proceed.

10 MR. BARNWELL: Defense rests.

11 THE COURT: And Mr. Jones, you may proceed.

12 MR. JONES: Your Honor, the Defense rests.

13 THE COURT: Mr. Foreman, ladies and gentlemen, you
14 have heard the entirety of the evidence in this case. The
15 next stage of the process will require the lawyers' closing
16 arguments and the Court's instruction on the law. It is
17 now 4:25, and I think it is -- we -- the day is well used.
18 It would not be prudent for us to begin that process this
19 evening because there are still some matters of law I need
20 to go over with the attorneys.

21 So what we will do -- and I have determined that we
22 will recess for the evening, and will resume in the morning
23 at 9:30 with closing arguments and the Court's instruction
24 on the law.

25 During this break, it is even more important that you

1 all abide by the Court's instructions and have no
2 discussion about this case among yourselves or with anyone
3 else. I know sometimes it is very difficult and may seem
4 very innocent to talk with someone about what you've heard
5 or the type case that you're hearing.

6 The reason that we ask you not to do this is because
7 when you begin to discuss with someone what you've been
8 hearing, it requires you to process what you've heard and
9 to draw conclusions based upon that analytical process.
10 And that by its very nature is deliberations, and you're
11 only allowed to do that among your fellow jurors once you
12 have heard all of the arguments and the Court's instruction
13 on the law and once you've been released to begin that
14 process. So I would ask that you strictly abide by those
15 instructions.

16 Also, please do not watch, read, or listen to any news
17 accounts about this case, or do any independent research of
18 any type regarding any matter about this case on the
19 internet or otherwise. When you return to the courthouse
20 in the morning, please come directly to your jury room.
21 And again, please don't have any contact with anyone in or
22 about the courthouse.

23 We hope that you have a restful evening, and we'll see
24 you in the morning at 9:30. Please leave your notepads in
25 your seats and we'll secure them during the recess.

1 (The jury exits at 4:27 p.m.)

2 THE COURT: You may take your seats. You all give me
3 a few moments. I need to print some portions of my charge,
4 and I will be right back.

5 MS. WILSON: Your Honor --

6 THE COURT: Uh-huh.

7 MS. WILSON: -- before you walk out, I'm going to hand
8 up -- I just have one copy -- *The State vs.* ---

9 THE COURT: You can just give us the citation.

10 MS. WILSON: *The State vs. David Bernard Elmore*, and
11 it is a January, 2006 case. It says Opinion No. 4082.
12 Judge Westbrook as the judge. Regarding directed verdict
13 motions. And again, it says (as read): "The trial accord
14 in a directed verdict motion is concerned with the
15 existence or nonexistence of evidence and not with its
16 weight if the standard remains constant, even when the
17 State provides exclusively on circumstantial evidence."

18 Now, we aren't conceding that the testimony of Mr.
19 Hollins is circumstantial, especially when it involves a
20 confession by a co-defendant. The case goes on to say (as
21 read): "If there is any direct evidence or substantial
22 circumstantial evidence reasonably tending to prove the
23 guilt of the accused, the case should be submitted to the
24 jury."

25 THE COURT: The Court is well familiar with the

1 standard.

2 MR. JENNINGS: And I think that -- and all -- and all
3 I will say, I think the proper -- whatever Your Honor's --
4 if Your Honor does not feel that there is sufficient proof
5 of the actual asportation of goods, I think that the
6 evidence is more than proof of the attempted armed robbery.
7 And I believe the proper inquiry is whether it goes forward
8 as armed robbery or attempted armed robbery, pursuant to
9 17-19-100.

10 If Your Honor does not feel there is sufficient proof
11 of the asportation, then the indictment will be amended to
12 attempted armed robbery as to Grant and Hartwell, and
13 accessory before the fact of attempted armed robbery as to
14 Ms. Smith. I think that's what everybody agrees to.

15 THE COURT: Thank you very much. We'll be at ease for
16 a few moments.

17 I will give the jury a general charge regarding their
18 function and my function. How they're to judge witness
19 credibility and believability. That they're to follow the
20 law as instructed by the Court and that they are bound by
21 the instructions of the Court.

22 I will also give them a charge about an expert witness
23 testimony. Then instruct them that the -- the record of a
24 witness can only be considered if they determine it's true
25 for the purposes of credibility. Then give them a general

1 charge regarding circumstantial and direct evidence. Then
2 instruct them that the charge, the arrest, and the
3 indictment are not evidence.

4 Then charge on the presumption of innocence.

5 Then charge *Victor vs. Nebraska* on reasonable doubt.

6 Then charge the elements of identification testimony
7 and how they are to judge that testimony. Also that the
8 State must prove identification beyond a reasonable doubt.

9 I think after reasonable doubt, before I charge
10 identification, I will charge regarding the fact that the
11 defendants did not testify, the fact that that cannot be
12 used against them.

13 I will then charge identification testimony and how
14 that is to be -- how that testimony is to be judged. And I
15 might change identification testimony around, and I may
16 charge it after the general charge regarding how they are
17 to judge witness credibility and believability, and along
18 in that same vicinity of the charge.

19 I'll then charge the elements of the offenses as they
20 were indicted. But actually they're kind of -- each of
21 them are somewhat charged differently. What I probably
22 will do is -- is charge -- at this moment as I look at
23 them, charge the elements of kidnaping; then the elements
24 of murder, the elements of burglary first, and the elements
25 of armed robbery.

1 I'll then charge accomplice liability, which is
2 commonly referred to as "the hand of one is the hand of
3 all." Within that charge is encompassed the language of
4 regarding mere presence.

5 I'll then charge -- give the jury instructions
6 regarding the multiple offenses that have been charged.
7 The fact that they must consider each offense
8 independently, regarding each element and the elements that
9 the Court has provided regarding how the State is to meet
10 their burden of proof, and to decide each of those
11 individually, independent of one another.

12 I'll also give them a general charge regarding the
13 fact that there are multiple defendants.

14 And actually I left something out, and I apologize
15 because I was -- I greatly appreciate your patience. I was
16 trying to find a computer. We just got new computers; our
17 software has been greatly enhanced, and there is no
18 computer in the building that can print from my thing,
19 except I have to disconnect this computer and take it back
20 there and hook it up to a printer, and it was just going to
21 take way too much time. So I apologize. I skipped some
22 portions of my charge because I was not able to print them,
23 and I will go back and tell you those that I omitted.

24 But I will be charging multiple charges, as well as
25 multiple defendants, and then of course give them the form

1 -- possible forms of the verdict. And there will be an
2 individual verdict form for each indictment for each
3 defendant. The charges that I left out, of course, will be
4 charging accessory before the fact for felony -- for both
5 murder and armed robbery.

6 I am debating at this time whether I may give the
7 charge entitled "dying declaration," which would instruct
8 (as read): "Ladies and gentlemen, the Court has admitted
9 evidence of statements allegedly made by the deceased
10 victim after the injuries. I've determined that these
11 statements should be admitted into evidence in this case.
12 However, it is for you to determine the believability of
13 these statements. In deciding this question, you may
14 consider whether the victim was dying and knew he was dying
15 and whether the victim had lost all hope of recovery at the
16 time the statements were made. And then, of course, as the
17 fact-finder, it is for you to determine the effect, value
18 and weight to be given to such testimony."

19 I'm debating. I've never given that instruction
20 before, but it is a part of our standard instructions, and
21 I may give it in conjunction with the other boiler plate
22 charge where I give -- regarding how they're to judge
23 witness credibility and believability. The same as I would
24 charge regarding the prior record of a witness, as well as
25 expert witness testimony.

1 I think that's all that I left out. If I left out
2 anything else, I apologize. I'll know that once I'm able
3 to actually print the rest of my charge from this memory
4 stick.

5 Are there any requests for any lesser included
6 offenses? From the State?

7 MR. JENNINGS: I think the only one -- we would just
8 ask you also charge attempted armed robbery in conjunction
9 with the armed robbery.

10 THE COURT: Is there any exception? And I'm going to
11 rule on the motion for directed verdict. Is there any
12 exception from the Defense regarding the State's request
13 that a lesser included offense of attempted armed robbery
14 be instructed? Mr. Bolus?

15 MR. BOLUS: There's no objection from me.

16 MR. JONES: I don't have any objection.

17 THE COURT: Mr. Barnwell?

18 MR. BARNWELL: No objection.

19 THE COURT: Okay. Then I will include that. Are
20 there any other requests for any lesser included offenses
21 to the offense of murder? From the State?

22 MR. JENNINGS: None for the State. I do have a
23 argument if the Defense requests though.

24 THE COURT: Okay. From the Defense? Mr. Bolus?

25 MR. BOLUS: If I was to request what?

1 THE COURT: If you wanted me to -- if any of you
2 wanted me to charge any lesser included offenses on the
3 offense of murder is what I'm asking. The State says they
4 have no request. They are prepared, however, to respond if
5 you have a request.

6 MR. BOLUS: I think I don't have a request.

7 THE COURT: Okay. Mr. Barnwell?

8 MR. BARNWELL: I don't think I have a request, Your
9 Honor.

10 THE COURT: Mr. Davis? I mean Mr. Jones?

11 MR. JONES: (To the State) Two for a lesser -- for
12 voluntary?

13 THE COURT: They have not requested any lesser
14 included offenses.

15 MR. BOLUS: (To Mr. Jones) He's anticipating you
16 asking for something.

17 MR. JONES: Your Honor, I -- I don't -- may I talk to
18 my client just a minute?

19 THE COURT: Sure. Go right ahead.

20 MR. JONES: I wasn't sure I -- I got the -- I -- I got
21 the request for charges and I was ---

22 THE COURT: They gave me that, I think, in
23 anticipation of you asking for it.

24 MR. JONES: I gotcha.

25 THE COURT: And I need to know if you all are

1 requesting any lesser included offense.

2 (Sotto voce between Mr. Jones and Defendant Smith.)

3 MR. JONES: Your Honor, we're not going to request
4 instruction ---

5 THE COURT: I'm sorry.

6 MR. JONES: We're not going to request instruction on
7 voluntary.

8 THE COURT: Any request for any other lesser included
9 offenses? That would be burglary in the first degree. Of
10 course, there are no lesser included as to kidnaping. And
11 the lesser included for armed robbery. I think we've all
12 agreed that you all would like me to add the -- the
13 attempted -- and the lesser included of attempted armed
14 robbery. So that's been covered.

15 Are there any requests on burglary in the first
16 degree? From the State?

17 MR. JENNINGS: No, Your Honor.

18 THE COURT: From the --

19 MR. BOLUS: No, Your Honor.

20 MR. BARNWELL: No, Your Honor.

21 MR. JONES: No, Your Honor.

22 THE COURT: Are there any exceptions to the charges
23 proposed? From the State?

24 MR. JENNINGS: No, Your Honor.

25 THE COURT: From the Defense? Mr. Bolus?

1 MR. BOLUS: No. There are no exceptions.

2 THE COURT: Mr. Barnwell?

3 MR. BARNWELL: No, Your Honor.

4 THE COURT: Mr. Jones?

5 MR. JONES: Your Honor, I would ask for the additional
6 request of the strong arm. I think there is, again, more
7 than enough -- the only evidence is really her statement
8 which never talks about any weapons, and Mr. Collins' [sic]
9 statement, which he did back up under cross that a "lick"
10 may not be -- he didn't talk about any weapons or anything.
11 A "lick" may or may not mean an armed robbery. A "lick"
12 could also be a noun, which is a person.

13 THE COURT: Is there any evidence in the record that
14 the -- the incident took place without weapons?

15 MR. JONES: There's no evidence, but it also, with the
16 accessory, the -- the intent plan, again, of -- I -- I
17 think you're instructing and I think you might have termed
18 it, but -- the accomplice -- was the action a natural
19 probable consequence of an agreed plan? There's no
20 evidence that -- and the State never attempted to produce
21 any evidence other than Mr. Collins [sic] -- which
22 obviously has issues on there -- that a-- that she knew
23 anything beyond a strong arm robbery, and that -- and you
24 know, anything beyond -- if her -- if her intent was that
25 this was going to be a "snatch and grab," or something of

1 that sort, I think there's -- there's a -- that's at least
2 a jury question as to whether or not they intended to
3 commit a strong armed robbery. I mean, again, there's --
4 Kerry Collins [sic]-- and Kerry never said she saw any
5 weapons, discussed weapons or anything of that sort. And
6 he backed up on cross that when Mr. Bolus asked him, "Is --
7 is a lick particularly an armed robbery," he said, "Could
8 be -- could be the other. Could be a noun."

9 I think she would be entitled to the -- to the charge
10 of strong armed robbery. No other evidence was -- was
11 submitted beyond that. Her statement never mentioned they
12 never asked.

13 THE COURT: Any exception from the State?

14 MR. JENNINGS: Your Honor, I think all -- all of Mr.
15 Hollins's testimony was that in his parlance and
16 understanding of the word "lick," it involved -- meant a
17 robbery involving weapons. Now, Mr. Bolus did ask him, in
18 fact, if he -- if "lick" could be used as a noun, as in
19 "they had a lick," but every time Mr. Hollins talked about
20 it, he said that a lick involved weapons.

21 And I think the most prudent example is that -- I
22 think, is the last question that Mr. Barnwell asked him on
23 his re-cross. And even at that point, Mr. Hollins
24 emphasized to him that -- that a lick involved weapons and
25 that Miss, you know, that was the common parlance on the

1 street.

2 MR. JONES: Your Honor, if I may. Again, if he -- he
3 said "robbery." He didn't go into armed robbery. He said
4 "robbery." And with regard he said, you know, for his mind
5 of this event, it -- for his mind. He never said what he
6 knew Marquita knew, or what he told her, or what he led her
7 to believe. And again, there was plenty of opportunities
8 for the -- for the State to delve into that with him.

9 THE COURT: The only thing the State has to prove
10 against your client, Mr. Jones, is that she was that -- the
11 only thing they have to prove beyond a reasonable doubt is
12 that she either advised, agreed, urged, counseled, hired,
13 or in some way aided or abetted another person to commit a
14 crime, that the defendant was not present when the offense
15 was committed. That's all they have to prove. So while
16 the underlying offense has to have taken place, all they
17 have to prove is that she aided, advised, urged, counseled,
18 or hired them to commit an armed robbery.

19 MR. JONES: Your Honor, and there was also testimony -
20 --

21 THE COURT: I think your argument goes more than one -
22 - the "hand of one is the hand of all" in terms of -- of
23 the spirit of liability, but all they have to prove is that
24 she made a phone call and said where they were. I mean
25 it's very -- it's a very different standard. They don't

1 have to prove she's guilty of armed robbery; they just have
2 to prove that she was -- that she was an accessory: that
3 she aided, advised, agreed, urged, counseled, or hired some
4 way, or in some way aided or abetted them in -- in
5 committing that offense.

6 MR. JONES: But Your Honor, isn't it -- I -- I would --
7 -- I would also argue, again getting into -- I think we'd be
8 able to argue as to -- I -- I think there would be an
9 argument as to, you know, if what -- if they'd be able -- I
10 can't remember if there was evidence of a retaliatory
11 nature. It was -- I cannot remember if that ever got into
12 the retaliatory nature of the drugs being -- of the ripoff
13 and all that. It would clearly be a whole different plan
14 from the armed robbery that's in evidence.

15 Well, when Chris Nelson testified, he didn't think it
16 was an armed robbery. He thought it was retaliatory in
17 nature. And that he thought that it was sort of
18 retaliatory -- retaliating against Dexter for a bad drug
19 sale. So at least the -- the argument is there by one of
20 the witnesses ---

21 THE COURT: I don't know that that was his testimony.

22 MR. JENNINGS: No.

23 THE COURT: He testified ---

24 (Noise made from unknown person in the gallery.)

25 THE COURT: If there is any disruption from the

1 gallery, I will clear this courtroom.

2 MR. JONES: Your Honor, when he -- I thought that I
3 had -- and I'm not sure who asked it, but I thought Chris',
4 you know, question was -- is he said, "I didn't even think
5 it was a robbery." He said, "Nobody wore masks. So I
6 thought it was a hit on Dexter."

7 THE COURT: That's not -- that's your parenthetical of
8 what he testified to. He testified about there being no
9 masks. He testified about the fact that they didn't have
10 any concern about their -- their identity because it was
11 not their intention to leave anyone.

12 MR. JONES: But I --

13 THE COURT: After they left.

14 MR. JONES: Well, I -- but I thought that he testified
15 it was not, you know, he didn't think it was a robbery, and
16 that he thought it was a hit. And I mean, I -- I --

17 THE COURT: Hold on.

18 MS. WILSON: I believe he said ---

19 THE COURT: Did he say that?

20 MS. WILSON: I believe he also testified ---

21 THE COURT: Did he use that language?

22 MR. WILSON: --- that he could overhear them asking
23 where the money was, and Dexter -- Dexter's response to
24 that when he was looking through that air-conditioner. I -
25 - I don't remember -- recall anything about a hit.

1 THE COURT: He never said that. And of course my
2 memory is not infallible.

3 MR. JONES: Mine -- mine, too, after all this, too.
4 But -- but I did note because ---

5 THE COURT: His testimony was on re-direct or cross.
6 I can't remember. One of the -- it wasn't on his direct
7 testimony. The -- the question was asked of him why he
8 shot into the residence, and that nobody had on any masks.
9 And that it was his impression that when folk don't wear
10 masks, they're not concerned about their identity because
11 they don't plan to leave anybody behind. Basically, that's
12 the gist of it, and I'm paraphrasing what he said also. So
13 we'd have to go back to the transcript to see exactly what
14 he said. But he never used the term "hit."

15 MR. JONES: Well, maybe -- maybe I -- I -- but it --
16 it was something where it was beyond, because I -- I
17 remember making a note that it was -- backed up the other
18 theory that it was a possible bad drug deal, that their
19 retaliation was going to be against Dexter.

20 MR. BOLUS: I think that was a statement that was used
21 against Mr. Hartwell. There was a statement saying that,
22 "Dexter sold me some bad product."

23 THE COURT: It came up with some other ---

24 MR. BOLUS: -- that that was where ---

25 THE COURT: --- witnesses, but it didn't come up with

1 the witness he's referring to.

2 MR. BOLUS: That was referenced ---

3 THE COURT: It was a passing reference to it.

4 MR. JONES: He could have -- I wrote down, Your Honor,
5 in my notes, "Just think they came to hurt him, not rob
6 him." And I actually highlighted ---

7 THE COURT: But he still testified that when he was
8 listening through the drapes, he heard them attempt to rob
9 -- committing a robbery.

10 MR. JONES: Well, he didn't -- and I -- and I -- but
11 again, his attitude --

12 THE COURT: A strong arm robbery is where you commit
13 the robbery with intimidation or force without a deadly
14 weapon. That's the only element that is not present.
15 There's no testimony in the record that this robbery even
16 in fact took place -- took place without weapons. There's
17 no factual support for it. I originally went into it
18 believing that there would be some factual support for it,
19 but the evidence as it has been presented to this jury --
20 the only version by direct or circumstantial evidence is
21 that if in fact the robbery took place as alleged, that Mr.
22 Perry was basically within the control of two people who
23 had guns on him for the purpose of taking money or other
24 things of value from him. Of course, it couldn't be drugs
25 because that's an illicit substance, and the law does not

1 recognize that as a thing of value, I don't think.

2 MR. JONES: I think actually they do because I've
3 researched it ---

4 THE COURT: Do they really?

5 MR. JONES: --- and I was thinking that was an
6 argument. I think it's actually in a case. Not that it
7 helps me any, but ---

8 THE COURT: No, it doesn't.

9 MR. JONES: Just for future.

10 THE COURT: It might well be. It's a thing of value
11 on the street, of substantial value.

12 MR. BOLUS: Could I suggest something to you?

13 THE COURT: Sure. Go right ahead.

14 (Sotto voce discussion between Mr. Bolus and Mr. Jones.)

15 MR. JONES: Your Honor, the other thing with -- with
16 accessory before an attempted robbery -- also as if you --
17 armed robbery.

18 THE COURT: That goes on the verdict form. There will
19 be no ---

20 MR. JONES: Separate charge?

21 THE COURT: I would simply -- there is no separate
22 charge for the accessory, except the aiding and abetting
23 language. It's a very short charge, and it just -- the
24 jury then considers the elements of the offense that I
25 charge, and they will determine whether in fact she

1 advised, agreed, urged, counseled, hired, or in some way
2 aided or abetted someone to commit the crimes. So it will
3 be included on the verdict form, but there is no particular
4 -- or be included in the verbiage, but there is no separate
5 charge for that.

6 MR. JONES: Your Honor, who -- I don't know if you --
7 if the only other thing I'm thinking without -- outside --
8 I don't know -- I understand you made your ruling on the
9 strong arm, but I -- I believe the liability of accomplice
10 act, one is not liable for accomplice unless natural,
11 probable consequences ---

12 THE COURT: That's something you will argue to the
13 jury.

14 MR. JONES: Okay. I didn't -- well, I didn't know
15 whether you would have to charge it. I know there's a
16 liability for accomplice acts charge actually, also. And -
17 -

18 THE COURT: Say that one more time.

19 MR. JONES: I know there actually is a charge to that
20 point also.

21 THE COURT: I'm going to give the prevailing case law:
22 "Hand of one is the hand of all." It will encompass
23 everything that the Supreme Court has said about accomplice
24 liability.

25 MR. JONES: Thank you, Your Honor. I know they had

1 brought it up and ---

2 MS. WILSON: Well, I was just -- I was going to -- I
3 don't know if you've got a copy of our request to charge,
4 but ---

5 THE COURT: I'm going to deal with those in a second.

6 MS. WILSON: Okay.

7 THE COURT: I got 1 and 2. Which one was felony
8 murder instruction?

9 MS. WILSON: That's right. The first one we withdraw.
10 That was in response.

11 THE COURT: Yeah, that's voluntary manslaughter.
12 That'll be marked as a Court's exhibit.

13 MS. WILSON: Okay. And I was going to add something
14 to State's request to charge No. 2, based on accomplice
15 liability to make it more complete.

16 THE COURT: You said you were going to what now?

17 MS. WILSON: I wanted to add something to the State's
18 No. 2 to make it more complete, which ties into what Mr.
19 Jones was just saying.

20 THE COURT: Uh-huh.

21 MS. WILSON: I think it's a little bit different than
22 "hand of one" -- than the "hand of one" issue because it
23 has to do more with the actual offenses versus the number
24 of parties involved.

25 As to the felony murder, we would ask for that

1 instruction because based on the crimes that we allege were
2 committed -- the burglary first, the kidnaping, and the
3 armed robbery -- those charges being felonies, and we
4 believe it's proper under the law that those are natural
5 and probable consequences. Or murder would be a natural or
6 probable consequence if any one of those offenses -- we
7 think a felony murder instruction would be appropriate.

8 Then what I was going to suggest that we add to what I
9 handed up is the language (as read): "A person is not
10 liable for the acts of an accomplice unless the act is a
11 natural or probable consequence of the plan. You must find
12 that another -- that a homicide was a natural or probable
13 consequence of the particular act to which the defendant
14 was an accomplice."

15 And I think that's different than the "hand of one"
16 charge because this goes more under what the agreement was
17 for them to do and what the consequences of the agreement.

18 THE COURT: I'm going to charge "hand of one is the
19 hand of all" totally separately.

20 MS. WILSON: All right.

21 THE COURT: I think the way you all are asking is very
22 confusing for the jury. I will charge felony murder
23 inference, but I'm going to charge that within the elements
24 of malice on murder. I'm going to use my standard charge.

25 MS. WILSON: Okay. Can you tell us what that is?

1 THE COURT: Uh-huh. It says (as read): "If one
2 intentionally kills another during the commission of a
3 felony, the inference of malice may arise. If facts are
4 proven beyond a reasonable doubt sufficient to raise an
5 inference of malice to your satisfaction, this inference
6 would simply be an evidentiary fact to be taken into
7 consideration by you along with other -- along with all the
8 other evidence in the case, and you may give it the weight
9 that you decide it should receive."

10 MR. JONES: Your Honor, with -- if I may?

11 THE COURT: Uh-huh.

12 MR. JONES: With regard again, as I understand it, I
13 think you're going to -- you're talking about the language
14 of the act is a natural probable consequence is not going
15 to be part of the instruction, and ---

16 THE COURT: I didn't say that.

17 MR. JONES: Oh, okay.

18 THE COURT: I said I'm going to charge the "hand of
19 one is the hand of all," and I'm not going to mix it in
20 with the rest of it. I'm just going to say ---

21 MR. JONES: I just wanted to clarify that that -- you
22 know, obviously, that was in there.

23 THE COURT: It's in there.

24 MR. JONES: I just want to make sure that ---

25 THE COURT: I'll tell you what it says in just a

1 second.

2 MR. JONES: Thank you.

3 THE COURT: And I may add that additional language
4 regarding the fact that burglary first, kidnaping, and
5 armed robbery are felonies under the law in the State of
6 South Carolina. Something to that effect.

7 MS. WILSON: While you're looking, I'm going to hand
8 up amended State's Request to Charge 2(a), which just --

9 THE COURT: Would you mark that as Court's Exhibit?

10 (Marked Court's Exhibit No. 2, Request to Charge.)

11 THE COURT: When I charge accomplice liability, I will
12 charge (as read): "If a crime is committed by two or more
13 people who are acting together in committing a crime, the
14 act of one is the act of all. A person who joins with
15 another to accomplish an illegal purpose is criminally
16 responsible for everything done by the other person which
17 occurs as a natural consequence of the acts done in
18 carrying out the common plan and purpose. For example, two
19 people can be guilty of killing another person when only
20 one of the two had a gun. There was only one bullet and
21 only one of the two fired the shot that caused the death.

22 "If two or more people are together, acting together,
23 assisting each other in committing the offense, the act of
24 one is the act of all. As it is said sometimes, "The hand
25 of one is the hand of all." Prior knowledge that a crime

1 is going to be committed without more is not sufficient to
2 make a person guilty of that crime. Mere knowledge that
3 another person is going to commit a crime, even if the
4 defendant is present when the crime is committed, is not
5 sufficient to convict the defendant as a principal.

6 "Guilt as a principal is shown by actual or
7 constructive presence at the scene as a result of prior
8 arrangement. Therefore, finding of a prior arranged plan
9 or common scheme is necessary for a finding of guilt as a
10 principal. The State must prove beyond a reasonable doubt
11 by competent evidence the theory of "the hand of one is the
12 hand of all.

13 "A principal in a crime is one who either actually
14 commits the crime, or who is present, aiding, abetting, or
15 assisting in committing the crime. When a person does an
16 act in the presence of and with the assistance of another,
17 the act is done by both. Where two or more, acting with a
18 common plan or intent, are present at the commission of a
19 crime, it does not matter who actually commits the crime.
20 All are guilty. The hand of one is the hand of all.

21 "Present at the commission of a crime means to be
22 sufficiently near to aid and abet and assist in the
23 commission of the crime. However, mere presence at the
24 scene of a crime is not sufficient to convict one as a
25 principal on the theory of aiding and abetting.

1 "Intent is also a necessary element, for there must
2 have been a common design and intent to commit the crime,
3 and the crime must have been committed pursuant thereto,
4 with the person aiding and abetting by some overt act.
5 Intent means intending the result which actually occurs,
6 and not accidentally or involuntarily. Intent may be shown
7 by acts and conduct of the defendant and other
8 circumstances for which you may naturally and reasonably
9 infer intent. The State must prove these elements beyond a
10 reasonable doubt."

11 And I will also charge constructive presence. And
12 that will read as follows: "A person may be constructively
13 present at the commission of a crime, even though the
14 person is some distance away from the actual scene, if it
15 is shown beyond a reasonable doubt that the person played a
16 role in the commission of the crime as a result of some
17 prior arrangement."

18 You all are -- the State is withdrawing request No. 1,
19 which deals with voluntary manslaughter; is that correct?

20 MS. WILSON: Yes, ma'am.

21 THE COURT: I'm going to add the language from No. 2,
22 which is telling them that the crimes of burglary first
23 degree, kidnaping, and armed robbery are felonies when I
24 instruct on felony murder inference.

25 The Defense, Mr. Barnwell has requested a mere

1 presence charge, which I think is covered by the Court's
2 standard charge. He's also requested a charge of
3 identification testimony, which I believe is covered in my
4 standard charge. And No. 3 is not applicable because none
5 of the defendants testified.

6 Mr. Barnwell also requested a charge that is numbered
7 No. 5, where he's asking the Court to instruct on
8 punishment, and I have -- I have advised him that the Court
9 will not be giving an instruction on punishment because
10 that is not appropriate for the jury to consider. That is
11 solely a matter of law for the Court. There is case law
12 that provides that a jury is not to consider punishment in
13 their deliberations. It is not appropriate. I have Mr.
14 Barnwell's request marked as a Court's Exhibit.

15 (Marked Court's Exhibit No. 5, Mr. Barnwell's request
16 to charge.)

17 Are there any exceptions to the charges proposed from
18 the State, or any further requests?

19 MS. WILSON: Can you -- would you mind reading your --
20 your accessory charge -- would you have ---

21 THE COURT: I will say, "The defendant" -- and I'm
22 going -- I'm going to separate out each defendant as to
23 what each is charged with and the elements that would be
24 applicable to them. And it will read (as read): "The
25 defendant Marquita C. Smith is charged with being an --

1 being an accessory before the fact of a felony, those being
2 murder and armed robbery. In order to prove this crime,
3 the State must prove beyond a reasonable doubt that the
4 defendant either advised, agreed, urged, counseled, hired,
5 or in some way aided or abetted another person to commit a
6 crime, and that the defendant was not present when the
7 offense was committed.

8 "Aid" means to help to promote a course or
9 accomplishment of, to give support to, or to give
10 assistance to. "Abet" means to encourage, or appear to
11 favor or support."

12 Any further requests from the state?

13 MS. WILSON: Beg the Court's indulgence.

14 THE COURT: Uh-huh.

15 MS. WILSON: Your Honor ---

16 THE COURT: Uh-huh.

17 MS. WILSON: The one thing that we would ask, I
18 believe that the Court goes through the natural or probable
19 consequence language with regards to the principals and the
20 substantive charges. But with regards to Ms. Smith and the
21 accessory charges, I think it would be appropriate at that
22 point to have that language charged in relation to the
23 accessory charges as well.

24 (Sotto voce discussion between the Court and the law
25 clerk.)

1 THE COURT: I'm sorry. Say that one more time.

2 MS. WILSON: Okay. It gets kind of confusing. The
3 Court has said that you would charge the natural and
4 probable consequence language with regards, "The hand of
5 one, the hand of all," which goes to the principals
6 involved.

7 THE COURT: It goes to everybody involved because if
8 she -- either she's -- either she's involved as a co-
9 conspirator and her hand is the same as theirs, or it is
10 not. There's no difference between her and the rest of
11 them sitting at the table. They're all similarly situated.

12 MS. WILSON: Well, she -- technically speaking, she's
13 not charged as a principal. And "the hand of one" would
14 make her a principal. She's -- she is charged as an
15 accessory, so ---

16 THE COURT: Before the fact.

17 MS. WILSON: --- right. And I realize that they're
18 very close and even the cases talk about how those lines
19 can be blurred. What I'm saying is that language, I think,
20 is perfectly appropriate the way you have it and that fits
21 for these two defendants who were principals who were
22 there. And while we could have charged Ms. Smith as a
23 principal, we did not. We charged her as an accessory.

24 THE COURT: Uh-huh.

25 MS. WILSON: Because of that -- because it's accessory

1 before the fact, I think it's also appropriate to charge
2 that natural and probable consequence language with regard
3 to those two offenses as we outlined in State's Request to
4 Charge 2(a).

5 THE COURT: Do you have any case law to support that?

6 MS. WILSON: Yes, ma'am. And it's ---

7 THE COURT: If you have it for me, I'll be glad to
8 look at it.

9 MS. WILSON: Okay. It's *State v. Bell*. I believe I -
10 - I wrote it on there. And I'll give you the site. It's
11 *State v. Bell*, which is 305 South Carolina 11. It's a 1992
12 case. And also *State v. Levelle*, 34 South Carolina 120.
13 It's an 1891 case.

14 And we also cited Professor McAninch's book, which has
15 a recitation of these cases -- page 123 of his book and
16 also page 526 -- where he outlines those instructions that
17 were given. And in the example of *State vs. Peterson*, I
18 believe there was a -- a charge of an unarmed larceny of a
19 car. And the question was whether or not the instructions
20 were appropriate and whether or not they charged
21 sufficiently that the State had to prove that murder was a
22 natural or probable consequence of that unarmed larceny.

23 And I -- I think that's kind of the situation that we
24 might have here, and I think it, again -- I'm basically
25 asking for a similar "hand of one" instruction to go along

1 with the accessory charges. You've got it for the
2 principals, but Ms. Smith was not charged as a principal.
3 And that's my concern, that the jury understands that they
4 have to find those things in regards to her as well because
5 she's not charged as a principal.

6 THE COURT: Mr. Jones?

7 MS. WILSON: And if I -- I'll hand this to -- Mr.
8 Jones has not seen what I handwrote while we were having
9 discussions. This might help him see what I was talking
10 about.

11 MR. JONES: Your Honor, this -- this is more in line
12 with what I was also asking you ---

13 THE COURT: Y'all agree on it. Work something out.
14 I'll be glad to do it. As long as there is no exception, I
15 don't have a problem. Y'all happy; I'm happy.

16 Let me see what it is.

17 MS. WILSON: This is Court's -- been marked Court's
18 Exhibit 5. It's State's 2(a) request.

19 THE COURT: Are you all requesting I simply add this
20 language to the end of the charge of aiding and abetting --
21 I mean, accessory after the fact?

22 MS. WILSON: I'm requesting that you charge all that,
23 the typewritten and the handwritten portion.

24 THE COURT: Well, I've already be charging felony
25 murder. And I don't think ---

1 MS. WILSON: Well, this is a different aspect of
2 felony murder. There are different ways to -- to have
3 felony murder.

4 THE COURT: I agree.

5 MS. WILSON: One is as you were charging it earlier as
6 to give the -- the rise -- give rise to malice.

7 THE COURT: Uh-huh.

8 MS. WILSON: This involves more of what I was saying
9 earlier. When you have the felonies that have been
10 committed that are -- that are felonies and you said you
11 would instruct that those crimes were.

12 THE COURT: I will in a -- in the felony murder
13 instruction, which is supported by case law. I -- I was
14 just perusing *State vs. Bell* and it nowhere cites this
15 language. I have found that books are not always that
16 accurate. No reflection on Professor McAninch, but
17 sometimes they use dicta, which is not a part of the -- of
18 the case.

19 MS. WILSON: Right.

20 THE COURT: But again, I have no problem with the
21 language. I'm just asking where are you all -- well, let
22 me be clear.

23 Mr. Jones, do you have any exception to what Ms.
24 Wilson has requested, which is that this entire felony
25 murder instruction be amended to the instruction for

1 accessory before the fact of murder regarding your client?

2 MR. JONES: Your Honor, I -- I don't believe I do,
3 looking over it.

4 THE COURT: Okay. If you all agree, that's fine with
5 me. I'll simply charge it along with it. There's no
6 exception. I have no dog in the fight.

7 MS. WILSON: So -- so the Court's 5 will come after
8 the accessory --

9 THE COURT: The Court's what now?

10 MS. WILSON: The Court's No. 5 will come after you
11 charge the accessory language.

12 THE COURT: This will not be a Court's Exhibit any
13 longer.

14 MS. WILSON: Right. Right.

15 THE COURT: It will be a part of the charge.

16 MS. WILSON: I thought that you had ---

17 THE COURT: What I will do is add your request, and
18 then with the consent of Mr. Jones, I will simply charge it
19 after -- after I have charged the elements of accessory
20 before the fact of murder.

21 MS. WILSON: Yes, ma'am.

22 THE COURT: But they'll all be charged the same.

23 MS. WILSON: Right.

24 THE COURT: And I will simply -- and then I'll just
25 amend it to the end of the charge.

1 Are there any further -- further requests to charge
2 from the State?

3 MR. JONES: Your Honor, one -- one thing that I ---

4 THE COURT: From the State?

5 MR. JONES: No, Your Honor. I'm sorry.

6 THE COURT: Mr. Bolus, any further requests to charge?

7 MR. BOLUS: Just to be clear, you are going to charge
8 attempted armed robbery ---

9 THE COURT: Uh-huh.

10 MR. BOLUS: --- or just put it on -- okay, and be a
11 part of the verdict form?

12 THE COURT: Uh-huh.

13 MR. BOLUS: For our two.

14 THE COURT: I'm going to show you verdict forms in
15 there.

16 MR. BOLUS: And then she's going to be charged
17 accessory before the fact of attempted armed robbery, and
18 we all -- we're all getting attempted armed robbery charge?

19 THE COURT: I'm simply going to charge attempted armed
20 robbery. The elements of that is the lesser included
21 offense of armed robbery.

22 MR. BOLUS: For these two defendants.

23 THE COURT: But she's being charged with accessory, so
24 all I simply will do is list those offenses. She does --
25 they don't have to prove the elements of those offenses to

1 find her guilty. They only have to prove that she aided,
2 assisted in those offenses.

3 MR. BOLUS: But they do have to prove that a principal
4 committed the acts.

5 THE COURT: Of course.

6 MR. BOLUS: And -- can I -- I'm trying to -- we're
7 trying -- Jones and I was talking. Is she going to get a
8 charge accessory before armed robbery or an accessory
9 before attempted armed robbery? Right? Because if you
10 give a charge of attempted ---

11 THE COURT: No. The charge ---

12 MR. BOLUS: --- armed robbery on these two ---

13 THE COURT: --- the charge that is supported with the
14 case law simply says for her to be guilty of accessory
15 before the fact, the State only has to prove those things
16 I've already articulated for the record.

17 MR. BOLUS: But the fact that armed robbery -- or is
18 she going to be -- attempted armed robbery?

19 THE COURT: Armed robbery. Well --

20 MR. BOLUS: Because there's a the big difference --

21 THE COURT: -- I got to think through that a little
22 bit.

23 MR. BOLUS: --- on the -- on the sentencing --

24 THE COURT: I got to -- I have to think through that a
25 little bit.

1 MR. BOLUS: That's what I was trying to get at.

2 THE COURT: I may simply say murder, armed robbery, or
3 the lesser included offense of attempted armed robbery.

4 MR. BOLUS: Yes, that's ---

5 THE COURT: That's what I probably will say.

6 MR. BOLUS: -- what I ---

7 THE COURT: But within the actual body of the charge,
8 I will charge armed robbery and attempted armed robbery as
9 a lesser included offense, as -- and what the -- what it'll
10 actually say is that if you find the State has failed to
11 prove the elements of armed robbery, you may also consider
12 the elements of attempted armed robbery.

13 MR. BOLUS: That's what I was trying to clarify -- Mr.
14 and Mr. Jones were trying to.

15 THE COURT: But the verdict form will reflect armed
16 robbery or as to the lesser included offense, attempted
17 armed robbery.

18 MR. BOLUS: Thank you very much.

19 THE COURT: But her's will say accessory before the
20 fact of attempted armed robbery.

21 MR. BOLUS: Yes, ma'am. That's what we ---

22 THE COURT: Are there any further requests to charge?
23 Mr. Bolus?

24 MR. BOLUS: No, ma'am.

25 THE COURT: Mr. Barnwell?

1 MR. BARNWELL: I'm just -- hope you would give due
2 consideration to dying declaration charge because a number
3 ---

4 THE COURT: I probably will charge it.

5 MR. BARNWELL: --- a number of different people get
6 cumulative with it.

7 THE COURT: Uh-huh. I'll charge it. Anything
8 further, Mr. Barnwell?

9 MR. BARNWELL: Nothing further, Your Honor.

10 THE COURT: Anything further, Mr. Jones?

11 MR. JONES: Nothing, Your Honor.

12 THE COURT: Okay. I'll see y'all in the morning at
13 9:30. And at that time, I'll have the verdict forms for
14 you to look at and I will staple them to the inside of the
15 indictments.

16 **AUGUST 30, 2007; DAY 4**

17 THE COURT: Okay. As a preliminary matter, we had
18 discussed some things in chambers this morning, and I
19 wanted to put that -- to put those on the record.

20 I guess the first and most immediate concern we need
21 to deal with, one of our jurors who is -- I'll just sort of
22 give it in a nutshell. One of our jurors apparently
23 overslept this morning, Mr. Simmons. Mr. Hutto called him
24 at about 10 of 10:00 when he had not checked in and it was
25 apparent to him that maybe he had overslept.

1 He is on his way. He told him to get here as quickly
2 as possible. And as I shared with counsel, it is my
3 understanding that many of the individuals on the jury work
4 in industry and their employers are requiring them to come
5 and work on night -- the night shift. And so I suspect --
6 which is just horrible. I suspect that he worked last
7 night and that is why he overslept. He -- I've watched the
8 jury. They have all been incredibly -- incredibly
9 attentive, and I have even more respect for him now knowing
10 that he's been working at night and coming in here and
11 serving on jury duty.

12 So as soon as he arrives, we will -- any delay, we'll
13 just have to accommodate it, and we will get started as
14 soon as he arrives.

15 I have also had each of the parties review the verdict
16 forms. Are there any exceptions to the verdict forms as
17 proposed from the State?

18 MR. JENNINGS: No, Your Honor.

19 THE COURT: Mr. Bolus, any exception to the verdict
20 forms for your client, Mr. Gary Grant?

21 MR. BOLUS: No exceptions.

22 THE COURT: Mr. Barnwell, for Jermaine Hartwell?

23 MR. BARNWELL: No exceptions.

24 THE COURT: And Mr. Jones, for Marquita Smith?

25 MR. JONES: No. No, Your Honor.

1 THE COURT: Any exception to the Court's stapling them
2 to the inside of the indictments, as I have done, from the
3 State?

4 MR. JENNINGS: None, Your Honor.

5 MR. BOLUS: None.

6 THE COURT: Mr. Bolus?

7 MR. BOLUS: None.

8 THE COURT: Mr. Barnwell?

9 MR. BARNWELL: None.

10 MR. JONES: None, Your Honor.

11 THE COURT: All right. Now, the other thing that we
12 did not do on yesterday, and I made a note to myself, is at
13 the close of the defense case, I think because it was a --
14 it was late in the hour and we were all so focused on the
15 charge conference, I did not give the attorneys an
16 opportunity to renew any motions.

17 Are there any motions from the State?

18 MR. JENNINGS: No, Your Honor.

19 THE COURT: From the defense, Mr. Bolus? Do you wish
20 to renew any of your motions?

21 MR. BOLUS: Just the same ones I made concerning armed
22 robbery and the -- the other charge, and especially the
23 armed robbery. I still don't believe there is enough
24 evidence to submit it to the jury on the armed robbery.

25 THE COURT: Okay. Mr. Barnwell?

1 MR. BARNWELL: The same one concerning insufficient
2 evidence.

3 THE COURT: And Mr. Jones?

4 MR. JONES: The same with armed robbery.

5 THE COURT: And I would assume that the State's
6 argument response would be the same?

7 MR. JENNINGS: That's correct.

8 THE COURT: The Court will note the renewed objections
9 for the record and deny them based on my previous ruling.

10 As regards the motion for directed verdict on armed
11 robbery, I've given the matter substantial thought and I
12 was concerned about whether the evidence rose above the
13 level of mere suspicion. I've looked back through my
14 notes. The evidence in the record regarding the armed
15 robbery deals with the -- is based solely in the testimony
16 of a co-defendant, who indicates that Mr. Grant told him
17 that he had taken certain property from the deceased prior
18 to his death, that being, I believe, some items of jewelry.
19 And if, in fact -- that did, in fact -- viewing in the
20 light most favorable to the State and considering
21 accomplice liability, if those allegations remained or the
22 -- the charge remained, that certainly would make it
23 applicable to -- to his co-defendant.

24 In ruling on a motion for direct verdict the Court is
25 concerned with the existence or nonexistence of evidence

1 and not its weight. It is not for the Court to act as the
2 fact finder. It is for the Court to look at the existence
3 or nonexistence of evidence.

4 And the Court is bound to deny a motion if there is
5 direct evidence or substantial circumstantial evidence
6 reasonably tending to prove the guilt of the accused.
7 However, a Court is not required to find that the evidence
8 infers guilt to the exclusion of any other reasonable
9 hypothesis, and that is based on *State vs. Cherry*.

10 I listened very intently to the arguments made by
11 counsel regarding the armed robbery and the fact that
12 there's only one witness to substantiate that charge. Of
13 course, to prove armed robbery the State must prove beyond
14 a reasonable doubt that the defendant took personal
15 property from the person or presence of another person;
16 that the property was in the presence of the -- of the
17 person; that the defendant carried the property away
18 intending to permanently deprive -- permanently deprive the
19 owner of the property and to keep the property for the
20 defendant's own use. Of course, the slightest removal of
21 the property or the complete possession, even for an
22 instance, is sufficient to show a taking and carrying away.

23 And the taking and carrying away must have been done
24 with violence, or by putting the owner of the property in
25 fear of violence. The State must also prove that the

1 defendant was armed with a deadly weapon during the
2 robbery.

3 Mr. Kerry Hollins testified, as well as -- I was
4 trying to think of the little fellow's name -- Chris Nelson
5 testified, that he observed the defendants with guns drawn
6 on Mr. Perry and that they were making certain comments to
7 him regarding the taking of property, which is direct
8 testimony, as well as the testimony of Kerry Hollins, who
9 indicated that Mr. Grant later told him that he did, in
10 fact, take property. And while I struggled with whether
11 the evidence rose above a mere suspicion, and a suspicion
12 is one that implies a belief or opinion as to guilt based
13 upon facts or circumstances which do not amount to proof,
14 I think ultimately, what it really comes down to, and what
15 the defense has argued to the Court, is that Mr. Hollins'
16 testimony should not be given any weight. It is not for
17 the Court to weigh the evidence, it is only for the Court
18 to be concerned with the existence or nonexistence of
19 evidence. And I think that what, basically, I would be
20 doing if I rendered a directed verdict, would be to act as
21 the fact finder in this case; and that is not the Court's
22 prerogative.

23 The matters argued in the directed verdict motion are
24 really arguments that go to the weight of the evidence, and
25 there's nothing that precludes counsel from arguing the

1 very things that they argued to the Court, which is that
2 Mr. Hollins' word should not be given any weight, that
3 basically his statements are self-serving, and in addition
4 to that, the State has failed to prove that, in fact, Mr.
5 Perry was in possession of the property or that it was ever
6 stolen. These are all things that they are free to argue,
7 and I'm sure will argue, but all of those -- the issues
8 that have been argued to the Court really go to the weight
9 to be afforded to the evidence, not the existence or
10 nonexistence of it. Therefore, the motion for directed
11 verdict on the armed robbery is denied.

12 Now, in conformance with the agreement that you all
13 have reached, I will be charging attempted armed robbery,
14 and we've already gone over the substance of that charge in
15 chambers. As well as, I will be charging attempted -- the
16 accessory on the attempted armed robbery.

17 As a result of the chambers conference, it is my
18 understanding that at the request of the State and the
19 request of defense counsel, Mr. Jones, that you all wish
20 for me to remove the charge regarding constructive
21 presence. Is that correct, from the State?

22 MR. JENNINGS: Yes, Your Honor.

23 THE COURT: Is that correct?

24 MR. JONES: Yes, Your Honor.

25 THE COURT: And the Court will remove that by the

1 consent of the parties.

2 Also, I believe that I advised you all that I have
3 added the language to the felony inference charge dealing
4 with the classification of felonies, and that was without
5 objection; correct, from the State?

6 MR. JENNINGS: Correct.

7 THE COURT: From the defense?

8 MR. BOLUS: Correct.

9 MR. JONES: Correct.

10 MR. BARNWELL: Correct.

11 THE COURT: And also, with the consent of counsel, I
12 added State's request to Charge Number 2(a), to be charged
13 in conjunction with the accessory before the fact charge
14 for Ms. Smith, and that was without objection; correct,
15 from the State?

16 MR. JENNINGS: Correct.

17 THE COURT: And from the defense?

18 MR. JONES: Correct.

19 THE COURT: I believe I've covered everything that we
20 went over in chambers conference. Is there anything -- any
21 -- are there any exceptions to the charges proposed as a
22 result of the chambers conference from the State?

23 MR. JENNINGS: No, Your Honor.

24 THE COURT: From the defense, Mr. Bolus?

25 MR. BOLUS: None.

1 MR. BARNWELL: No, Your Honor.

2 MR. JONES: No, Your Honor.

3 THE COURT: Okay. I believe they've indicated to me
4 that the juror has arrived. Let me make sure that that is,
5 in fact, the case and then we will get started.

6 Again, I will emphasize and reinforce that during
7 closing arguments, I do not expect there to be any movement
8 in the courtroom. I know that there are lawyers that have
9 other appointments that are seated near the back of the
10 courtroom and the bailiffs will allow them to leave for the
11 purposes of attending other court hearings, but as regards
12 other members of the gallery, absent some emergency and
13 having some urgent need to go to the restroom or otherwise,
14 I do not expect there to be any movement, extraneous
15 comments, or other disturbances in the gallery. I need to
16 advise you that if any of those take place, I have
17 empowered security to handle it. So I -- and I expect them
18 to handle it swiftly and decisively. So I would ask that
19 everyone comport themselves appropriately, and that the
20 decorum of this courtroom and the dignity of this process
21 be maintained.

22 Are we ready to proceed from the State?

23 MR. JENNINGS: The State's ready, Your Honor.

24 THE COURT: From the defense?

25 MR. BARNWELL: Yes, Your Honor.

1 MR. JONES: Yes, Your Honor.

2 THE COURT: And as I understand it, the State will
3 open and close. Ms. Wilson, you'll be opening on the law?

4 MS. WILSON: Yes, ma'am.

5 THE COURT: And Mr. Jennings will be closing on the
6 facts?

7 MR. JENNINGS: That's correct.

8 THE COURT: And I think that everyone is in agreement
9 that the State is still entitled to last argument. Is that
10 correct, Mr. Bolus?

11 MR. BOLUS: Just for posterity sake, I do lodge an
12 objection to that concept that one little document
13 commented during the prosecution side by a co-counsel who
14 we have to slightly ---

15 THE COURT: Did it come in as a State's Exhibit or as
16 a Defense Exhibit?

17 MR. BOLUS: Unfortunately it came in as a Defense
18 Exhibit during the prosecution side, and our -- our
19 interests aren't exactly co-aligned either, I mean. So I
20 don't like that idea, but I hear that's the law so ...

21 THE COURT: Well, you acknowledge that that is the
22 precedent, but you just want to argue against precedent and
23 lodge ---

24 MR. BOLUS: Yes.

25 THE COURT: --- just in case, on the outside chance,

1 that ---

2 MR. BOLUS: Yes, ma'am.

3 THE COURT: Okay. Mr. Barnwell?

4 MR. BARNWELL: I'll -- I'll join in Mr. Bolus's

5 argument.

6 THE COURT: Okay. Mr. Jones?

7 MR. JONES: The same.

8 THE COURT: Okay. We'll note it for the record. The
9 State may -- we need a jury, don't we? Please bring in the
10 jury.

11 THE COURT: (To the court reporter) I'm sorry. That
12 needs to be marked as a Court's Exhibit.

13 (Marked Court's Exhibit No. 3, State's request to
14 Charge No. 2(a))

15 (The jury enters at 10:19 a.m.)

16 THE COURT: You may be seated. Good morning, ladies
17 and gentlemen. I hope that you all had a restful evening.
18 We -- as I indicated last night, we have now reached the
19 stage of the trial where we will have closing arguments and
20 the Court's instructions on the law. You will hear from
21 the State, after which you will hear from defense counsel,
22 after which will again be addressed by the State.

23 I would ask that you give the attorney's your
24 undivided attention. I will be mindful of the length of
25 time that we're sitting and I will keep in mind whether we

1 need any breaks during this process. I've arranged for the
2 clerk -- I've sort of estimated how long I think the
3 process may take and I've asked the clerk to have lunch
4 available for you. And we are estimating and I've asked
5 them to have that available by 12:30. I think that's a
6 happy medium. Even if we finish before then, that still
7 would be a good hour for lunch.

8 So again, I would ask that you give the attorneys your
9 undivided attention. You may proceed.

10 MS. WILSON: Thank you, Your Honor.

11 THE COURT: You're welcome.

12 MS. WILSON: May it please the court?

13 THE COURT: Yes, ma'am.

14 MS. WILSON: Thanks to you all for your attention and
15 patience during this process this week.

16 I want to talk to you a little bit about the law and
17 some of the concepts of law. I'm not going to go through
18 each charge as I did in my opening. Mr. Jennings, when he
19 goes through the facts of this case, he'll talk to you more
20 about the elements of each specific charge. But there are
21 some concepts that apply to the testimony and evidence that
22 you've heard that I want to talk to you about, and then the
23 judge, at the end of the case, will tell you more about
24 those as well.

25 You've all in your daily lives heard the term "beyond

1 a shadow of a doubt." Beyond a shadow of a doubt. And
2 that may be a standard that you use in your daily life, but
3 it's not the standard for here in the courtroom. Here in
4 the courtroom, the law, our law, is that the State has to
5 prove its case not beyond a shadow of a doubt, but beyond a
6 reasonable doubt. Beyond a reasonable doubt.

7 And what is that? Beyond a reasonable doubt doesn't
8 mean beyond all doubt. It doesn't mean beyond all doubt.
9 And the judge will tell you there are few things in your
10 life that are absolutely, one hundred percent certain. And
11 that's not the standard we have to meet. And think about
12 that. I talked to you a little bit about that in opening.
13 For you to be one hundred percent sure of something, you
14 had to see it for yourself, you had to hear it for
15 yourself; which means you would have to be there, which
16 means you would be a witness, and you wouldn't be able to
17 be a juror. Our standard is to leave you firmly convinced,
18 firmly convinced of the charges before you. Not beyond all
19 doubt, but beyond a reasonable doubt.

20 Another concept that you need to be aware of when
21 you're looking over the evidence of these past few days is
22 that involving felony murder. And what the law says is
23 that when there is an unlawful act of malice and it's done
24 in the commission of a felony, and the judge will tell you
25 that armed robbery, kidnaping, and burglary are -- and

1 burglary are felonies, that when those crimes are committed
2 and a death happens, it's murder. It's murder.

3 Think about that. The reason for that is it's a
4 natural, foreseeable consequence, such a dangerous crime
5 that a death is going to happen. It's not a surprise.
6 It's not a surprise.

7 I'll give you an example, not that it applies to this
8 case, but one we often see in our line of work. There's an
9 argument, there's a disagreement, somebody has a beef, they
10 decide to shoot at somebody. They kill them. They might
11 come to us and say, "I didn't mean to kill him. I just
12 meant to scare him. I was trying to shoot beyond him or
13 beside him or above him and I missed."

14 When you undertake such a dangerous act, you don't get
15 to claim surprise that it went wrong. You are responsible
16 for the foreseeable, for the natural, probable consequences
17 of your actions.

18 Armed robbery is dangerous; kidnaping is dangerous;
19 burglaries are dangerous. Why? Because people get hurt,
20 because people die. And I ask you to remember that when
21 you consider the evidence of this week.

22 Another concept that I talked about with you at the
23 beginning of the -- of this case is that the hand of one is
24 the hand of all. And think about why that makes sense. It
25 makes sense because people know there's safety in numbers.

1 They know that they have a better shot of creating or
2 committing a successful lick or a successful armed robbery
3 if they have help. It takes each person involved, it takes
4 each one of them, and for that reason the hand of one is
5 the hand of all. And another way of saying that is when
6 accomplices get together and they help each other out, the
7 law says that they're all equally guilty. The hand of one
8 is the hand of all.

9 Now remember, as I talked with you in opening, this is
10 a legal principle. Morally speaking, you might believe
11 that there is a difference between the person who actually
12 stares someone down and shoots them. You might believe
13 that there is a moral difference in someone shooting a man
14 in the back and someone who is standing there holding a gun
15 not firing. That is something for a judge to consider, for
16 a judge to consider as to sentencing. That is not for you
17 to consider, because when they set out to help each other
18 out, to act together, under the law they are all legally
19 responsible. That is not an option for you, because as the
20 judge told you in the very beginning, she will give you the
21 law that you have to follow.

22 Now, you get to decide however you want to decide
23 about the credibility of the witnesses. You can believe
24 all of what they say, none of what they say, or part of
25 what they say. And you can think about their motivations.

1 You can think about the stress that they were under.

2 Think about the Cobbs being bombarded and held at
3 gunpoint. Think about the surprise they were under. Think
4 about the stress. Think about all of that in considering
5 their memory of what happened. And think about the fact
6 that they told you that had never happened to them. That
7 was probably one of the most important, most impactful
8 things that's ever happened -- happened to them. And they
9 were paying attention.

10 Think about Chris Nelson when he came back to the
11 house and saw his friend through that window, what he was
12 hearing. He knew something was wrong. He sees his friend
13 at gunpoint. He's hearing, "Where's the money? Where's
14 the money?" He hears his friend saying, "Tear up the
15 walls. Look around." And he was clear in what he saw.

16 And think about how their stories and their
17 recollections fit together. Manny. Manny. Birdie and
18 Odoner both see Mr. Grant. Mr. Hollins telling you Mr.
19 Grant. When you think of credibility of the witnesses,
20 think about how their stories fit together and think about
21 how they don't fit together. If it was so perfectly carved
22 out so that everything matched, every little nook and
23 cranny fit together, that would mean that we all got
24 together and made it perfect. Because in real life, you
25 know that things aren't perfect. You know, that people

1 have their own recollections of what happened. We just ask
2 that you look at how those recollections fit together, and
3 they fit together absolutely consistently with regard to
4 these defendants.

5 Proof of who shot. Once again, under the hand of one
6 being the hand of all, it doesn't matter who shot. When
7 one fired, they all might as well of fired, because they're
8 all responsible. They're all responsible. What matters
9 then who bought -- is who bought in. Who signed up? Who
10 was ready to go? When they bought in, when they agreed to
11 help each other commit -- not all three of them, any one of
12 them that you find. When they agreed to a burglary first,
13 when they agreed to a robbery, when they agreed to a
14 kidnaping, they bought in. That's what we have to prove.

15 Who knew that Dexter Perry was going to die? Who knew
16 that? Chris Nelson told you he thought that and he told
17 you why he thought that. He thought it because the men
18 were not masked. Was he right? I don't know if he was
19 right or not, but that's what he believed at the time and
20 that's why he got a gun and that's why he fired, trying to
21 help out. Did it help? I don't know. He's a 20-year-old
22 guy watching his friend getting beaten and held at gunpoint
23 knowing his aunt and uncle are in there. He panicked.

24 Did those defendants know that night that Dexter Perry
25 was going to die? I don't know. That's not what we have

1 to prove to you. What we have to prove is a plan and not
2 that the plan was murder. We have to prove that they
3 undertook that plan to commit robbery, to commit burglary,
4 and to commit kidnaping, and I submit to you when you think
5 about that and you think about that woman sitting right
6 there, and she talks about in her own words, not my words,
7 not Mr. Jennings' words, in her own words planning that
8 robbery. She knew when she went and met with them -- it
9 was four of them. She knew it was four to one. She knew
10 he was going to be kidnaped, because she knew when he was
11 going to be robbed that he was not going to be free to go.
12 Once again, there was safety in numbers because the hand of
13 one is the hand of all. She knew, and she had every
14 opportunity for an out. She had every opportunity not to
15 make a call, not to accept a call, not to tip them off.
16 She signed up for the plan just like Mr. Grant did and just
17 like Manny did.

18 I ask you to remember those concepts as you listen to
19 what the defense attorneys have to say to you, and I ask
20 that you listen further when Mr. Jennings goes through all
21 of the facts of the case. And in the end, once again, we
22 ask you for a verdict that speaks the truth, a verdict that
23 gives each and every one of them exactly what they deserve.

24 MR. BOLUS: Ladies and gentlemen, first of all I
25 certainly appreciate your time. I understand some folks

1 had not only to spend some time here, but they may have had
2 to work, that type of thing. And in the long run,
3 probably, this could be your finest hour. No matter what
4 happens with the verdict, you might remember this years
5 from now and say, "You know, that was one tough week, but
6 we did out job."

7 And if you were sitting in here charged with a crime,
8 you'd want somebody to listen to the evidence, and whether
9 they had to work at night or whatever they had to do, that
10 they paid attention and they came to court. That separates
11 us from a lot of other countries where you just get three
12 judges lined up and they make a decision, and generally
13 it's always a bad decision for the defendant. At least in
14 this country, we have a jury.

15 And like I said in my opening, you're not an arm of a
16 the State. For crying out loud, the State has plenty of
17 arms. They got policemen, they got investigators, they got
18 everything. We pay taxes for that. So for you to get the
19 idea that you're just these folks' pals and friends and
20 you're here to do their bidding, that's just not the way it
21 is. The system was conceived that you would act as a
22 barrier between the force of the law, the State or the
23 federal government, and the citizens of South Carolina, the
24 citizens of the United States.

25 You know, this case would be real easy if you just

1 decide, "Well, the hand of one is the had of all." The
2 morality that Ms. Wilson wants you to forget is that -- is
3 what the law is based on. Almost all law comes from
4 morality. She says put your morality aside and just go
5 with the legal concepts. Well, you know, when that
6 happens, we get all kinds of bad problems in this world.
7 The hand of one and the hand of all, that's led in some
8 countries if -- if one man shoots a soldier of -- of -- of
9 a certain group, ten people are hung in the village. You
10 know why? The Germans in World War II figured the hand of
11 one is the hand of all. One Frenchmen kills one of our
12 soldiers, we hang 100 of them. Because they all hate us,
13 the hand of one is the hand of all.

14 That also gives you the concept of the Crusades, when
15 the Christians were fighting the Muslims and the Jews were
16 in the way and -- this is historical fact. The Christians
17 and the Muslims were fighting and they asked, "Well, how do
18 we make sure that we don't kill any of the Jewish people
19 that are in Jerusalem?" Well, the commander of the -- of
20 the Christian army says, "Well, we're not going to have to
21 worry about that because we're just going to wipe out
22 everybody in the village in Jerusalem, and let God sort out
23 who was Jewish, who was Muslim, who was Christian."

24 But the hand of one is the hand of all, that can be a
25 -- something just mashes people when they don't need to be

1 all mashed with the same hand. What I'm getting at is, why
2 do we need a jury if it's just the hand of one is the hand
3 of all? Something awful happened out there and I'm not
4 excusing it. A man was killed, but you have evidence in
5 front of you to make a decision and you're not bound --
6 you're not bound by this hand of one is the hand of all
7 concept. The law says that if you want to be bound by
8 that, you can be bound by that. If you want to go back
9 there and say, "Okay. Dexter Perry is dead. We got three
10 people sitting there." You know, you can take five
11 minutes. Hand of one is the hand of all. Let the Lord
12 sort it out in the end, but lets just find them all guilty
13 of everything.

14 But you have an opportunity and you're supposed to do
15 your duties to go through each defendant and each
16 indictment and -- if you want to make it simple, find
17 everybody guilty of everything. But that's not what you're
18 here for is to go home by two o'clock today, because these
19 people won't be going home. You're here today to decide
20 levels of guilt. That's your job. You can find somebody
21 guilty of one thing and not guilty of another thing. You
22 can find one defendant guilty of something and not the
23 other defendant guilty of the same thing. That's your job
24 today.

25 Now, what we have here is the State's own witnesses --

1 the State's own witnesses, except for Mr. Hollins and we'll
2 get to Mr. Hollins in a minute, but Joe Husser, he has
3 Kerry Hollins in the house. Kerry Hollins is the guy that
4 the prosecution is going to do for him what they don't want
5 you to do for the defendants. And what I'm saying is, if
6 you think that Mr. Hollins is going to testify and he was
7 testifying because he had -- he had a hang up, a bad
8 conscience, and that these folks are not going to help him
9 out in the long run and not going to do something for him,
10 then you were born last night. Because what's going to
11 happen is that after this case is over -- you're probably
12 going to read about it probably next week -- Mr. Hollins is
13 going to get some deal offered to him and he's going to
14 take it. You know why? Because the prosecution has that
15 power. They have the power to decide levels of guilt.

16 Now, they -- they seem to think that Hollins is less
17 culpable than everybody else. He's their witness. Well,
18 you know, if they can take that concept of morality, which
19 is what Ms. Wilson wants you to forget when you go back
20 there today, if they're going to exercise their morality
21 and decide that Mr. Hollins is their witness and they going
22 to do something for him, then you have the same right to go
23 back in that jury room and decide, out of these three
24 people, levels of guilt.

25 So she's -- she's -- she's contradicting herself.

1 Morality has to be in this courtroom. All law is based on
2 morality. Matter of fact, some -- some -- Cato in the 1st
3 Century says, "When morality and society degenerates, the
4 society creates more laws." And you can tell the more
5 corrupt a society is, the more laws we have. A lawless
6 society wouldn't need laws. Unfortunately, us all being
7 fallen people in some respects, we need laws to guide us.
8 Laws are based on morality.

9 So don't go back there and throw out your morality and
10 throw out your common sense and throw out your sense of
11 justice, and just say, "Hey, I don't want to think today,
12 you know, my mind -- you know, I'm just not that smart. So
13 let's just say the hand of one is the hand of all.
14 Everybody's guilty of everything."

15 But Mr. Husser, himself, their witness who was there,
16 his testimony, he never saw Gary Grant in the house. He
17 never saw him in the house. He didn't pick him out of a
18 lineup. He describes three males. Remember, he described
19 three skinny males. He never picked out Grant in the
20 house. He never saw Grant. Joe Husser said that Kerry
21 Hollins, Kerry Hollins, their witness -- the witness is
22 going to get the deal, believe me. Their witness was in
23 the house. Kerry said he wasn't in the house, he was just
24 driving around, just taking them from place to place. But
25 Joe Husser who's in the house, says that Kerry Hollins was

1 in the house and pistol whipping Dexter with a .38 caliber.
2 Now, you have their witness putting Kerry Hollins in the
3 house, beating Dexter with a .38 caliber.

4 Then you have Mr. Cobbs himself saying that the skinny
5 male, he refers to Manny -- Manny over there. The skinny
6 male had a .45 caliber, and he was pistol whipping the
7 victim.

8 So, you've got two of the State's witnesses, Husser
9 and Cobbs, saying that Manny and Kerry Hollins were pistol-
10 whipping Dexter Perry. Now, Mr. Cobb says Mr. Grant had
11 him with a gun to his head, but Mr. Cobb does not put Mr.
12 Grant doing anything to Dexter Perry.

13 And when you heard from the -- you heard from the
14 ballistics man, two bullets were found in Mr. -- Mr.
15 Dexter: there was a .45 caliber, the gun that Mr. Cobbs
16 says that Manny was carrying, and a .38, which is the gun
17 that Mr. Husser says that Kerry Hollins had. He described
18 three skinny males in the house. Mr. Hollins was
19 relatively thin. I wouldn't call him skinny, but he's not
20 250/260 pounds like my client.

21 So you have an opportunity here to decide levels of
22 guilt. And if the hand of one is the hand of all, you can
23 do what you need to do on that. But these folks here have
24 already exercised their morality and their discretion, and
25 they have already put up in person who by all accounts --

1 if -- if these two gentlemen are guilty, he's just as
2 guilty. But they're giving him a deal. They're going to
3 give him deal ---

4 MR. JENNINGS: Objection, Your Honor. There's no
5 evidence ---

6 THE COURT: Please -- please approach.

7 (Bench conference.)

8 THE COURT: Overruled. Mr. Bolus, you may continue.

9 MR. BOLUS: Thank you, Your Honor. I am not here to
10 say that my client, Mr. Grant, is a poster boy and should
11 get some sort of award or something like that. But you
12 know, we as people, we have an obligation to delve out --
13 when you're on jury, to delve out punishment that you see
14 fit, and this system of justice is not the only system of
15 justice. There is other systems, there'll be other places
16 where justice is going to be rendered, and in those other
17 places people will be rewarded for what they do in life and
18 they'll be punished on the level of their sin. And you
19 have the same ability and right to do what the prosecution
20 does in this case and what they do in every case. I'm
21 asking you, please go through each indictment and decide
22 the level of guilt.

23 Whatever happens, anybody getting convicted of
24 anything, they're not going to go home. They're going to
25 be punished very severely. And you can sit stick around

1 and hear what the judge does if someone's convicted, and
2 you know, you're going to find out what the levels of
3 punishment are, but just to go back there and say "the hand
4 of one is -- is the hand of all." and we don't want to
5 think about anything else, that's a failure of the system.

6 In closing, there was no -- there's really no evidence
7 of armed robbery in this case. It looks like it might have
8 been an attempted robbery. There is no evidence of any
9 goods being taken. Dexter Cobbs' [sic] own people, his own
10 relatives, his own folks that were with him, there's no
11 mention of any goods being taken. You know, that may be
12 kind of minor in the long run, but it's something that you
13 need to consider, that the only person that said anything
14 about goods being taken was Mr. Hollins, who is a
15 defendant, who is their witness, said something about Mr.
16 Grant saying that, "I had a bracelet and a ring." There's
17 no bracelet and ring in this courtroom. They've got a lot
18 of other evidence. They did not bring that in here.
19 There's no money, there's no drugs that were stolen.
20 There's absolutely no indication that any goods were taken.
21 And in the long run that may not be a big matter, but there
22 is -- that's still a matter for you to consider. There was
23 no armed robbery in this case.

24 I just ask that you do your duty today. It's going to
25 be tough, but you can -- whatever happens, you put in a

1 good week and one day you'll be talking to your kids and
2 grandkids about the week spent in Berkeley County. It's
3 not fun, but it's something you have to do. Thank you.

4 THE COURT: Mr. Barnwell?

5 (Sotto voce discussion between the court reporter and
6 the Court.)

7 THE COURT: Mr. Barnwell, let me interrupt you one
8 second. Could counsel approach for me, please?

9 (Bench conference.)

10 THE COURT: Mr. Barnwell, if you will just give us a
11 second and then you may proceed. Mr. Barnwell, you may
12 proceed. We appreciate your indulgence, Ladies and
13 Gentlemen.

14 MR. BARNWELL: Ladies and gentlemen, I would like to
15 thank you for the very close attention you've been paying.

16 Please listen carefully to this -- my closing
17 argument, because I don't get a chance to come back again
18 and talk to you again. Under the rules, the State gets the
19 last argument because I did introduce some evidence, which
20 was the lineup where Kerry Hollins was identified as being
21 present.

22 I talk to you about reasonable doubt. I thinking,
23 give you reasons for you to doubt, if you did have some
24 doubt. I'm going to mention some things, not to say these
25 are exclusive at all. You may have some doubts from what

1 Mr. Bolus -- his presentation or Mr. Jones's presentation
2 or -- or something you just picked out yourself listening
3 to testimony. But I'm going to suggest a few reasonable
4 doubts.

5 Mr. Bolus mentioned the hand of one is the hand of
6 all, and Ms. Wilson also included that as part of her
7 presentation. What that has to do with is if there's
8 agreement to participate, or -- and participation in -- in
9 an armed robbery and a murder results, then the hand of one
10 is the hand of all. But there has to be an agreement and
11 participation, or that doesn't apply. It applies when --
12 when the agreement ends. So you make -- if -- if you going
13 to find my client, Jermaine Hartwell, guilty of all of
14 those things based on the hand of one is the hand of all,
15 you have to find that he agreed and participated.

16 Now, Tawana Deas said he wasn't present at the Red
17 Lobster, he wasn't present at Ruby Tuesdays. She never
18 heard Marquita Smith say anything about him. At Tawana
19 Deas's house her testimony was she ran and jumped over the
20 balcony. She doesn't know who -- who was there, who wasn't
21 there, or -- or if -- if Mr. -- Mr. Grant and Mr. Hartwell
22 were simply merely present.

23 I mentioned in -- in the -- in the opening argument
24 that his position is he -- he had a bad drug transaction
25 with Mr. Perry and he wanted to discuss that with him.

1 There's no -- there's no fingerprints -- no
2 fingerprints on that broken door.

3 And I would ask you also to listen to the judge's
4 instructions. She's going -- she's going to instruct you
5 on -- on mere presence. If a person is merely present,
6 that doesn't mean they're -- they're guilty. The State has
7 to prove that they actually committed the crime, not just
8 that they were -- just there.

9 I don't believe there is testimony from Mr. Cobbs that
10 -- that Jermaine Hartwell had a .45 pistol. Mr. Cobbs said
11 that he heard the name "Manny," but Manny was not present
12 in the courtroom. And also, testified two guys came later.

13 Now, I want you to recall there are four -- four
14 people who are saying they're involved in this. One of
15 them is a driver and three -- three guys were -- were in --
16 in the -- in the residence, according to testimony. Birdie
17 Cobbs, she doesn't see who was -- who was pointing a gun.
18 She identified Gary Grant. She did not identify Jermaine
19 Hartwell as being somebody who was pointing a gun. Mr. --
20 Mr. Cobbs did not identify Jermaine Hartwell.

21 Chris Nelson -- Chris Nelson is not a credible
22 witness. He -- he's a drug dealer by his own admission.
23 He was dealing drugs for about eight months. He comes up
24 with this cock and bull story about a gun. He said, "Well,
25 he ran down four or five trailers." He said that one of

1 the guys outside the trailer pointed the gun at him and he
2 wrestled it away. That make sense? Or the guy recognized
3 him and gave him the gun? But did he give -- did he give
4 the gun back to the guy? He didn't recognize the guy. He
5 -- he didn't remember who it was. He throws it down in the
6 grass. He doesn't say, "Thank you very much. I had an
7 emergency. I had to run down to this trailer. I
8 appreciate you giving me the gun." That's not some gun he
9 got from someone. This is his gun. He's not credible.

10 And he's not credible about peaking in a window and
11 what he saw peaking in the window either.

12 He's not credible at saying he saw Jermaine Hartwell
13 through the air conditioner. And he also, in his
14 statement, didn't say Manny was the one that was pointing
15 the gun. Said some guy was pointing the gun. First time
16 he mentioned "Manny" was on the witness stand, claiming
17 that he saw him -- recognized him from some clubs.

18 Mr. Bolus's theory that Chris Nelson was just
19 protecting his -- his drugs and his money is certainly a
20 reasonable -- reasonable conclusion.

21 And also, as far as the time goes, he was saying that
22 he ran down -- ran down -- left -- ran down five or six
23 trailers, got a gun, got somebody to call 9-1-1. He said
24 that's take 15 seconds, but that would be time as far as
25 somebody entering the trailer later. Mr. -- Mr. -- Mr.

1 Cobbs says that people entered the trailer later.

2 What about Joe Husser? Now, Joe Husser -- the
3 prosecution called Mr. Husser. They did not introduce the
4 lineup where he -- he identified Kerry Hollins. I did
5 that. I put that into evidence. There's another
6 identification of my client, but his description was that
7 person had (as read) "facial hair, not a goatee, long
8 sideburns," and that would have fit Mr. Hollins' picture
9 better than Mr. Hartwell's picture. He -- he claimed -- he
10 said in his statements that he didn't really know what the
11 other two guys looked like. Mr. Kerry Hollins was never in
12 the house. He was -- he was out driving the Pontiac G6.
13 He wasn't -- he -- he was never even there. Mr. Husser is
14 not credible.

15 Kerry Hollins did testify that Jermaine Hartwell got
16 bad product from Dexter Perry and he wanted to make it
17 right. Also testified that -- that only person that Dexter
18 Perry knew was Jermaine Hartwell. He didn't know any of
19 the others. He didn't know Mr. Grant, he didn't know him,
20 and so his testimony that Dexter Perry said, "Manny did it"
21 -- and it came up through testimony from a lot of different
22 people after he was shot -- I would like you to consider
23 whether he just mentioned the name of the one person he
24 knew in the hopes that other people would get held
25 responsible, that that's the reason he mentioned Manny's

1 name.

2 But also, I ask you to listen carefully to the judge's
3 instructions on dying declaration, whether this is, in
4 fact, a dying declaration.

5 Again, I emphasize the presumption of innocence. I
6 would ask that you listen very carefully to the
7 instructions of the judge again about presumption of
8 innocence, which is that a person is innocent unless the
9 State proves his guilt beyond a reasonable doubt. The
10 burden is on the State. The burden is on the State to
11 prove him guilty. Thank you very much.

12 THE COURT: Mr. Jones.

13 MR. JONES: Your Honor, if I may, I'm going to use ---

14 THE COURT: Certainly. Go ahead take the time that
15 you need to set up.

16 (Sotto voce discussion between Mr. Jones and State's
17 counsel.)

18 MR. JONES: Ladies and gentlemen, I want to kind of
19 start out a little different. I want to walk through the
20 sequence of events and a little bit of Tuesday and a little
21 bit of Wednesday's testimony.

22 Obviously, you can tell there is a little difference
23 between my client and the rest of the people charged with
24 these crimes. She's charged with accessory. She's 19.
25 She wasn't present. It's a little different circumstance.

1 Keep in mind that the two pieces -- the key pieces of
2 evidence against Marquita Smith are her statement and Kerry
3 Hollins.

4 You somewhat have to decide the truth on those two
5 statements. There's not a lot of evidence otherwise: no
6 forensic evidence, nobody in the house that saw or heard or
7 knew anything about Marquita Smith. So really only the
8 events at the house they're saying she's responsible for
9 because they happened, and because of her earlier actions.
10 Again, the hand of one is the hand of all, and that she
11 should have known that all this was a -- let's see, what's
12 the -- (as read): "a probable and natural consequence of
13 her actions."

14 And all this comes down to credibility. And again, it
15 really comes down to for Marquita Smith, Kerry Hollins and
16 Marquita Smith. You've heard her testimony introduced
17 through Detective Merrithew. There wasn't any reason to
18 add anything to it. She said what she said, and I told you
19 the first day I come up that she played a role in it. She
20 knows there's going to be consequences for it, and all we
21 ask is that we make sure that the consequences -- and your
22 job is to make sure that the consequences -- that she's
23 held accountable for the part that she did and not for
24 everything that happens.

25 But I want to kind of walk you through something re

1 quick. Ladies and gentlemen, you remember on Tuesday Mr.
2 Husser took the stand. Mr. Husser sat down, the solicitor
3 -- solicitor's witness -- that he gets to use Mr. Husser to
4 get the evidence that Mr. Husser knows that effects this
5 case. That's the mechanism that he is able to get that
6 evidence into court so that you all can hear it and decide.
7 He can only do it through his witnesses and he can do it at
8 the appropriate time. When he calls a witness, he has that
9 opportunity, it's called "direct examination," to get into
10 evidence his case and so that you all can hear it to
11 consider.

12 And he got up and he sat down the lineup, and I'm not
13 sure which one it is over there, but Mr. Husser, he got the
14 little laser pointer out and he pointed up there. And he
15 got Mr. Husser to identify -- I think it was Manny that he
16 identified in the house. He said, "You sure?" "Yeah, I'm
17 positive, sure." "Okay." All that stuff.

18 He took that off and asked that they enter that into
19 evidence. Marked it Defense Exhibit -- State's Exhibit,
20 I'm sorry, whatever number.

21 Sat it down. Came back and he asked some other
22 questions. Asked a few things, and then he sat down. On
23 direct examination that was his opportunity to put in any
24 evidence that Mr. Husser had regarding this case. That was
25 his opportunity. That one time he said, "Ladies and

1 gentlemen of the jury, please answer any questions that the
2 defense has."

3 Well, Mr. Bolus got up and asked some questions. Mr.
4 Barnwell got up, and you know, this -- there's a little bit
5 of confusion. He got up and he picked up these pictures,
6 walked up to Mr. Husser and showed him, and Mr. Husser
7 pointed something out on here, and then he attempted to set
8 it on here and testify. And you heard there was some
9 confusion. "That's not in evidence yet. That's not in
10 evidence yet."

11 And there was a little confusion of now, is this the
12 State's evidence or is this the Defense's evidence?
13 Because it's the State's portion of the case we were still
14 in, but it wasn't the State introducing this evidence. It
15 was the defense, Mr. Barnwell. We ended up naming it
16 "Defendant's Exhibit Number 1," and I know Mr. Barnwell
17 talked about, "Well, I got this in and that affected my
18 ability to go last," and all. I'm glad he did.

19 But what Mr. Barnwell did was he ended up sitting this
20 down --

21 (Sotto voce between Mr. Jones and State counsel.)

22 And obviously I'm not sure if any of us really
23 understood the significance of it at that time. And he
24 asked Mr. Husser to come over here and take that laser
25 pointer, and point out if there's anybody on there that !

1 recognized. And he took that laser pointer and he pointed
2 it right there on the top left to Kerry Hollins.

3 And Mr. Barnwell asked him, "Are you sure?" "Yeah,
4 yeah, yeah." And he sat down and then I got up and I said,
5 "Are you positive that's the person that was in that house
6 pistol whipping you? Are you positive he was at the scene
7 and in the house?" Mr. Husser said, "I'm positive that's
8 the guy that was in there. That's the guy that was pistol
9 whipping me."

10 Now, you notice when I got done, the State never got
11 up. They never refuted that. They never addressed that
12 issue. If you think about the significance of it, if Mr.
13 Barnwell hadn't gotten up and sat this thing under there
14 and made this Defense Exhibit Number 1, you know who would
15 have been sitting and testifying before you the next day
16 and you would have never known that he was in that house
17 pistol whipping Mr. Husser? Kerry Hollins. Sound like a
18 "hide the ball" to you?

19 He got up and deliberately didn't present this, didn't
20 put this in. To make matters worse, the next day he put
21 Kerry Collins on the stand -- Hollins, I'm sorry. And the
22 one thing he said is he said, "I got one instruction from
23 the solicitor," Mr. -- Mr. Hollins, "tell the truth."

24 What's Mr. Hollins say? "I was never there. I was
25 never in that house."

1 Now, you notice how the State put Joe Husser on
2 Tuesday, put Mr. Hollins on Wednesday. If Mr. Barnwell
3 hadn't got up there, there's no other way that ID they
4 could get in. Y'all were never intended to know that Kerry
5 Hollins was in that house.

6 Did you ever hear the State ask Mr. Hollins about,
7 "How was your car put at the scene in that trailer park
8 that night?" That ID, that was made by Joe Husser, was
9 made the night of this incident. And Kerry Hollins,
10 arrested the night of that incident by Trooper Davis in
11 that car, did you notice the State never asked and never
12 tried to reconcile how Kerry Hollins could have been
13 identified by Chris Nelson, his car -- Kerry Hollins' car,
14 and by Joe Husser in that trailer park. And an APB went
15 out on that car that night, which is why Trooper Davis
16 stopped him that night shortly -- not too long after that
17 murder.

18 The detectives did their jobs: They got on it; they
19 got the information out; they knew Kerry Hollins was
20 involved; they knew Kerry Hollins was in that house; they
21 put an APB out. And you know who's telling you all this?
22 The defense. And you know why Kerry Hollins is up here?
23 Because Kerry Hollins's story is a little different than
24 Marquita's. And if they can use that truth then they can
25 hold trial, extend this "hand of one, hand of all" to

1 Marquita Smith.

2 It was -- it was a egregious thing to set her cousin
3 up. But she sat up there and you read in her statement
4 that she set him up to be robbed. She didn't -- she -- the
5 gun -- Kerry Hollins set up there and he lied in y'all's
6 face and he said Marquita set all this up.

7 You notice he's pretty confident and he's pretty
8 cocky. But think about it: If the State gets up here --
9 excuse me. Get a little water.

10 But if the State stands up here today and they tell
11 you to believe Kerry Hollins, you think they would have
12 intentionally put him up here and not put this other
13 evidence in, that he was picked out at the scene. Now you
14 think about it: If they get up here and they tell you,
15 "Ladies and gentlemen, you need to believe Kerry Hollins
16 because Kerry Hollins defined what a lick was. You need to
17 believe Kerry Hollins." Kerry Hollins said that a watch or
18 a bracelet and a ring was taken out of that house. To get
19 to armed robbery they've got to have something taken out of
20 that house. They've got to have something called
21 "asportation." Something's got to be taken away with the
22 intent to carry it off.

23 You notice they never brought any of Dexter's family
24 in to say whether he ever had a ring or bracelet? You
25 notice they never asked Chris Nelson, his best friend? You

1 notice that they never asked a single person in that house,
2 "Did you see if anybody took anything off of him?" The
3 only person is Kerry Hollins. And then I -- I think Joe
4 Husser talked about he couldn't find his wallet, so he
5 assumed; but again, you saw how the house was torn up. He
6 couldn't say what happened to the wallet one way or the
7 other. But they used Kerry Hollins. That's how they're
8 getting to the armed robbery. That's the only way they get
9 to that armed robbery.

10 And -- and again, follow the line -- Joe Husser's a
11 victim, too. They're requiring you to pick your victim.
12 Is it Dexter Perry or is it Joe Husser? Because you think,
13 two months down the road, as Mr. Bolus said, this case will
14 be over. And you think that the solicitor gets up here and
15 he says, "Ladies and gentlemen of the jury, I told, right
16 here in front of you, Mr. Collins -- Hollins" -- I'm sorry
17 -- "to tell the truth." Do you think they're going to
18 prosecute him and go after him? They don't know whether
19 he's the shooter or not. I mean, think about it:
20 Potentially, the murderer was sitting right there. They
21 never addressed it, yet they verify his statements and they
22 verify that he wasn't there. They can't go back after him.
23 Who's going to go after him? This is Number One in the
24 office and Number Two in the office. There's nobody that
25 can come back and hold him truly accountable for Joe

1 Husser.

2 They can't put Joe Husser -- do a separate trial, put
3 Joe Husser -- what are they going to do? Put Joe Husser on
4 the stand? Joe Husser's going to say, "Well, you said I
5 was truthful back in the trial of Marquita Smith and
6 everybody else." And Kerry Hollins is going to say, "Well,
7 you said I was truthful and you told the jury I was
8 truthful back in the -- in the -- in the trial for Marquita
9 Smith."

10 You want to know what the deal he got? The deal is he
11 gets the State to sanction his story when we know he was
12 there. There's no other way Joe Husser knew who Kerry
13 Hollins was. It was that night right after the murder.
14 They didn't know each other. Kerry Hollins said they
15 didn't know each other. There's no other way they knew
16 each other. What's the explanation? There's no way. And
17 the State was hoping you would never find out, because if
18 Mr. Barnwell hadn't have put that -- set that slide up
19 here, it would've never have come out. Because the only
20 time that the solicitor could put that into evidence was on
21 direct examination when Mr. Husser was sitting right there.

22 And the funny thing is, is that the State, right there
23 in front of Mr. Husser, in essence, gutted a lot of the
24 case if they -- if Mr. Husser wanted to have full
25 accountability for what happened to him.

1 It's wrong. And -- and why? Because Kerry Hollins
2 was able to define "lick," and was able to try and put into
3 terms so that they could get to Marquita Smith so that they
4 could say Marquita Smith was an accessory, and that Kerry
5 Hollins could tie her into this plan, and -- and make all
6 of this foreseeable for -- for Marquita Smith. There's
7 nobody else that can do it.

8 But I don't mind -- you know, witnesses all the time
9 get up and the defense says you believe this witness and
10 the State says you believe this witness. The State's put
11 you in an impossible position. If Kerry Hollins wasn't at
12 that scene, then Joe Husser, Chris Nelson are lying. But
13 they made identifications. They heard the word "Manny."

14 If Joe Husser's telling the truth and Chris Nelson's
15 telling the truth, then Kerry Hollins' car was in that
16 trailer park, Kerry Hollins was in that house; and Kerry
17 Hollins was beating on Joe Husser and Kerry Hollins
18 potentially pulled the trigger on Dexter Perry. And the
19 State is never, ever, ever going to tell you that.

20 And they were going to pick and -- cherry pick the
21 little pieces of truth of -- of what they wanted you to
22 perceive as the truth, to use it to get to an end. And
23 that's scarey. They -- they're supposed to seek justice.
24 They're supposed to be seeking -- put it all up there. You
25 have the right to decide credibility. But if you don't get

1 the information -- if you never got that, you can't decide.

2 You take everything -- the solicitor gets up there and
3 says, "The only thing you got to do is tell the truth."

4 You take everything that they say for the truth because
5 they put it up there. That's a big, big, issue that Joe
6 Husser was being pistol whipped in that house by him, and
7 he's adamant that Kerry Hollins was there. That's a big
8 issue. And how in the world if you don't have that
9 information are you able to decide whether Kerry Hollins is
10 telling the truth or not? It's wrong. It's wrong. It's
11 wrong.

12 Two -- well, Marquita Smith's statement was entered in
13 and Kerry Smith's [sic] was entered in. Kerry Smith [sic]
14 said, "I didn't get --" you know, did you notice when I
15 pressed him on it? I said, "What changed two weeks ago?"

16 The State knew August of last year that Kerry Hollins
17 was in that house beating on him. They knew that. The
18 police officers took the statements. They knew that. They
19 knew that car was in the parking lot. They put it out on
20 the radio. But they didn't tell you because it didn't go
21 to their version of the events. And you talk about
22 reasonable doubt?

23 If Kerry Hollins is who's going to decide whether
24 property was taken away, if Kerry Hollins is going to
25 decide what a lick is defined as, if Kerry Hollins is going

1 to decide what the plan was, they sure didn't want you to
2 know that he was sitting in that house.

3 You want to know what the deal is? He gets up here
4 and says what his original statement says, they gloss over
5 the fact he was in there. Sorry Joe Husser. Sorry Dexter
6 Perry. Sorry if you're a potential shooter. Pretty
7 smooth. You want to talk about somebody -- you want to
8 talk about a lick? That's a lick.

9 There's a limit "to hand of one, and hand of all," and
10 the State can't manipulate the evidence and not put stuff
11 in to try and reach their end.

12 So a 19-year-old girl, and the State's going to hold -
13 - they've been manipulated by Kerry Hollins, but it's okay.
14 And they're going to take a girl that made a bad choice --
15 it's every parent's nightmare -- that made a bad choice in
16 a boyfriend. Kerry Hollins intentionally didn't bring up
17 guns. He didn't talk about guns. It's never in his
18 statement that he ever told her there was a gun. It's
19 never in his statement that he told her they were going to
20 do any type of kidnaping. It's never in his statement or
21 in his testimony that he was going to -- to arm -- to -- to
22 do an armed robbery, any of it.

23 He got Marquita -- and you know, Marquita came in on
24 her own. She came in. Detectives called, and they said,
25 "Look, we've got Kerry Hollins and we've got a statement."

1 She never asked for an attorney. She sat down and she told
2 them everything. She said this is what we did. And yet,
3 all-in-all, the facts line up, except there was never a
4 mention of guns, there was never a mention of an armed
5 robbery, was never a mention of any attempt, any plan of
6 murder. Kerry told her he wouldn't get hurt, and Marquita
7 sat right there and told them everything.

8 But they couldn't manipulate her facts to try and get
9 to this armed robbery. They had to try -- and get this
10 murder on her.

11 And -- and Dexter Perry's family is mad. I
12 understand. It's her cousin. It was a horrible thing to
13 do, but hold her responsible for the part that she did.
14 Don't let the State trick you into casting this wide net.
15 They've already tried to trick you once by withholding a
16 crucial piece and asking you to believe a witness that they
17 would never have told you was in that house. You talk
18 about a deal with the devil?

19 Just briefly going through it. I -- I don't want to
20 totally focus on Kerry Hollins, but if you think in terms
21 of Marquita's statement and the facts surrounding it and
22 even pieces of Kerry's, she's tried to -- Marquita couldn't
23 even set up the right restaurant to go to. She goes to Red
24 Lobster. They're closing. It's a public place. It's not
25 a -- it's -- it's not a dark road. It's not a dark house

1 or anything. It's a public place.

2 The next place is the second Ruby Tuesdays. It's
3 closed too. She then goes to the third Ruby Tuesdays and
4 Tawana testifies she didn't want Kerry to know where she
5 was. Presumably she had a problem. She went to Ruby
6 Tuesday one and Ruby Tuesday two.

7 She loved Kerry and Kerry manipulated her. But there
8 are little glimmers of her trying to back out of this
9 thing. She gets there and, you know, the whole deal where
10 Kerry says and all is, "I didn't want to come out there
11 because I didn't want Tawana to see my face because she
12 knows me." You heard Tawana testify that Marquita told
13 her, "Kerry's across the road at McDonald's," at that time.
14 She told her that. And you know what Kerry says, "I was
15 never in the area of Ruby Tuesdays." Tawana's their
16 witness, and so is Kerry.

17 They did go from there and they go -- and supposedly
18 the plan at Ruby Tuesdays, it falls apart. You know what
19 Kerry says? "Something came up."

20 What came up? Did he have a business meeting or
21 something? What came up? I tell you what came up. Kerry
22 Hollins planned this all along. Kerry Hollins never told
23 Marquita about any guns, any armed robbery. He assured her
24 nobody would get hurt. All Marquita was thinking is
25 they're going to run out there, snatch the money -- Dexter

1 carried the money on him -- grab the money he had on him
2 and go. It's wrong, it's bad; no doubt about it. But it's
3 not murder, and it wasn't an armed robbery. And Kerry
4 intentionally worked it that way.

5 She then goes, leaves, takes Tawana, drops Tawana off.
6 Tawana then gets her brothers. Tawana leaves with her two
7 brothers who live with her and they go home. Marquita goes
8 to the Hess Station and meets with Kerry. Kerry says, "Go
9 in there and find out where Dexter's hole is."

10 She calls Dexter and says, "Hey, where you at?"
11 Dexter tells her he's at the trailer park in Silver Fox.
12 She goes into Silver Fox. And when she pulls up, what does
13 she find? Dexter's there. Who else is there? Six to
14 eight guys. There's a cookout that's winding down.
15 There's six to eight guys in there. Talks with Dexter,
16 leaves from there, goes back to the Hess, talks to Kerry,
17 and then goes on her way home.

18 Dexter calls. Dexter says, "I'm going over to
19 Tawana's." Dexter goes over and -- he goes on over to
20 Tawana's. He calls Tawana and says, "I'm coming over."
21 She goes over there. Kerry calls Marquita. Marquita says,
22 "Everybody's going over to Tawana's." Dexter says, "I'm
23 going over there with the crew." I'm sorry, Kerry says,
24 "I'm going over there with the crew."

25 She gets to -- again, Marquita didn't know whether the

1 brothers were in there or not. And by this time, you gotta
2 think, nothing happens at Red Lobster, nothing happens at
3 Ruby Tuesday one, nothing happens at Ruby Tuesday two,
4 nothing happens at Silver Fox. You know, maybe it's a
5 bunch of boys just bluffing and bragging. She's never seen
6 any guns or anything. She's never been involved -- Kerry
7 said, to his knowledge she didn't have any expertise in
8 this, any prior involvement in this.

9 Get to Tawana's, they step outside, and you've heard
10 Tawana testify Marquita says, "Something is not right."
11 And she says it loud enough for Dexter to hear. And she
12 says, "Tawana, get back inside."

13 And at that time everything breaks loose. They knock
14 her down, Tawana goes over the banister, she's calling the
15 police, Marquita's running, they grab Dexter. And at that
16 point in time, it's not foreseeable, it's not foreseeable
17 that they're going to snatch him. Nothing's happened at
18 every point before that. That's not foreseeable. It's not
19 a probable and natural consequence.

20 They did take Dexter over to Silver Fox and Marquita
21 runs and meets up with Tawana. At this time Tawana's
22 already on the phone with the police. And you heard that
23 Kerry called while Tawana was on the phone with the polic
24 and says, "What's she doing?" And she -- and Marquita
25 hangs up.

1 Now, the police -- you know, the solicitor rather, the
2 State said -- made a big deal about Marquita's first
3 statement, said it was false. It really wasn't false. She
4 just didn't provide all the details. She said two or three
5 people grabbed Dexter. But you know what she did say? She
6 said they're in a purple Nissan. You remember what Chris
7 said? The car they had been in the whole night was
8 Dexter's, I think, green station wagon. The purple Nissan
9 was Amber's. It was Chris Nelson's sister, cousin,
10 whatever -- it was niece, something like that. It was her
11 car. No association with Dexter.

12 Notice what Marquita did. Again, a little glimmer.
13 She gave them the right car to look for. She was too
14 scared to give everything. Should have -- should she?
15 Sure. Sure. No doubt about it. But she's not guilty of
16 murder, and she's not -- and that's not foreseeable
17 consequence. That's not "hand of one, hand of all" for
18 armed robbery.

19 When she gives that information -- you know, and when
20 we go to foreseeability, is it foreseeable they would have
21 taken Dexter back to Silver Fox? Think about it. Chris
22 says -- all the cops, Joe Husser, Chris, everybody says,
23 "Dexter doesn't live here. He doesn't reside here. He
24 doesn't spend the night over here. He doesn't keep stuff
25 over here. He comes over here and hangs out occasionally."

1 Chris says, "He doesn't keep his money over here. He
2 doesn't know what money I have. I knew he had some money,
3 but my money is in a shoe and I don't tell him what money I
4 have."

5 And keep in mind Chris also said, "Dexter and I never
6 carry guns." So no -- Marquita -- there's no need for a
7 gun.

8 The State talked about four to one -- four people on
9 one. We'll address that. Marquita had been to Silver Fox,
10 remember, back 45 minutes/an hour earlier; and met with
11 Dexter and then left. There was a cookout going on.
12 There's six to eight guys outside. And we know because
13 later on that evening Chris Nelson got a gun from one of
14 them. At least one of them had a gun, presumably maybe
15 more. And as far as anybody knew, those could be Dexter's
16 people. Who's going in there? And now it's not four to
17 one. Now it's eight or ten to four. Is it foreseeable at
18 all that Marquita should have known that they were there?
19 Should she have told the police what she did? Sure. That
20 doesn't make her guilty of armed robbery, doesn't make her
21 guilty of murder. They're trying to stretch that.

22 Whatever happens at the house -- is it -- let me ask
23 you this: Is it foreseeable that Chris Nelson would have
24 come up there, seen what's going on, run down the street,
25 not call the police or anything, run upon to his cousin's

1 house, there's six -- six/seven guys out there. One of
2 them draws down, he snatches the gun away, yells, "Call
3 9-1-1." Just think about whoever's hold -- carrying that
4 gun? Tell me what the odds are that that person's going to
5 call 9-1-1? Probably pretty slim.

6 He runs back and he opens fire; shoots three times
7 through the front door. Is that a probable and natural
8 consequence? Is that foreseeable for Marquita? The law
9 doesn't say you have to foresee every single consequence or
10 circumstance. And if you -- if you don't, you're not
11 liable for every -- all consequences. There is individual
12 liability, and there is actor's liability at the scene.

13 Kerry Collins -- Hollins got up here and he testified,
14 and the solicitor said, "What's a lick?" He said, "It's an
15 armed robbery."

16 You saw Mr. Bolus got up here and press him, and he
17 said, "Well, a lick could be an armed robbery or it might
18 be -- might not be armed." And a lick can also be a noun,
19 meaning the subject.

20 The State came up here the first day and they used
21 armed robbery, armed robbery, armed robbery. The only
22 evidence that Marquita knew of any armed robbery or could
23 have foreseen any armed robbery is through Kerry Hollins,
24 nothing else. Nothing else.

25 Ladies and gentlemen, to find armed robbery, you've

1 got to find property was taken away. Kerry Hollins is the
2 only person -- and you think, if truly property had been
3 taken away, the State would have been up here and they
4 would have had Dexter Perry's family, Chris Nelson, or any
5 number of the people that were in the house and said, "Did
6 you see him taking anything off? Did you see him doing
7 anything?" Didn't -- never asked that question, never
8 once.

9 They want you to take Kerry Hollins' word at it's face
10 value. And again, from the very beginning, they were going
11 -- they planned to leave out the fact that he was a suspect
12 in there, pull the wool over your eyes ---

13 Ms. Wilson: Your Honor, I object to that.

14 THE COURT: Please approach.

15 (Bench conference.)

16 THE COURT: You may proceed.

17 MR. JONES: Ladies and gentlemen, I'm going to close.
18 It's been long enough and I'm going to ask that you don't
19 believe what Kerry Hollins said. We know -- we know
20 there's a deal. Ladies and gentlemen, Kerry Hollins is the
21 key to Marquita Smith.

22 For Marquita Smith there is a charge on there for
23 accessory before the fact to attempted armed robbery. I
24 told you when I came up here the very first day, I'm not
25 trying to say that she doesn't have any -- that she

1 shouldn't be held accountable at all. From the very first
2 day I got up here I never said that. It's a horrible thing
3 what happened. She's a smart girl, she did what she did.
4 But ladies and gentlemen, my office -- my law office has
5 nine people in there, maybe same number of staff. If I
6 give somebody the key to my office and I say -- and the
7 alarm code, and I say, "Go in there and steal the computers
8 out of my office at night," and they walked in there on
9 Monday morning, nine o'clock, and kill everybody in there,
10 it's not the "hand of one, hand of all." I'm going to have
11 some liability, but that's not foreseeable.

12 What the State's saying is because a bad act happened
13 and because she had some involvement at some point in the
14 lineup, she's liable. That doesn't make sense, and that's
15 a scarey principle for every single person in here. And
16 that's a scarey principle to let the State draw it out that
17 far. There's a point to where there's a new plan and to
18 where the actors on this kidnaping and all of those things
19 are responsible for what they did, she's responsible for
20 what she did.

21 You've got an instruction on there for accessory
22 before the fact of attempted armed robbery. Again, nothing
23 -- only person that said anything was taken was Kerry
24 Hollins. I would ask that if you find that's the case, I
25 would ask that you find her guilty of accessory before the

1 fact of attempted armed robbery. But maybe you say there's
2 too many problems with the way this case went. There's too
3 many questions in here.

4 I leave that with you all. Thank you for your time.

5 THE COURT: You may proceed.

6 MR. JENNINGS: Thank you, Your Honor.

7 THE COURT: You're welcome. You need to set up
8 anything?

9 MR. JENNINGS: Ladies and gentlemen of the jury, it's
10 the first time I've had the opportunity to appear before
11 you and talk specifically about the case, and I also want
12 to thank you for the time and the attention that you've put
13 in this week. There's been a lot of testimony, and
14 watching each of you, you've all paid extraordinary
15 attention to it, and we appreciate you and thank you for
16 that.

17 You know, facts are stubborn things. There's nothing
18 I can do, there's nothing Ms. Wilson can do to change the
19 facts. There's nothing Detective Merrithew can do to
20 change the facts, and likewise, there's nothing the defense
21 attorneys can do to change the facts: Mr. Bolus, Mr.
22 Barnwell, and Mr. Jones.

23 What happened that night happened and nobody can go
24 back and change that. If they need to resort to attacking
25 myself and Ms. Wilson to take your attention off of what

1 their clients did that night, then that's what they're
2 going to do. But what I ask you, each one of you
3 individually and collectively as a group, is to keep your
4 eye on the ball. Keep your eye focused on what these three
5 defendants did that night, and look at the evidence that we
6 presented. And we're going to go through much of that
7 evidence, because that's your job.

8 This system we have is a wonderful system. It's the
9 best system in the world because we have twelve of you,
10 impartial people, who showed up at the beginning of the
11 week with no friends to reward and no enemies to punish.
12 You swore an oath that you would listen to all of the
13 evidence and at the end of the trial take the facts, as you
14 decide them, and apply it to the laws Judge Jefferson
15 charges you. And that is all that we ask you to do, for
16 each one of you individually to decide in your mind, based
17 on the evidence that you heard, what happened that night.
18 And then once y'all decide what happened, you take those
19 facts and apply it to the laws Judge Jefferson tells you,
20 and that will give you what you need to render your
21 verdict.

22 Now a trial, I like to say, is often just like a
23 puzzle, and each piece of the puzzle is something that we
24 presented to you. And we began that on Tuesday morning
25 with each witness, each item of evidence was another piece

1 of the puzzle. And I submit to you that at the end of
2 yesterday when we had completed all that testimony, we had
3 a complete picture of what happened on August the 1st that
4 carried over into the morning of August the 2nd.

5 I'm going to talk with you about some of the law, and
6 we're going to talk about some of the facts and how it
7 plays into that law.

8 Ms. Wilson already told you reasonable doubt -- we
9 have to prove to you beyond a reasonable doubt that each
10 defendant is guilty of each crime that they are charged
11 with. And Judge Jefferson is going to tell you that you
12 need to consider each indictment separately and distinctly
13 as it applies to each defendant and make a separate
14 decision as to that charge. Reasonable doubt is not proof
15 beyond any doubt. Judge Jefferson's going to charge you is
16 that -- that if after hearing all the evidence you are
17 firmly convinced of each defendant's guilt as to each
18 charge, then it will be your duty to find them guilty.

19 I want to talk about Ms. Smith first. She's charged
20 as an accessory before the fact. Essentially, an accessory
21 before the fact is a person who knowingly advises, urges,
22 or aides and abets another person, in this case Kerry
23 Hollins, Jermaine Hartwell, or Gary Grant, in the
24 commission of the armed robbery or the attempted armed
25 robbery of Dexter Perry and she was not present at the

1 scene. Essentially, what we claimed and told you in the
2 opening statement and maintained throughout the trial is
3 that Ms. Smith had an integral role, and I'd submit what
4 we'll talk about is a -- is a vital role in the plan that
5 failed. But clearly aided and abetted, urged, advised
6 these defendants in carrying out this crime. I submit to
7 you that with a friend like Marquita Smith or a family
8 member like Marquita Smith, who needs any enemies, because
9 without Marquita Smith, Dexter Perry would still be here
10 today.

11 What is astonishing about this case, ladies and
12 gentlemen, and adds to the maliciousness of what she did,
13 is we're not talking about a onetime plan, we're not
14 talking about one throw-away comment like, "I know somebody
15 you can rob. You can rob Dexter," and the plan ends there.
16 Marquita Smith orchestrated, planned, and directed this
17 robbery from beginning to end. Without her, it would not
18 have happened; would not have happened. None of these
19 people knew Dexter Perry, did not know where he was, did
20 not know where he was going, and did not know where he was
21 going to be. One person provided that information to this
22 group, and it's Marquita Smith.

23 We have not overcharged Marquita Smith, I submit to
24 you. She is charged with exactly what she did, and that is
25 setting up her cousin, Dexter Perry. And I submit to you

1 that when you set somebody up to be robbed, and those are
2 Marquita Smith's words, when you set somebody up to be
3 robbed, it is entirely foreseeable that that person could
4 be killed during the course of that robbery.

5 It's not a one-time plan. It's not a one-time
6 comment. This took place over three days. We're not
7 relying on anybody to implicate Marquita Smith. Marquita
8 Smith, when she finally decided to tell the truth,
9 implicated herself in State's Exhibit 51, which you'll have
10 back in your jury room.

11 This plan wasn't hatched in the spur of the moment one
12 night. This plan was hatched on Sunday, on July 30th, when
13 Kerry Hollins calls Marquita Smith says, "Do you know
14 anybody we can rob?" And what does Marquita Smith say?
15 She gives up Dexter right then. On Sunday, July 30th, she
16 had already given up her cousin to be robbed. "I told
17 Kerry," Marquita Smith's words. "I told Kerry Dexter's the
18 only person I know who flashes around money."

19 Then it carries over to Monday, July 31st. Even
20 again, Sunday, not only does she just give them Dexter
21 Perry's name, she calls Chris Nelson to make sure that, in
22 fact, Dexter's got money that they can rob him of. "After
23 talking to Chris, I told Kerry what Chris said." Marquita
24 Smith calls him back to tell them that they do have the
25 money so that they can be robbed, that the plan can go

1 forward.

2 On Monday they have more conversation about the
3 robbery. She doesn't do anything to put a stop to it. She
4 just tells them that she doesn't want to do it on Monday
5 because she doesn't want to go out with Chris Nelson that
6 night to dinner.

7 The third day, three days later, she talks to Kerry
8 again. "I told Kerry that Chris and Dexter were back in
9 town." Marquita Smith makes the plans for them to go to
10 dinner, because she continues in her statement, "I told
11 Kerry about the plans."

12 They would have no idea what was happening that night
13 without Marquita Smith. And keep in mind, Defense would
14 have you believe she didn't know it was going to be a
15 robbery -- she didn't know it was going to be an armed
16 robbery. She uses the word "robbery" in her own statement.

17 Ladies and gentlemen, when y'all came up here on
18 Monday and reported for jury duty, you didn't leave your
19 common sense at home and your life experience at home.
20 Y'all know what a robbery is, what a lick is.

21 Initial plan, they're going to the Red Lobster. Who
22 calls then to tell them that the Red Lobster is closed? "I
23 called Kerry when we got to the Red Lobster." Marquita
24 Smith called them and told them it was closed. Don't come
25 here. It can't happen here. It's ten o'clock. The guys

1 aren't here yet. We're going to have to leave and go
2 someplace else. I'm going to let you know where we're
3 going next. "We decided to meet at Ruby Tuesdays on Ashley
4 Phosphate Road. I called Kerry and told him we were going
5 to meet at the Ruby Tuesdays."

6 Marquita Smith, continuing the plan every step of the
7 way, from its inception. Anytime there was a chance it was
8 going to fall apart, she continued it. At any point along
9 this line it could have stopped and Dexter Perry would have
10 been safe, except for Marquita Smith. Every step she
11 called these guys, who she knew was going to rob her
12 cousin, and told them what was happening and where they
13 were going.

14 "Kerry called me, asked me if Dexter had a lot of
15 money. I told him, 'Yes.'" If she wants to save Dexter
16 Perry, why doesn't she just say, "No, he doesn't have any
17 money. It's a waste of time. Don't do it."? Because she
18 continued the plan. She told them, "Yes, he's got money.
19 Let's keep going forward."

20 A very critical piece of evidence I submit to you.
21 You remember what Tawana Deas said when they left Ruby
22 Tuesdays? What did she tell you that Marquita Smith asked
23 her? To follow them. Now, if you don't think she's in it
24 thick as thieves with these guys, why does she want to
25 follow Chris Nelson and Dexter Perry? Because she wants to

1 find out where they're going.

2 And they lost them because Tawana told her to make the
3 wrong turn. So what did she have to do after that? She
4 had to call her own cousin, and lie to him and trick him
5 into telling her where he was. These are not my words.
6 These are not Ms. Wilson's words. These are not a co-
7 defendant or co-conspirator's words. These are Marquita
8 Smith's words in writing (as read): "Kerry called me and
9 asked me to show him where Dexter and Chris's hole was,
10 where they kept their drugs. I called Dexter and told him
11 that Tawana wanted me to check and see if he was with
12 another girl. So he gave me directions to where he was at
13 in the Silver Fox trailer park."

14 She called her own cousin and lied to him to find out
15 where he was so that her buddies could go rob him. If
16 that's not malicious -- "I called Kerry and told him the
17 directions."

18 And it doesn't stop there. Then she drives to North
19 Charleston to meet him to take him up to Highway 78 to show
20 him where Dexter lived. Now, if this is just going to be
21 some innocent little snatch and grab, and nothing was going
22 to happen, why was it necessary to know where Dexter was
23 and where he was staying? Because that's the house where
24 they thought that this drugs and money was, and they were
25 going to have to go back to the house with Dexter.

1 But she doesn't stop there. She finds out where
2 Dexter is. She finds out he's gone to Tawana's house and
3 leads them straight to Dexter. Takes them from Highway 78
4 all the way down into Goose Creek, takes the wolves down
5 there. "I told them Dexter had gone to Tawana's house,"
6 and she leads them there.

7 And what happens when she gets to Tawana's house and
8 Dexter's there? She tells Tawana she needs -- she wants to
9 put on some long pants so that she can take her skirt out
10 to the car. I submit to you the only reason she had to go
11 outside is to make sure they were there. Because she knew
12 once she was inside the house she couldn't talk on the
13 phone to Kerry Hollins anymore. She had to go outside and
14 make sure that things were ready to go once and for all.
15 And she went back in and she led her cousin right to him.

16 If -- when you get back into the jury room, I would
17 ask take a couple of minutes and see how many times you can
18 jot down that Marquita Smith could have put a stop to this
19 whole thing. How many times over those three days, with
20 any one action, could she have stopped everything that was
21 in motion? I've jotted down a couple and I'm sure y'all
22 will be able to come up with more than that.

23 She could have told Kerry Hollins from the very
24 beginning she didn't know of anybody to rob. She could
25 have told Dexter, her cousin, about the plan. We're

1 talking about three days. How long would it have taken her
2 to say, "Dexter, I just need to let you know these guys are
3 going to rob you. Maybe take out -- you know, get out of
4 town." One phone call. They never would have known.

5 She could have called the police. That's a novel
6 idea. How long would that have taken to make that phone
7 call to let them know what's going on? If she's that
8 afraid of Kerry Hollins, as the defense would have you
9 believe, take ten seconds.

10 At any point that night she could have not told Kerry
11 what was happening, but instead she made the decision to
12 give him a step-by-step-by-step chronology of what was
13 happening. And not even that. It's not even like she's
14 just responding to, you know, some threats or something.
15 She's making calls to him telling him what's happening.
16 "The Red Lobster's not open." Marquita Smith said, "I
17 called Kerry to tell him we were going to Red Tuesday -- to
18 Ruby Tuesdays." Those were his -- her decisions. At any
19 point she could have lied to Kerry about where the victim
20 was. And up to the very last second, before she led Dexter
21 Perry to them, she could've told him not to go outside.

22 Instead, she leads them to him, and then the final
23 nail in the coffin of what her real intention was that
24 night, she tells Kerry Hollins to get out of there because
25 the police are on the way. She doesn't call the police.

1 Do you remember Detective Crumley when he testified?
2 He was surprised when he got there because they responded
3 so quickly that there were already family members there.
4 Who called the family members? Marquita Smith. Because
5 she was trying to build her story to get herself out of
6 trouble. And she lied to Detective Crumley.

7 You will have State's Exhibit Number 50 back in your
8 jury room. If you can read State's Exhibit 50 and think
9 that this is just her leaving out some details about what
10 happened, then you find her not guilty. Because when her
11 statement about all that she has done that night, about
12 starting to set up the robbery at Red Lobster, changing it
13 to Ruby Tuesdays, lying to her cousin, calling to find out
14 where he is to get the directions, taking these co-
15 defendants out there to show them where he lives, finding
16 out that he went to Tawana's, taking them to Tawana's,
17 going out and checking and making sure that they're there,
18 and the -- the most she can come up with was that (as
19 read), "I was at my friend Tawana Deas's house. Me and my
20 friend Tawana Deas was together and my cousin, Dexter
21 Perry. We was walking to his car and about three guys come
22 out of nowhere, knocked me down and took my cousin. I took
23 off running. Dexter can't be found. He was driving this
24 purple Nissan."

25 If she's that innocent, that taken advantage of, the

1 first instance she has the chance to talk to a law
2 enforcement officer, isn't it reasonable to expect that she
3 would tell them what happened, that she was forced into
4 doing all of this? She didn't and the reason she didn't is
5 because it's not the truth. It's simply not the truth.

6 She set something up and set it in motion, and the
7 problem, ladies and gentlemen, is that under the law and
8 rightfully so, when you set something like this in motion,
9 you can't just go back in time and say, "I don't want to be
10 responsible for what happened afterwards, for what I caused
11 to happen." The law doesn't recognize that, and that is
12 why the hand of one is the hand of all. Because when you
13 set something in motion, a robbery, it is entirely probable
14 and entirely foreseeable that somebody's going to get hurt.

15 The interesting thing about criminal law, ladies and
16 gentlemen, is we don't pick the witnesses. It's not like
17 Ms. Wilson and I got together and said, "Well, these are
18 the folks we want to have to come and testify," or we have
19 the ability to go and say, "Well, we'd like a librarian or
20 a doctor or a nurse or a nurse's assistant." We play with
21 the cards that we're dealt. They pick the witnesses: Gary
22 Grant, Jermaine Hartwell, Marquita Smith. Kerry Hollins is
23 her boyfriend. We don't -- we don't pick them. We don't
24 pick the people that were out there.

25 What was the natural consequence of her plan? What

1 did the actions that she put in motion lead to? I submit
2 to you these set of crimes, there's no question, occurred.
3 No question. The question is -- is who did it and who
4 should be held responsible?

5 Burglary first: You enter the dwelling of another,
6 without consent, with the intent to commit a crime, and
7 there's the presence of one or more aggravating
8 circumstances. Clearly in this case we have two residences
9 that were entered: Tawana Deas's home at Snow Goose Circle
10 and Dutch Fork. The door was kicked in at Ms. Deas's
11 house. We have photographs, which you'll have, of the
12 victim's blood that was tested at SLED. Clearly their
13 intent to commit a crime at the time was the armed robbery
14 and the kidnaping.

15 Possible aggravating circumstances are the entering
16 occurred during the hours of darkness, no question about
17 that, the middle of the night. While entering the home or
18 while in the home, he or another participant was armed with
19 a deadly weapon. No question they were all armed. Caused
20 physical injury to a person who was not a participant in
21 the crime. Clearly Dexter Perry was injured at Snow Goose
22 Circle. We have his blood. He was pistol whipped in his
23 head. He used or threatened a dangerous instrument,
24 displayed a pistol. No question burglary first occurred.

25 Armed robbery: To take from the person or presence of

1 Dexter Perry his goods or money while armed with a deadly
2 weapon. Obviously we're alleging the bracelet and the ring
3 were taken. Gary Grant's words; however, if you don't feel
4 that that was proven beyond a reasonable doubt, attempted
5 armed robbery is a lesser included offense. Clearly the
6 plan was the armed robbery. They did their best at Dutch
7 Fork to find something. Couldn't find what they were
8 looking for.

9 I submit to you in this case there's no question we
10 have four kidnappings. Was anybody seized, abducted,
11 confined by any means whatsoever without the authority of
12 law? Clearly Dexter Perry was taken at gunpoint from Snow
13 Goose Circle and taken to Dutch Fork. When they burst in
14 the home, they -- they forced Mr. Cobbs down on the floor
15 at gunpoint. Both he and Mrs. Cobbs tell you they were not
16 free to leave. Obviously, they've got this group of men in
17 their house with guns ransacking their house. They can't
18 move. They were confined and seized. And Joe Husser,
19 while he was being held at gunpoint back in his room and
20 the blanket put over his head.

21 So there's four -- two burglaries, the armed robbery
22 or attempted armed robbery, and four kidnappings, and
23 obviously against their will and consent.

24 So next we need to turn to the eyewitness
25 identification. Who was it that did this? The judge is

1 going to charge you on several factors that you can
2 consider. The first is the opportunity of the witness to
3 view the defendant, and I submit to you in this case we've
4 got basically six witnesses that put these defendants at
5 the scene.

6 Odoner Cobbs; I'm going to talk with you briefly about
7 what they say. He was in his house, minding his business,
8 watching TV, had just fixed a sandwich when his door gets
9 kicked in and Dexter Perry comes flying in, followed by
10 these guys with guns. He told you, and every other witness
11 told you, that every person that came into that house was
12 armed with a handgun. The person he described as the
13 heavysset black male, he said pointed the gun at him, forced
14 him down on the ground, and when he kept looking at him
15 told him, "If you look at me again, I'm going to blow your
16 brains out." He said the lights were on in the house. He
17 got a -- he could see the person's face, no problem.

18 And as the -- as the events continued to unfold, who
19 does he keep hearing this name mentioned? Manny, Manny,
20 Manny. Dexter Perry said, "Manny, you don't have to keep
21 hitting me. You already hit me." Manny, consistently all
22 through it. And the next day when the detectives come to
23 him and show a photo lineup, State's Exhibit 1, who does he
24 identify? Gary Grant was in that house with a handgun, had
25 Dexter Perry at gunpoint, and was involved in it all the

1 way up to his neck.

2 Birdie Cobbs told you the same thing. She's laying in
3 her bed asleep when somebody comes to her door, tells her
4 to stay there. She describes the same person. And when
5 she comes out and sits at the kitchen table, she -- she can
6 still -- she sees her husband down on the floor with a gun
7 to his head and sees the same stocky black male that --
8 that her husband described and she provides the same
9 description. And the same day, when they're separated, not
10 able to talk, shown the same photo lineup, she identifies
11 Gary Grant. No doubt about it in their mind.

12 And think about it, when you're in -- in your jury
13 room, what incentive do they have to identify the wrong
14 person? If they're not picking the person that's really in
15 the house, then the -- the people that really did it are
16 out on the street.

17 Joe Husser, he corroborates Manny. Says that when
18 Dexter Perry comes back in the room, after he's forced to
19 his room at gunpoint, Manny -- Dexter keeps saying, "Manny,
20 you don't have to keep hitting me. Don't have to keep
21 hitting me. There's nothing here. Y'all look. Tear the
22 walls up. There's nothing here." The next day -- and he
23 tells the detectives Manny -- that Dexter was saying it was
24 Manny.

25 The next day, State's Exhibit Number 4, when he gets a

1 chance to look at these six photographs, just by chance he
2 picks Jermaine Hartwell's photograph? The same Jermaine
3 Hartwell that every person has testified is Manny? He says
4 that Jermaine Hartwell was in that house, with a gun, had
5 Dexter Perry at gunpoint, had that family at gunpoint
6 ransacking their home, tearing everything up, committing
7 this armed robbery.

8 The only evidence in this case, ladies and gentlemen,
9 is that every person that was part of that mob was armed
10 with a handgun.

11 Chris Nelson, who somehow this turned into all his
12 fault -- Chris Nelson's come to find out where his best
13 friend is and looks through the window. You'll have the
14 photograph showing where the slide was still open next to
15 the air conditioner. He looks in and sees Manny. And
16 tells you, "I recognized him. Dexter and I had seen him
17 before at a car show." He says Manny had a gun, was
18 holding Dexter at gunpoint in the room. Points to Jerma
19 Hartwell and says, "That's Manny. That's the person I s
20 in there with a gun."

21 The hand of one is the hand of all. They're all i
22 together. We don't need the hand of one is the hand of
23 for that. They were all in there conspiring, aiding, a
24 abetting each other to do the same thing and that was
25 commit the armed robbery of Dexter Perry. Each one kr

1 it, and each one was involved.

2 Dexter Perry told you one person that was involved.
3 The only reason he said "Manny," I submit to you, is
4 because that's the only one he knew. But he told the
5 officer and told his family members, as he's lying [sic] on
6 the floor dying, that Manny was involved.

7 And finally, Kerry Hollins. I'm not asking you to
8 believe everything that Kerry Hollins said. Was Kerry
9 Hollins in the house that night? I don't know. I wasn't
10 there. But what we can do and what you can do and what I
11 submit to you, the problem that the defense can't overcome
12 and why they want to attack Kerry Hollins is because I told
13 you, facts are stubborn things. They can't change the
14 facts and they can't change the fact that on every
15 important issue, what Kerry Hollins said is supported by
16 other independent witnesses.

17 Kerry Hollins told you that when they were at their
18 house in North Charleston, they're all armed -- they all
19 armed themselves with handguns. And what did -- what all
20 the witnesses inside that home say is they're being
21 terrorized. Every person that entered the house had a
22 handgun.

23 He told you Manny was involved. He told you Manny is
24 Jermaine Hartwell. He told you Gary Grant was involved.
25 So did Odoner Cobbs, Birdie Cobbs, Joe Husser, and Chris

1 Nelson. They told you the same thing. He told you
2 Marquita Smith set this up. Marquita Smith told you she
3 set it up. Every key fact that he talked about is
4 supported concerning the -- concerning the evidence of what
5 happened and -- and what crimes were committed.

6 I submit to you some other factors that you can
7 consider: degree of witnesses' attention. I submit to you
8 these folks that have lived in this house since 1993,
9 Odoner Cobbs has worked at the same upholstery shop for 16
10 years, never had anything like this happen to them before.
11 And in the middle of the night have their door kicked in by
12 a couple of maniacs with guns and come and tearing their
13 house up, I submit to you that their degree of attention
14 would be at its highest. That if they had the chance to
15 see somebody and to remember them later, who was doing this
16 to them, who was terrorizing them, they would not forget
17 that face, and they did not forget Gary Grant's face.

18 Joe Husser, who told you he never made it out of --
19 down the hallway into the room to see where Gary Grant was.
20 He identified the person that was back there terrorizing
21 him, Jermaine Hartwell, Manny, who had the gun on Dexter
22 Perry.

23 What was the accuracy of their description, the level
24 of their certainty? That day each of them identified the
25 person they could. Told the detectives that day there was

1 no doubt in their mind, and they told you that when they
2 testified.

3 So we get to the last question, which is the murder.
4 Murder is the unlawful killing of another with malice
5 aforethought. It is probably the most serious crime we
6 have in South Carolina and its -- and its got the shortest
7 definition.

8 Malice is simply, a term of art. It's acting with a
9 dark and evil heart, a heart fatally bent on mischief. The
10 intentional killing of a person with no just cause or
11 excuse.

12 In this case, or in any case, there's two types of
13 malice. Express: If somebody says, "I'm going to kill
14 you," obviously they're acting maliciously. There's also
15 ways that you can infer malice from a person's conduct.
16 One way is the use of a deadly weapon. And in this case,
17 significantly, it's a felony murder. The law says, and
18 Judge Jefferson will charge you, if the victim was killed
19 in the course of another felony, then his death is murder.
20 End of story.

21 Burglary first, kidnaping, armed robbery, attempted
22 armed robbery, all felonies. When you take somebody at
23 gunpoint and they end up getting killed, it's murder.

24 Now, the defense attacks Chris Nelson. Says it's
25 Chris Nelson's fault that -- that this all happened. We

1 know who didn't kill Dexter Perry. We know it wasn't Chris
2 Nelson because we had the ballistics done. You'll have
3 State's Exhibits 61 and 62 and 59, the three shots that
4 Chris Fired. One of the shots that hit Jermaine Hartwell
5 and the photograph that shows the bullet wound. Three
6 shots and Agent DeFreese told you, without a doubt, the gun
7 that fired those three shots did not fire either of those
8 two bullets that were in the victim.

9 We know that two other guns were involved, which
10 automatically is consistent with what all the witnesses
11 said, that every person in there had a gun and started
12 shooting.

13 And that's the reason, ladies and gentlemen, that the
14 hand of one is the hand of all. Because we can't -- the
15 State cannot always prove exactly what happened. We can
16 prove what happened up -- up to that step and we've done
17 it. We proved who was there. We proved what they were
18 planning to do. We proved they were all in there with
19 guns. Who fired the fatal shot? We don't know because
20 they got rid of their guns. Should we reward Gary Grant
21 and Jermaine Hartwell for getting rid of their guns so that
22 we can't go back and -- and ballistically compare them to
23 the bullets? That doesn't make sense and that's why the
24 law says that "the hand of one is the hand of all," to
25 eliminate that problem.

1 One who joins with another to accomplish an illegal
2 purpose is liable criminally for everything done by his co-
3 defendant incidental to the common design and purpose.
4 When they all got together to commit this robbery and they
5 broke in the home at Snow Goose Circle, kidnaped Dexter,
6 went and broke into the Cobbs' house, once they were all in
7 it, they were in it for the long haul. And whoever fired
8 those shots, they're all guilty of murder. That's the law,
9 and I submit to you that that is the right law, because we
10 can't prove who fired the fatal shot and they should not
11 benefit from that.

12 Put another way, if a crime is committed by two or
13 more persons who are acting together in the commission of a
14 crime, then the act of one is the act of all. And it goes
15 all the way back to the beginning. It goes back to
16 Marquita Smith. Once she started this ball rolling, every
17 person who got involved, they all knew what the plan was,
18 and they were on board.

19 What the defense has done, I submit to you -- and what
20 I ask you to do is keep your eye on the ball. Keep your
21 eye on -- on what happened that night, because each one of
22 these defendants agreed to rob Dexter Perry. They were
23 armed; they chased him down. They went over half of lower
24 Berkeley County trying to find him. They kicked in the
25 door at Snow Goose Circle, and they kidnaped him. They

1 took him up to Dutch Fork; they kicked in that door. They
2 terrorized every person in that home that night, held them
3 at gunpoint, ransacked their home, the sanctity of their
4 home. And then they want to blame Chris Nelson for firing
5 those shots. And Chris Nelson did nothing more than try to
6 protect his friend, ladies and gentlemen. It's a lot more
7 than Marquita Smith did.

8 She wasn't trying to protect Dexter Perry. She led
9 Dexter Perry to the wolves. She knew what was going to
10 happen. She knew what the plan was. She had no problem
11 with it, because at any point in that night she could have
12 put a stop to it. She could have and she didn't. She is
13 just as guilty as if she was standing in that house, ladies
14 and gentlemen, because without her, none of it would have
15 happened.

16 Gary Grant and Jermaine Hartwell took the plan and
17 they ran. They did what they wanted. The only thing that
18 they didn't do is they didn't find the cash and they didn't
19 find the drugs that they were looking for, but everything
20 else went exactly according to the plan. I submit to you
21 when you get back in your jury room and you look at each
22 piece of evidence and you apply it to the law, that you
23 will be convinced beyond any doubt that each defendant is
24 guilty of every crime they have been charged with. Thank
25 you.

1 THE COURT: Madam Forelady, ladies and gentlemen, you
2 all have been sitting since a little after ten. I want to
3 give you a short break so that you can refresh yourselves.

4 During this break, please do not discuss the case.
5 Please leave your notepads in your seats. As soon as
6 you're done using the restroom, please let the bailiffs
7 know and at that time we'll immediately resume with the
8 Court's instructions. I anticipate that my instruction
9 probably will be somewhere between 25 and 30 minutes. I
10 tried to intercept your lunch so it would get here at 1:00
11 instead of 12:30, but I was not able to do that. I'm going
12 to sort of play it by ear because I don't want your lunch
13 to get cold, so if necessary I may stop. But we'll just
14 have to play it by ear and we'll just have to see how we
15 handle it. Okay? Just wanted you to know that I -- I was
16 looking out for you. If you would go with the bailiff and
17 your caretakers, please.

18 (The jury exits at 12:11 p.m.)

19 THE COURT: You may be seated. We'll be at ease for
20 about ten minutes. I'm thinking five to ten minutes. As
21 soon as the jury knocks on the door we're going to resume.

22 The jury has indicated that they are ready to proceed.
23 There's one other matter I wanted to deal with prior --
24 just to make sure we have it on the record. I originally -
25 - and I meant to mention this this morning and I -- it just

1 -- just slipped my mind.

2 My charge would normally include an instruction
3 regarding the statements made by the defendant and how they
4 are to judge that statement. It really goes to the
5 voluntariness of the statement. I did not include that
6 charge in this instruction because of the Defendant Smith's
7 position, basically, that it was her statement. There was
8 no contest it wasn't her statement, and that the substance
9 of it was not in fact; and there were no contentions that
10 it was not freely and voluntarily made. So I did not
11 include -- it's basically a *Jackson vs.. Deno* kind of a
12 statement that says I've allowed the statement in, but it's
13 for you to judge whether it was made freely and voluntarily
14 and of her own will, and that she wasn't pressured or
15 coerced. The more I listen to Mr. Jones's statement, I
16 don't think there is really any contention about that. So
17 I have left that out of my charge. I just wanted to make
18 sure that was acceptable to everyone, from the State?

19 Ms. Wilson: That's fine, Your Honor.

20 MR. JONES: Yes, Your Honor.

21 THE COURT: Is there anything before we proceed with
22 the Court's instruction on the law from the State?

23 MR. JENNINGS: No, Your Honor.

24 THE COURT: From the defense?

25 MR. BOLUS: None.

1 MR. BARNWELL: None.

2 MR. JONES: No, Your Honor.

3 THE COURT: Please bring in the jury.

4 (The jury enters at 12:25 p.m.)

5 THE COURT: You may be seated. During this trial,
6 ladies and gentlemen, you and I have certain duties to
7 perform. As the trial judge it is my responsibility to
8 preside over the trial of this case. And I also have the
9 duty to rule upon and pass upon the admissibility of the
10 evidence offered during this trial.

11 You are not -- you are to consider only the competent
12 evidence that is before you, and you are to disregard and
13 disabuse from your mind any testimony ordered stricken from
14 the record in this case during the progress of this trial,
15 if there has been any. You are to consider only the
16 testimony which has been presented from the witness stand
17 together with any exhibits which have been made a part of
18 the record in this case and any stipulations of counsel
19 entered into the record.

20 I have the additional duty to instruct you on the law
21 applicable to this case. As the presiding judge, I am the
22 sole judge of the law of this case and it is your duty as
23 jurors to accept and apply the law as I now state it to
24 you. If you have a preconceived idea as to what the law is
25 or what the law ought to be in a case or in this case, and

1 it should not agree with what I now tell you the law is,
2 you are obligated, under the oath which you have taken, to
3 abandon this preconception on your part because you are
4 sworn to accept the law and apply the law precisely as I
5 now state it to you.

6 In every case tried in this court before a jury, the
7 judge becomes -- the jury becomes the sole and exclusive
8 judge of the facts in the case. You the jury are the
9 judges of the facts in this case. This Court is the judge
10 of the law.

11 The constitution of our state has declared that a
12 trial judge shall not intimate, state, comment upon, or
13 make any statement to a trial jury about the facts in a
14 case. Since you the jury are the sole judges of the facts
15 in this case, you are not to infer anything that I -- from
16 what I've said during the progress of this trial in ruling
17 upon the admissibility of evidence or otherwise, or
18 anything that I now say during the course of this
19 instruction to you that I had any opinion about the facts
20 in this case. The law does not permit me to have an
21 opinion about the facts. This is a matter solely for you
22 the jury to determine.

23 As jurors then, it is your duty, as I have instructed
24 you to determine the effect, the value, the weight, and the
25 truth of the evidence presented during this trial.

1 Necessarily you must assess the credibility of witnesses
2 who have testified in this case. Credibility is simply a
3 legalistic term which means believability. It becomes your
4 duty as jurors to analyze and to evaluate the evidence and
5 determine that evidence which convinces you of its truth.

6 I instruct you that in determining the question of the
7 credibility or believability of witnesses who have
8 testified in this case, you may believe one witness as
9 against several witnesses or several witnesses as against
10 one witness. You may believe a part of the testimony of a
11 witness and reject the remaining part of the testimony of
12 that same witness. If you have a good and sound reason,
13 you may believe the testimony of a witness in its entirety
14 or reject the testimony of a witness in its entirety.

15 You may consider whether any witness has exhibited to
16 you any interest, any bias, any prejudice or other motive
17 in the case. You may consider the demeanor of the witness;
18 that is, the appearance and manner of the witness from the
19 witness stand. You can believe as much or as little of
20 each witnesses' testimony as you think proper. You may
21 believe, as I've indicated, the testimony of a single
22 witness against that of many witnesses or just the
23 opposite. Ladies and gentlemen, of course you do not
24 determine the truth merely by counting witnesses.
25 Throughout this process you have but one objective, to seek

1 the truth regardless of its source.

2 Ladies and gentlemen, this Court has admitted evidence
3 of statements allegedly made by the deceased victim after
4 the injuries. I have determined that these statements
5 should be admitted into evidence in this case; however, it
6 is for you to determine the believability of these
7 statements. In deciding this question, you may consider
8 whether the victim was dying and knew he was dying, and
9 whether the victim had lost all hope of recovery at the
10 time the statements were made.

11 Ladies and gentlemen, I instruct you that a person who
12 has a past criminal record is competent to testify during a
13 trial. A past record does not affect the ability of that
14 witness to testify. The past record may be -- may only be
15 considered by you, if at all, in determining the witness's
16 believability. Remember, ladies and gentlemen, that you
17 are the sole judges of the facts in this case and of the
18 believability of any and all of the witnesses.

19 I also instruct you that the rules of evidence
20 ordinarily do not permit witnesses to testify to opinions
21 or conclusions. An exception to this rule exists for
22 witnesses we call "expert witnesses." A witness who by
23 education and experience has become an expert in some art,
24 science, profession, or calling may state an opinion as to
25 relevant and material matters in which the witness claims

1 to be an expert, and they also state the reasons for that
2 opinion. You should consider any expert opinion received
3 in evidence in this case like any other evidence. Give it
4 the weight you think it deserves. If you decide that the
5 opinion of an expert witness is not based on sufficient
6 education and experience; or if you conclude that the
7 reasons given in support of the opinion are not sound, or
8 that the opinion is outweighed by other evidence, you may
9 disregard the opinion entirely.

10 An expert witness's testimony is to be given no
11 greater weight than that of other witnesses simply because
12 the witness is an expert. Further, you are not required to
13 accept an expert's opinion even though it is not
14 contradicted.

15 Ladies and gentlemen, I instruct you that there are
16 two types of evidence which are generally presented during
17 a trial: direct evidence and circumstantial evidence.

18 Direct evidence is the testimony of a person who
19 asserts or claims to have actual knowledge of a fact such
20 as an eyewitness. Circumstantial evidence is proof of a
21 chain of facts and circumstances indicating the existence
22 of a fact. The law makes absolutely no distinction between
23 the weight or value to be given to either direct or
24 circumstantial evidence, nor is a greater degree of
25 certainty required of circumstantial evidence than of

1 direct evidence.

2 You should weigh all of the evidence in this case.
3 After weighing all of the evidence, if you are not
4 convinced of the guilt of the defendants beyond a
5 reasonable doubt, you must find the defendants not guilty.
6 Conversely, if you are convinced of the guilt of the
7 defendants beyond a reasonable doubt then you must find
8 them guilty.

9 Ladies and gentlemen, I instruct you that the fact
10 that the defendants were arrested, charged, and indicted in
11 this case is not evidence in this case and cannot be
12 considered by you as evidence of guilt in this case; nor
13 does it create any presumption or inference of guilt. This
14 documentation, ladies and gentlemen, are simply the formal
15 written instruments which contain the charge or charges
16 made against the defendants. They serve as the formal
17 documents by which the cases are processed or brought into
18 this Court.

19 Ladies and gentlemen, the defendants have pled not
20 guilty to the indictments and that plea casts the burden on
21 the State to prove the defendants guilty, because a person
22 charged with committing a criminal offense in South
23 Carolina is never required to prove himself or herself
24 innocent.

25 I instruct you, Mr. Foreman, ladies and gentlemen of

1 the jury, that it is a cardinal and important rule of the
2 law of evidence that the defendant or defendants in a
3 criminal trial, no matter what the seriousness of the
4 charge made against them may be, will always be presumed to
5 be innocent of the crime for which they are indicted unless
6 their guilt has been proven by evidence satisfying you of
7 that guilt beyond a reasonable doubt.

8 This presumption of innocence does not cease when you
9 retire to deliberate, but it accompanies the defendant or
10 defendants from the time of their appearance throughout the
11 trial until you reach a verdict of guilt based upon
12 evidence satisfying you of that guilt beyond a reasonable
13 doubt. Our Supreme Court has said that the presumption of
14 innocence is like a robe of righteousness placed about the
15 shoulders of the defendants, and it remains with them and
16 assigns them to that class, the innocent, until that
17 presumptive robe of righteousness has been stripped from
18 their person by evidence satisfying you of that guilt
19 beyond a reasonable doubt.

20 Mr. Foreman, and ladies and gentlemen of the jury, the
21 presumption of innocence is not mere legal theory. It is
22 not just a legal phrase. It is a substantial right to
23 which every defendant is entitled unless you the jury are
24 satisfied from the evidence of their guilt beyond a
25 reasonable doubt.

1 I instruct you and emphasize that the fact that the
2 defendants did not testify is not a factor to be considered
3 by you in anyway in your deliberations and in your
4 consideration on the question of the guilt or the innocence
5 of the defendants. It must not be considered by you in any
6 manner whatsoever. A defendant has the constitutional
7 right to remain silent, and the assertion of this right
8 must not be considered by you in your deliberations in any
9 manner. I repeat, under your oath, you are to draw no
10 conclusion, whatsoever, from the fact that the defendants
11 in this case did not testify. The fact that the defendants
12 did not testify should not even be discussed in the jury
13 room in any manner whatsoever.

14 The burden of proof, as I have stated to you, is on
15 the State. The defendants are not required to prove their
16 innocence. The burden of proof remains on the State to
17 prove guilt beyond a reasonable doubt. You may ask, What
18 is a reasonable doubt in the law? The State has the burden
19 of proving the defendants guilty beyond a reasonable doubt.
20 Some of you may have served as jurors in civil cases where
21 you are told that it is only necessary to prove that a fact
22 is more likely true than not true. In criminal cases the
23 State's proof must be more powerful than that. It must be
24 beyond a reasonable doubt. Proof beyond a reasonable doubt
25 is proof that leaves you firmly convinced of the

1 defendant's guilt.

2 There are very few things in this world that we know
3 with absolute certainty, and in criminal cases the law does
4 not require proof that overcomes every possible doubt. If,
5 based on your consideration of the evidence, you are firmly
6 convinced that the defendants are guilty of the crimes
7 charged, you must find them guilty. If, on the other hand,
8 you think there is a real possibility that they are not
9 guilty, you must give them the benefit of the doubt and
10 find them not guilty.

11 Ladies and gentlemen, an issue in this case is the
12 identification of the defendants Grant and Hartwell as the
13 persons or -- person or persons who committed the crimes
14 charged. The State has the burden of proving identity
15 beyond a reasonable doubt. You must be satisfied beyond a
16 reasonable doubt of the accuracy of the identification of
17 the defendant or defendants before you may convict the
18 defendant or defendants.

19 Identification testimony is an expression of belief or
20 impression by a witness. You must determine the accuracy
21 of the identification of the defendant or defendants. You
22 must consider the believability of each identification
23 witness in the same way as any other witness. You may
24 consider whether the witness had an adequate opportunity to
25 observe the offender at the time of the offense. This will

1 be affected by things like how long or short of time was
2 available, how far or close the witness was, the lighting
3 conditions, and whether the witness had the chance to see
4 or know the person in the past. Once again, I instruct you
5 the burden of proof on the State extends to every element
6 of the crimes charged, and this specifically includes the
7 burden of proving beyond a reasonable doubt the identity of
8 the defendant or defendants as the persons -- person or
9 persons who committed the crimes alleged. If after
10 examining the testimony you have a reasonable doubt as to
11 the accuracy of the identification, you must find the
12 defendants not guilty.

13 Ladies and gentlemen, the defendants Grant and
14 Hartwell are charged with kidnaping. The State must prove
15 beyond a reasonable doubt that the defendants knowingly and
16 unlawfully seized, confined, inveigled, decoyed, kidnaped,
17 abducted, or carried away another person without authority
18 of law.

19 To do a thing unlawfully is to do it willfully against
20 the law. Knowingly means with knowledge, conscientiously,
21 not accidentally. Seized means to take hold of suddenly or
22 forcibly. Confine means to limit, restrict, or enclose
23 within bounds, imprison or shut or keep in. Inveigle means
24 to lure, entice, or lead astray by false representations,
25 promises, or other deceitful means. Decoy means to lure by

1 or as if by decoy. A decoy is something to entice a person
2 into a trap. Kidnap is to remove a person against his
3 will, by unlawful force or by fraud. Abduct means to carry
4 off secretly or by force for an illegal purpose. Carry
5 away means to remove.

6 The State does not have to prove that the defendant or
7 defendants did all of these things. Instead, if you find
8 beyond a reasonable doubt that the defendants did any of
9 these things, you may find the defendants guilty of
10 kidnaping.

11 Something done without the authority of law is
12 something which the law does not sanction, permit, allow,
13 condone, or provide justification for.

14 The kidnaping does not have to be done for any
15 personal or monetary gain, or for any illegal purpose. It
16 may be for any reason whatsoever.

17 I further instruct you that the defendants Grant and
18 Hartwell are charged with murder. The State must prove
19 beyond a reasonable doubt that the defendants killed
20 another person with malice aforethought. Malice is hatred,
21 ill will, or hostility towards another person. It is the
22 intentional doing of a wrongful act without just cause or
23 excuse, and with an intent to inflict an injury or under
24 circumstances that the law will infer an evil intent.

25 Malice aforethought does not require that malice exist

1 for any particular time before the act is committed, but
2 malice must exist in the mind of the defendants just before
3 and at the time the act is committed; therefore, there must
4 be a combination of the previous evil intent and the act.

5 Malice aforethought may be express or inferred. These
6 terms "express" and "inferred" do not mean different kinds
7 of malice, but merely the manner in which malice may be
8 shown to exist. That is either by direct evidence or by
9 inference from the facts and circumstances shown which may
10 -- which are proven.

11 Express malice is shown when a person speaks words
12 which express hatred or ill will for another, or when a
13 person prepared beforehand to do the act which was later
14 accomplished. For example, lying in wait for a person or
15 any other acts of preparation going to show that the deed
16 was within the defendant's mind would be express malice.

17 Malice may be inferred from conduct showing a total
18 disregard for human life. Inferred malice may also arise
19 when the deed is done with a deadly weapon. A deadly
20 weapon is any article, instrument, or substance which is
21 likely to cause death or grave bodily harm. Whether an
22 instrument has been used as a deadly weapon depends on the
23 facts and circumstances of each case. The following are
24 examples of dead -- are examples of instruments which may
25 be deadly weapons: a pistol, a shotgun, a riffle, a dirk,

1 a dagger, a knife, a slingshot, metal knuckles, a razor,
2 gasoline, a firebomb or Molotov cocktail, and lighter
3 fluid. A gun may be a deadly weapon even if it is not
4 operating.

5 I further instruct you that if one intentionally kills
6 another during the commission of a felony, the inference of
7 malice may arise. If facts are proven beyond a reasonable
8 doubt sufficient to raise an inference of malice to your
9 satisfaction, this inference would simply be an evidentiary
10 fact to be taken into consideration by you along with all
11 of the other evidence in the case, and you may give it the
12 weight that you decide it should receive.

13 I further instruct you that the crimes of first degree
14 burglary, kidnaping, and armed robbery are felonies.
15 Again, ladies and gentlemen, this -- this is simply an
16 evidentiary fact to be taken into consideration by you
17 along with all the other evidence in the case, and you may
18 give it the weight that you decide it should receive.

19 The defendants Grant and Hartwell are charged with
20 first degree burglary. The State must first prove beyond a
21 reasonable doubt that the defendants entered a dwelling
22 without consent. A dwelling is any building or portion of
23 a building in which a person ordinarily sleeps. A building
24 constructed as a dwelling that has never been occupied
25 cannot be considered a dwelling for purposes of burglary,

1 but a building is a dwelling even if the residents are
2 temporarily absent from the building.

3 In order to prove that the defendant entered the
4 dwelling -- the defendants entered the dwelling, the State
5 does not have to show that the defendants' entire body
6 entered the dwelling. The smallest entry is sufficient.
7 It may be any part of the body such as a hand or foot, or
8 even an instrument such as a hook or other instrument. In
9 addition, the State does not have to prove that force was
10 used to gain entry. If a person enters a building by using
11 deception, artifice, trick, or misrepresentation to get
12 consent to enter, this is an entry without consent.

13 Next, the State must prove beyond a reasonable doubt
14 that the defendant intended -- that the defendants intended
15 to commit a crime, either a felony or a misdemeanor, at the
16 time of the entry. The mere entry into a dwelling without
17 consent is not burglary. If the intent to commit a crime
18 is formed after the entry, it is not burglary. On the
19 other hand, if the defendant intended to commit a crime at
20 the time of the entry, it is a burglary, even if the intent
21 was abandoned after the entry. It does not matter that the
22 intended crime was not completed. Intent may be shown by
23 acts and conduct of the defendants and other circumstances
24 from which you may naturally and reasonably infer intent.

25 Finally, the State must prove beyond a reasonable

1 doubt one of the applicable circumstances. One: When
2 entering while in the dwelling or when fleeing, the
3 defendant or accomplice was armed with a deadly weapon or
4 explosive. A deadly weapon is any article, instrument, or
5 substance which is likely to cause death or grave bodily
6 harm. Whether an instrument has been used as a deadly
7 weapon depends on the facts and circumstances of each case.
8 And as I've explained, the following are examples which may
9 be deadly weapons: a pistol, a shotgun, a rifle, a dirk, a
10 dagger, a knife, a slingshot, metal knuckles, a razor,
11 gasoline, a firebomb or Molotov cocktail, and lighter
12 fluid. A gun may be a deadly weapon even if it is not
13 operating.

14 Or when entering while in the dwelling or while
15 fleeing, the defendant or an accomplice caused physical
16 injury to anyone not participating in the crime.

17 Or when entering while in the dwelling or when
18 fleeing, the defendant or an accomplice used or threatened
19 to use a dangerous object.

20 Or when entering while in the dwelling or when
21 fleeing, the defendant or an accomplice displayed what was
22 or appeared to be a knife, pistol, revolver, rifle,
23 shotgun, machine gun, or other firearm.

24 Or that the defendants entered or remained in the
25 dwelling in the nighttime. Nighttime is the period between

1 sunset and sunrise during which there is not enough
2 daylight to recognize a person's face except by artificial
3 light or moonlight.

4 The defendants Grant and Hartwell are charged with
5 armed robbery. In order to prove this offense, the State
6 must first prove beyond a reasonable doubt that the
7 defendants took personal property from the person or
8 presence of another person. Property is in the presence of
9 a person if it is within the person's reach, inspection,
10 observation, or control, so that the person could, if not
11 overcome with violence or prevented by fear, keep
12 possession of the property.

13 The State must also prove beyond a reasonable doubt
14 that the defendant carried the property away, intending to
15 permanently deprive the owner of the property and to keep
16 the property for the defendant's own use. The slightest
17 removal of the property or the complete possession of the
18 property, even for an instant by the defendants, is
19 sufficient to show a taking and a carrying away of the
20 property. The taking and carrying away of the property
21 must have been done with violence or by putting the owner
22 of the property in fear of violence.

23 Finally, the State must prove beyond a reasonable
24 doubt that the defendants were armed with a deadly weapon
25 during the robbery. A deadly weapon is any article,

1 instrument, or substance which is likely to cause death or
2 grave bodily harm. Again as I've instructed, whether an
3 instrument has been used as a deadly weapon depends on the
4 facts and circumstances of each case. And again using my -
5 - my earlier examples, the following are examples of
6 instruments which may be considered as deadly weapons: a
7 pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a
8 slingshot, metal knuckles, a razor, gasoline, a firebomb, a
9 Molotov cocktail, and lighter fluid. A gun may be a deadly
10 weapon even if it is not operating.

11 Ladies and gentlemen, I instruct you that if you find
12 that the State has failed to prove that the defendants
13 Grant and Hartwell are guilty of armed robbery, you may
14 then decide whether the State has proven that the
15 defendants are guilty of attempted armed robbery.

16 I instruct you that an attempt is an effort to
17 accomplish a crime which does not succeed. An attempt
18 includes a specific intent to do a particular criminal act
19 along with an act falling short of the act intended. The
20 State must show more than mere preparation and intent.
21 There must be some overt act committed in the effort to
22 commit the crime. Intent means intending the result which
23 actually occurs, not accidentally or involuntarily. Intent
24 may be shown by acts and conduct of the defendant -- of the
25 defendants and other circumstances from which you may

1 naturally and reasonably infer intent.

2 Ladies and gentlemen, I instruct you that if a crime
3 is committed by two or more people who were acting together
4 in committing a crime, the act of one is the act of all. A
5 person who joins with another to accomplish an illegal
6 purpose is criminally responsible for everything done by
7 the other person which occurs as a natural consequence of
8 the acts done in carrying out the common plan and purpose.
9 For example, two people can be guilty of killing another
10 person when only one of the two had a gun, there was only
11 one bullet, and only one of the two fired the shot that
12 caused the death. If two or more people are together,
13 acting together, assisting each other in committing the
14 events, the act of one is the act of all; or as it is
15 sometimes said, "the hand of one is the hand of all."

16 Prior knowledge that a crime is going to be committed
17 without more is not sufficient to make a person guilty of
18 that crime. Mere knowledge that another person is going to
19 commit a crime, even if the defendant is present when the
20 crime is committed, is not sufficient to convict the
21 defendant as a principle.

22 Guilt as a principle is shown by actual or
23 constructive presence at the scene as a result of prior
24 arrangement; therefore, a finding of a prior arranged plan
25 or common scheme is necessary for a finding of guilt as a

1 principle. The State must prove beyond a reasonable doubt
2 by competent evidence the theory of the hand of one is the
3 hand of all.

4 A principle in a crime is one who either actually
5 commits the crime or who is present aiding, abetting, or
6 assisting in committing the crime. When a person doesn't
7 act in the presence of and with the assistance of another,
8 the act is done by both. Where two or more are acting with
9 a common plan or -- or intent are present at the commission
10 of a crime, it does not matter who actually commits the
11 crime, all are guilty. The hand of one is the hand of all.

12 Present at the commission of a crime means to be
13 sufficiently near, to aid and abet and assist in the
14 commission of the crime; however, mere presence at the
15 scene of a crime is not sufficient to convict one as a
16 principle on the theory of aiding and abetting. Intent is
17 also a necessary element, for there must have been a common
18 design or intent to commit the crime; and a crime must have
19 been committed pursuant there to where the person aiding
20 and abetting by some overt act.

21 Intent means intending a result which actually occurs,
22 not accidentally or involuntarily. Intent may be shown by
23 acts and conduct of the defendants and other circumstances
24 from which you may naturally and reasonably infer intent.
25 The State must prove these elements beyond a reasonable

1 doubt.

2 Ladies and gentlemen, the defendant Marquita Smith is
3 charged with being an accessory before the fact of the
4 felonies of murder and armed robbery. In order to prove
5 these crimes, the State must prove beyond a reasonable
6 doubt that the defendant, Marquita Smith, either advised,
7 agreed, urged, counseled, hired, or in some way aided and
8 abetted -- aided or abetted another person to commit a
9 crime, and that the defendant was not present when the
10 offense was committed.

11 Aid means to help, to promote the course or
12 accomplishment of, to give support to, or to give
13 assistance to. Abet means to encourage or appear to favor
14 or support.

15 I instruct you that whenever an unlawful act of malice
16 is done in the commission of a felony and death ensues, it
17 will be murder. I further instruct you that the crimes of
18 burglary first degree, kidnaping, and armed robbery are all
19 felonies. I further instruct you that a person is not
20 liable for the acts of an accomplice unless the act is a
21 natural or approximate -- a natural or probable consequence
22 of the plan. You must find that homicide was a natural and
23 probable consequence of the particular act to which the
24 defendant was an accomplice.

25 Ladies and gentlemen, I instruct you that if you feel

1 -- if you find that the State has failed to prove that the
2 defendant, Marquita Smith, is guilty of accessory before
3 the fact of a felony, that being armed robbery, you may
4 then decide whether the State has proven that she is guilty
5 of the offense of accessory before the fact of a felony,
6 that being attempted armed robbery.

7 And as I explained, an attempt is an effort to
8 accomplish a crime which does not -- which does not
9 succeed. Attempt -- an attempt includes a specific intent
10 to do a particular criminal act along with an act falling
11 short of the act intended. The State must show more than
12 mere preparation and intent. There must be some overt act
13 committed in the effort to commit the crime.

14 And as I've explained, intent means intending the
15 result which actually occurs, not accidentally or
16 involuntarily. Intent may be shown by acts and conduct of
17 the defendant and other circumstances from which you may
18 naturally and reasonably infer intent.

19 Ladies and gentlemen, there are three separate
20 defendants in this case, each of whom is charged with
21 different crimes.

22 The defendant Gary Grant is charged with the offenses
23 of armed robbery, four counts of kidnaping, two counts of
24 burglary in the first degree, and murder.

25 The defendant Jermaine Hartwell is charged with the

1 offenses of armed robbery, four counts of kidnaping, two
2 counts of burglary in the first degree, and murder.

3 The defendant Marquita Smith is charged with the
4 offenses of accessory before the fact of a felony, that
5 felony being murder; and accessory before the fact of a
6 felony, that felony being armed robbery.

7 The case of each defendant and the evidence and the
8 law concerning that defendant should be considered
9 separately and individually. Your verdict does not have to
10 be the same for all defendants. The fact that you may find
11 one defendant guilty or not guilty should not control your
12 verdict as to the other defendants.

13 Where more than one person is charged with a crime, if
14 the evidence warrants it, you may convict one and acquit
15 the other; or you may acquit both or you may convict both
16 or all. It will depend upon your view of the testimony and
17 evidence.

18 You must take each defendant and consider the evidence
19 as to that defendant and my instructions to you on the law.
20 You will then write a separate verdict of guilty or not
21 guilty for each individual defendant.

22 Ladies and gentlemen, the indictments in this case
23 allege eight different offenses against the defendant Gary
24 Grant. And as I've already indicated, those offenses are
25 armed robbery, four counts of kidnaping, murder, and two

1 counts of burglary in the first degree.

2 And the indictments allege eight different offenses
3 against the defendant Jermaine Hartwell. Again as I've
4 indicated, those being four counts of kidnaping, one count
5 of murder, one count of armed robbery, and two counts of
6 burglary in the first degree.

7 And as to Marquita Smith, accessory before the fact of
8 a felony murder and accessory before the fact of a felony
9 armed robbery.

10 Each indictment charges a separate and distinct
11 offense. You must decide each indictment separately on the
12 evidence and the law applicable to it, uninfluenced by your
13 decision as to any other indictment. The defendants may be
14 convicted or acquitted on any or all of the offenses
15 charged, and as I've indicated, you will be asked to write
16 a separate verdict for each -- write a separate verdict of
17 guilty or not guilty for each separate indictment.

18 Ladies and gentlemen, there are several possible
19 verdicts that you must find -- that you may find for each
20 individual defendant, and I will go over each of those
21 possible verdicts with you shortly.

22 I emphasize that there is absolutely no significance,
23 whatsoever, to the order in which I go over these verdicts.
24 It is simply that one must be stated first.

25 Ladies and gentlemen, your verdict must be a unanimous

1 one, which means that all 12 of you must agree. And as
2 I've indicated, I will go over each of the indictments --
3 each of the possible verdicts for each indictment.

4 As to the defendant Gary Grant, indictment 2007-314,
5 which is an indictment for armed robbery, that indictment
6 reads as -- that verdict form reads as follows (as read):
7 "As to the indictment number 2007-GS-08-314, we the jury,
8 by unanimous consent, find the defendant guilty of armed
9 robbery or not guilty"; or as to the lesser included
10 offense, "We the jury, by unanimous consent, find the
11 defendant guilty of attempted armed robbery or not guilty."

12 And as to the indictments for kidnaping which are
13 07-GS-08-315, 316, 317, and 318, they all read -- read as
14 follows: "We the jury, by unanimous consent, find the
15 defendant guilty of kidnaping or not guilty."

16 And as to the indictment for murder, which is
17 indictment 2207-GS-08-319 (as read): "We the jury, by
18 unanimous consent, find the defendant guilty of murder or
19 not guilty."

20 As to each verdict form burglary in the first degree,
21 which are indictments 2007-GS-08-347 and 343 (as read):
22 "We the jury, by unanimous consent, find the defendant
23 guilty of burglary first or not guilty."

24 And as to the defendant Jermaine Hartwell, the verd
25 forms read as follows: "As to indictment 2007-GS-08-301

1 309, 310, and 311, which are indictments for kidnaping, the
2 options are as follows, "We the jury, by unanimous consent,
3 find the defendant guilty of kidnaping or not guilty."

4 As to indictment 2007-GS-08-312, which is an
5 indictment for murder, "We the jury, by unanimous consent,
6 find the defendant guilty of murder or not guilty"

7 And as to the offense of armed robbery, 2007-GS-08-
8 313, "We the jury, by unanimous consent, find the defendant
9 guilty of armed robbery or not guilty," or as to the lesser
10 included offense, "We the jury, by unanimous consent, find
11 the defendant guilty of attempted armed robbery or not
12 guilty."

13 And as to the indictments for burglary in the first
14 degree, the options are the same, "We the jury, by
15 unanimous consent, find the defendant guilty of burglary
16 first degree or not guilty."

17 And as to the defendant Marquita C. Smith on
18 indictment 2007-1748, accessory before the fact of a felony
19 murder, "We the jury, by unanimous consent, find the
20 defendant guilty of accessory before the fact of a felony
21 murder or not guilty."

22 And as to indictment 2007-GS-08-1751, accessory before
23 the fact of a felony armed robbery, "We the jury, by
24 unanimous consent, find the defendant guilty of accessory
25 before the fact of a felony, armed robbery or not guilty";

1 or as to the lesser included offense, "We the jury, by
2 unanimous consent, find the defendant guilty of accessory
3 before the fact of a felony, that being attempted armed
4 robbery or not guilty."

5 Ladies and gentlemen, again I emphasize that there is
6 absolutely no significance whatsoever to the order in which
7 I state these possible verdicts. And again, I emphasize
8 that your verdict must be a unanimous one, which means all
9 12 member of the jury must reach consensuses and agree.

10 Mr. Foreman, it is your responsibility to fill out the
11 verdict forms. It is also your responsibility to advise
12 the bailiffs when the jury has completed its deliberations
13 by knocking on the door and telling them that the jury has
14 reached a verdict. It is also your responsibility that if
15 the jury has any questions during deliberations, that you
16 write those questions out and present them to the bailiff.

17 Ladies and gentlemen, I will advise you that if you
18 have any questions during deliberations, please note that
19 there will be a delay in our response. There is a
20 procedure that we must follow in answering jury questions.
21 So know that if you send a question and there is a delay,
22 please know that we're not ignoring you, that we're simply
23 adhering to that process in the -- in -- in providing an
24 answer to any question that you might have.

25 I'm going to ask that you return to your jury room.

1 Please leave your notepads in your seats and please do not
2 begin your deliberations. There are matters of law that I
3 must take up with the attorneys that may require additional
4 instruction or clarification of an instruction; however, if
5 there is no further instruction, we will send in your
6 notebooks as well as the evidence, and at that time we will
7 excuse the alternates and you will be allowed to begin your
8 deliberations.

9 Again, please do not yet begin your deliberations.
10 And if you would go with your caretakers and we will advise
11 you as to how we will be proceeding.

12 (The jury exits at 1:03 p.m.)

13 THE COURT: You may be seated. Are there any
14 exceptions from the State?

15 MR. JENNINGS: No, Your Honor. The only thing Ms.
16 Wilson and I were talking about is just making sure it's
17 clear to the jury that they can only convict for the armed
18 robbery or attempted armed robbery.

19 THE COURT: You know, I was concerned about the
20 verdict form, frankly, and I -- I didn't catch it yesterday
21 because, I'll be frank, I was little fatigued and I just
22 didn't -- and it's a funny thing, even the charge, when you
23 read it to yourself, it is very different than when you're
24 reading it out loud. And I got a little concerned about --
25 I've seen it done a different way, which is -- it would

1 simply say, "We the jury, by unanimous consent, find the
2 defendant guilty of -- of armed robbery or as to the lesser
3 included offense, guilty of -- guilty of attempted armed
4 robbery or not guilty," is the way I've also seen it done.
5 But I'm not certain that it would necessarily -- I guess
6 they would determine -- they would go through it and they'd
7 either say guilty of armed robbery or not ---

8 Ms. Wilson: How bout if you said if -- if you
9 determine that the defendants are not guilty of armed
10 robbery ---

11 THE COURT: No. What I said is if you find that the
12 defendant -- that the State has not proven beyond a
13 reasonable doubt the elements ---

14 MS. WILSON: Right.

15 THE COURT: --- of armed robbery, you may consider
16 whether they have proven the elements of attempted armed
17 robbery.

18 Ms. Wilson: Could we put that on the form?

19 THE COURT: I think I've instructed them. I mean, I -
20 - I ---

21 Ms. Wilson: I know you said it in your instructions.
22 You did say it in your instructions. I was just worried by
23 the time you got to the verdict form that was so long, I --
24 I'd hate for them to check both or something, and us have
25 to ferret that out.

1 THE COURT: Ask them a question, I know. I have found
2 that generally they ask questions if they're confused. I
3 don't know. Mr. Bolus, what are you thoughts?

4 MR. BOLUS: I would just bring them in and say you
5 can't find them guilty of both of them. It's one or the
6 other.

7 THE COURT: Or you can find them not guilty.

8 MR. BOLUS: Or not -- right. But not both. It's one
9 or the other or not either.

10 THE COURT: Does any -- well, let me ask Mr. Barnwell.

11 MR. BARNWELL: I agree with Mr. Bolus. I think that
12 would be ---

13 THE COURT: Mr. Jones?

14 MR. JONES: I agree also.

15 THE COURT: The State have any exception?

16 Ms. Wilson: That's fine.

17 THE COURT: And what I will just simply say is that
18 you're -- that we're clarifying an instruction that the
19 Court has charged you regarding the elements of armed
20 robbery. And I hope I can remember this after I say it.
21 The Court -- that the Court has charged you regarding the
22 offenses of -- the offense of armed robbery, and that --
23 that you must consider whether the State has met those
24 elements. I need to think about that. You cannot find the
25 defendants guilty of both offenses.

1 Let me think through that for a minute. I got to
2 think through it. I've got to think through how I want to
3 say that. Because I don't want to make it more confusing.

4 Ms. Wilson: How about if you said, "You should only
5 consider the offense of attempted armed robbery if you find
6 the State has not met its burden as to armed robbery"?

7 THE COURT: That's a little -- that's -- that's a
8 little -- I want to be really, really clear that I don't
9 make -- I don't cross the line and comment on the facts. I
10 -- I don't want to -- I -- let me think for a second about
11 how I want -- better ways -- better ways to say it.

12 I simply could say, "Ladies and gentlemen, I instruct
13 you that you may only consider the lesser included offense
14 if you find the State has failed to prove the elements of
15 the armed robbery." Any suggestions from defense counsel?

16 MR. BOLUS: I just like the way I said it the first
17 time.

18 THE COURT: I don't remember what you said, Mr. Bolus.
19 You're going to have to remind me.

20 MR. BOLUS: As long as they know they can't do both,
21 but they can find either.

22 THE COURT: I can say, "Ladies and gentlemen of the
23 jury, I further instruct you that under the less -- that
24 under the Court's instructions regarding the lesser
25 included offenses, you cannot make a finding of guilt on

1 both, but you can make a finding of not guilty on either."

2 That's confusing. I'm not sure I like that. I'm not
3 sure my instruction is unclear and I'm not sure the verdict
4 form is unclear.

5 MS. WILSON: I thought your instruction was good. I
6 was just concerned about how far back it was in relation to
7 the verdict form.

8 THE COURT: Actually, it was -- there's only like five
9 pages ahead of when I got to it, because Ms. Smith's stuff
10 is very short and it was right before that.

11 I -- I think the -- I -- I am concerned that I will
12 make it -- make the instruction less clear by now trying to
13 add something to it, and I think the form in and of itself
14 is fairly self explanatory.

15 The only other way I've seen it done is to leave out
16 the second part. In other words, where it would simply
17 read -- and I'm just using as an example Ms. Smith. So it
18 would just say, "Guilty of accessory before the fact of a
19 felony or as to the lesser included offense, guilty of
20 accessory before the fact attempted armed robbery or not
21 guilty." That's the only other way I've seen it done. And
22 I don't know that it makes it any more clear.

23 I tend to think doing it the way we have it makes it
24 more clear, because it's -- and if they do something
25 inconsistent, we'll just have to -- we'll just have to

1 cross that bridge and just have to get it clarified. Or
2 either I'll just have to deal with it as a matter of law
3 because they can't -- I mean, if they -- and I'm thinking
4 out loud, if they said not guilty on both of them, that's
5 clear. If they said -- if they said guilty on both of them
6 -- I don't -- that would mean they had to ignore the
7 instruction. That means they would had -- they would have
8 disregarded the instruction. Although I had one jury, not
9 in a criminal case, disregard the instructions in a civil
10 case I had. Totally disregard it. But I -- that means
11 they would have to totally disregard it. And if they -- if
12 they did that, what I might do is simply bring them back in
13 and re-instruct them on lesser -- on the elements of the
14 lesser included offense. And then we'd have to craft
15 something that tells them that you've done something
16 inconsistent with the instructions. I'm going to send you
17 back to -- and I don't think that would -- would enure to
18 the detriment of the defendants, because clearly they would
19 want to know which one -- well, I don't know.

20 Yeah. I think it was clear. I'm going to stick with
21 my initial gut reaction. If something otherwise happens,
22 we'll just have to deal with it. But I -- I think the
23 instruction regarding the lesser included offenses was
24 clear and I've used that -- not in this particular offense,
25 but I've used lesser included before, and I've used this

1 type of verdict form and I've never had an inconsistent
2 verdict. Okay.

3 Are there any exceptions from the defense, Mr. Bolus?

4 MR. BOLUS: None.

5 THE COURT: From Mr. Barnwell?

6 MR. BARNWELL: No. I did write something down on this
7 attempted armed robbery and armed robbery. I don't know if
8 you want to consider it or not.

9 THE COURT: Sure. I'm always open minded.

10 MR. BARNWELL: "You may find the defendant Marquita
11 Smith guilty of accessory to armed robbery or not guilty to
12 accessory of armed robbery, or you may find defendant
13 Marquita Smith guilty of a lesser included offense of
14 attempted armed robbery or not guilty of accessory to
15 attempted armed robbery. But you may not find defendant
16 Marquita Smith guilty of both accessory to armed robbery
17 and accessory to attempted armed robbery.

18 THE COURT: I think he might have a good solution.
19 What y'all think? Mr. Bolus?

20 MR. BOLUS: I like it.

21 THE COURT: Mr. Jones?

22 MR. JONES: Sounds good to me.

23 THE COURT: I could -- I could do that. Is your
24 handwriting legible, Mr. Barnwell?

25 MR. BARNWELL: It's not legible.

1 THE COURT: Mine's becoming illegible. Let me see if
2 I can decipher it. Oh, it's no so bad. You write in code
3 like I do, though. That's nice. Okay.

4 (Sotto voce discussion between the Court and law
5 clerk.)

6 THE COURT: Okay. This is what I would propose. I'd
7 say -- and you all can tell me if you find this acceptable.
8 It's a little redundant, but I think it's basically what
9 Mr. Barnwell has suggested: "You may find the defendant
10 Gary Grant guilty of armed robbery or not guilty of armed
11 robbery, or you may find the defendant Gary Grant guilty of
12 attempted armed robbery or not guilty of attempted armed
13 robbery. But you may not find the defendant Gary Grant
14 guilty of both armed robbery and attempted armed robbery.

15 "You may find the defendant Jermaine Hartwell..." and
16 it would likewise say the same thing about Mr. Hartwell.

17 And then it would say likewise the same thing
18 regarding Mrs. Smith, which is, "You may find the defendant
19 Marquita Smith guilty of accessory before the fact of a
20 felony armed robbery or not guilty of accessory before the
21 fact of a felony armed robbery, or you may find her on the
22 -- on the attempt, but you may not find her guilty of both
23 accessory before the fact of a felony armed robbery and
24 accessory before the fact of a felony attempted armed
25 robbery." Is that acceptable to everyone?

1 MR. JENNINGS: Yes, ma'am.

2 THE COURT: Mr. Bolus?

3 MR. BOLUS: Yes, ma'am.

4 THE COURT: Mr. Barnwell?

5 MR. BARNWELL: Yes, Your Honor.

6 THE COURT: Mr. Jones?

7 MR. JONES: Yes, Your Honor.

8 THE COURT: Okay. If you all could bring the jury
9 back in.

10 MR. JONES: Your Honor, I have one other -- one other
11 issue.

12 THE COURT: I'm sorry. I didn't ask you. I
13 apologize. Mr. Barnwell, was there anything further? Did
14 you have any further exceptions?

15 MR. BARNWELL: No, ma'am.

16 THE COURT: Mr. Jones, any exceptions to the charge?

17 MR. JONES: Just one with regard to the accessory. I
18 think it said "of a offense," and I think it would be of
19 "the offense," which -- and it might read -- maybe I ---

20 THE COURT: I didn't -- I didn't say that at all.

21 MR. JONES: I'm sorry. I couldn't hear you.

22 THE COURT: I didn't read any classifications of
23 offenses. I read the offenses she was actually charged
24 with.

25 MR. JONES: No. I mean the jury charge. I think

1 there was a part in there where it says "defending and
2 advised -- was not present when -- or let's see -- in order
3 to prove this, they must prove they intended -- and aided
4 and abetted another person to commit, I think you said "a
5 crime," and I -- and I was --

6 THE COURT: It's a generalized charge. It has to be
7 read that way because at the beginning I told them that
8 she's charged with both of them. So this charge applies to
9 both of those offenses; otherwise, I'd have to read it
10 twice.

11 MR. JONES: Right. I just don't want them to think
12 what if -- if there's -- you know, if there's anything that
13 -- any crime that she could be charged with, I don't want
14 them to be confused.

15 THE COURT: I think it's self explanatory that it
16 applies to the offenses of murder and armed robbery or
17 attempted armed robbery.

18 MR. JONES: It's talks about it has to be part of the
19 offense -- principle to commit the offense, is one of the
20 instructions that I had. And I just don't want there to be
21 any confusion on the jury that -- that -- you know, that
22 she's -- and -- and she's, you know, party to something
23 else. Just because they find that there's a crime --

24 THE COURT: I think it's very clear when I say to them
25 what she's charged with that she can only be held

1 accountable for murder or armed robbery or attempted armed
2 robbery. And that's why I separated it out the way I did
3 as to each of the defendants. She's not charged with the
4 other offenses.

5 MR. JONES: Right. Right.

6 THE COURT: Does the State -- does the State have a
7 contrary opinion to the Court's opinion?

8 MR. JENNINGS: No. We agree with Your Honor's
9 opinion.

10 THE COURT: I'll note your exception for the record.

11 Please bring in the jurors so that I can give this
12 additional instruction.

13 (The jury enters at 1:24 p.m.)

14 THE COURT: You may be seated. Mr. Foreman, ladies
15 and gentlemen, out of an abundance of caution, I'm going to
16 give you -- I'm going to attempt to clarify an instruction
17 that I've given you.

18 Ladies and gentlemen, you may find the defendant Gary
19 Grant guilty of armed robbery or not guilty of armed
20 robbery, or you may find the defendant Gary Grant guilty of
21 attempted armed robbery or not guilty of attempted armed
22 robbery. But you may not find the defendant Gary Grant
23 guilty of both armed robbery and attempted armed robbery.

24 Likewise regarding the defendant Jermaine Hartwell,
25 you may find Mr. Hartwell guilty of armed robbery or not

1 guilty of armed robbery, or may find him guilty of
2 attempted armed robbery or not guilty of attempted armed
3 robbery. But you may not find him guilty of both armed
4 robbery and attempted armed robbery.

5 And as it regards the defendant Marquita Smith, you
6 may find her guilty of accessory before the fact of a
7 felony, that felony being armed robbery; or not guilty of
8 accessory before the fact of a felony, again that felony
9 being armed robbery. Or you may find her guilty of
10 accessory before the fact of a felony, that being attempted
11 armed robbery; or not guilty of accessory before the fact
12 of a felony, that being attempted armed robbery. But you
13 may not find the defendant Marquita Smith guilty of both
14 accessory before the fact of a felony, armed robbery, and
15 accessory before the fact of a felony, attempted armed
16 robbery.

17 That will conclude the Court's additional instruction.
18 If you would go with the bailiffs for me, please. Please,
19 do not yet begin your deliberations. I still have a couple
20 of matters of law to take up with the attorneys; however,
21 if there is no further instruction or clarification of an
22 instruction, your notebooks and the evidence will be sent
23 in.

24 Please feel free to go ahead and start to enjoy your
25 lunch, and we will then release you to begin your

1 deliberations. You can go with the bailiffs.

2 (The jury exits at 1:27 p.m.)

3 THE COURT: You may be seated. Any exceptions from
4 the State?

5 MR. JENNINGS: No, Your Honor.

6 MR. BOLUS: None.

7 MR. BARNWELL: None, Your Honor.

8 MR. JONES: None, Your Honor.

9 THE COURT: All right. The record shall reflect the
10 jury's been released to begin their deliberations at 1:27.
11 If you could please bring out the alternates, and you all -
12 - pardon me?

13 COURT OFFICER: They're all right in the middle of
14 lunch.

15 THE COURT: Are they really? Can we take the
16 alternates to another room down here to start their lunch?

17 BAILIFF: I can.

18 THE COURT: Thank you. If you all would go through
19 the evidence for me, please, and make sure it's all in
20 order.

21 And also, I had to correct a scribner's error on the
22 verdict forms to reflect "guilty of burglary first degree,"
23 to make sure it mirrored the indictments.

24 MR. JENNINGS: We're fine, judge.

25 THE COURT: Everything is in order?

1 MR. JENNINGS: It looks like.

2 THE COURT: You all bear with me. I want to excuse
3 the alternates, and I want everybody to be present for
4 that. Where are the alternates?

5 BAILIFF: They're in there.

6 THE COURT: Can you get them for me?

7 (Alternate jurors enter at 1:35 p.m.)

8 THE COURT: I wanted to thank you both on behalf of
9 the State and Defense counsel and the defendants. We thank
10 you for your time and your attention to this case. I've
11 watched you both. You both were prompt, you've been
12 timely, and you've been extremely attentive to the
13 evidence. Being an alternate is a thankless job. You get
14 to do all the work but you don't get to deliberate. Least
15 we could do is give you a little lunch. I apologize that I
16 interrupted you all eating.

17 You are free to remain if you would like to see how
18 the jury deliberations come out, or you're also free to be
19 excused. If you need work excuses, please let us know.
20 Your checks as well as your work excuses will be mailed.
21 If you don't need your excuses today, they'll be mailed out
22 probably tomorrow and you will get them, I guess on
23 Saturday probably; or sometime shortly thereafter.

24 You are free to discuss this case if you would like,
25 but I would ask that you not do that until after the jury

1 has concluded its deliberations and until we have excused
2 everyone. By the same token you don't have to discuss your
3 verdict and if someone -- I mean, your deliberations or
4 your hearing of the case. And if someone should persist in
5 trying to speak to you, please make the clerk's office
6 aware of it so that we can protect your privacy.

7 Again, we thank you and you're excused with the
8 Court's profound thanks.

9 All right. We will be at ease.

10 **VERDICT**

11 THE COURT: You may be seated. Is the State ready to
12 proceed?

13 MR. JENNINGS: Yes, Your Honor.

14 THE COURT: The defense, Mr. Bolus, ready to proceed?

15 MR. BOLUS: Yes, Your Honor.

16 THE COURT: Mr. Barnwell, are you ready to proceed?

17 MR. BARNWELL: Yes, Your Honor.

18 THE COURT: Mr. Jones?

19 MR. JONES: Yes, Your Honor.

20 THE COURT: I understand from the bailiffs that the
21 jury has reached a verdict. Please bring in the jury.
22 Well, before you do that, I just remembered something else
23 I reminded myself.

24 I understand the gallery is full of a great deal of
25 individuals, some being related to the victims in this case

1 as well as the defendants in this case. I made these
2 remarks earlier in the week; some have had the benefit of
3 them, some have not. I know that these could be highly
4 charged emotionally -- highly charged proceedings and very
5 emotionally charged proceedings, but I would ask that
6 everyone abide by the decorum of the courtroom and the --
7 and what that is what -- and what is required of the
8 dignity of the process and that there be no outburst. If
9 there are any outbursts, you see that we have a great deal
10 of law enforcement present; you will immediately be removed
11 from the courtroom and it may result in other actions. So
12 I would ask that now, that if you do not feel that you can
13 comport yourselves appropriately, that you allow yourself
14 to be -- to leave the courtroom, because I do not want
15 there to be any inappropriate events taking place in the
16 presence of the panel. And I expect everyone to act
17 accordingly. Please bring in the jury.

18 (The jury enters at 3:10 p.m.)

19 THE COURT: You may be seated.

20 Mr. Foreman, is it correct the jury has reached a
21 verdict?

22 MR. FOREMAN: Yes, ma'am.

23 THE COURT: If you would give the verdict forms to the
24 bailiff for me.

25 Mr. Foreman, while reviewing the verdict forms, I

1 realize that there is one form that you did not fill out
2 for the defendant Gary Grant. I'm going to have to send
3 you all back to your jury room to fill out that form, and
4 then once you have completed that -- and I know it's a lot
5 of indictments -- once you've completed that process,
6 please knock on the door and advise the bailiffs that
7 you've completed that process.

8 (The jury exits at 3:10 p.m.)

9 THE COURT: You may be seated. We'll be at ease until
10 they've done that.

11 THE BAILIFF: Judge, they've got it.

12 THE COURT: All right. Bring them back in.

13 (The jury enters at 3:12 p.m.)

14 THE COURT: You may be seated. If you would give the
15 verdict forms to the bailiff.

16 MR. FOREMAN: I apologize, Your Honor.

17 THE COURT: That's okay. You don't have to apologize.

18 Madame Clerk, if you would publish the verdict in the
19 order of the defendants, which would be Mr. Grant, Mr.
20 Hartwell, and Ms. Smith. And I've put them back in order
21 for you.

22 Mr. Grant, if you would stand for the publication of
23 the verdict.

24 COURT CLERK: *The State of South Carolina vs. Gary*
25 *Grant*, Indictment No. 2007-GS-08-314. We the jury, by

1 unanimous consent, find the defendant guilty of armed
2 robbery.

3 Indictment number -- *The State of South Carolina vs.*
4 *Gary Grant*, 2007-GS-08-315. We the jury, by unanimous
5 consent, find the defendant guilty of kidnaping.

6 *The State of South Carolina vs. Gary Grant*, 2007-GS-
7 08-316. We the jury, by unanimous consent, find the
8 defendant guilty of kidnaping.

9 *The State of South Carolina vs. Gary Grant*, 2007-GS-
10 08-317. We the jury, by unanimous consent, find the
11 defendant guilty of kidnaping.

12 *The State of South Carolina vs. Gary Grant*, 2007-GS-
13 08-318. We the jury find -- by unanimous consent, find the
14 defendant guilty of kidnaping.

15 *The State of South Carolina vs. Gary Grant*, 2007-GS-
16 08-319. We the jury, by unanimous consent, find the
17 defendant guilty of murder.

18 *The State of South Carolina vs. Gary Grant*, 2007-GS-
19 08-343. We the jury, by unanimous consent, find the
20 defendant guilty of burglary first degree.

21 *The State of South Carolina vs. Gary Grant*, 2007-GS-
22 08-347. We the jury, by unanimous consent, find the
23 defendant guilty of burglary first degree.

24 THE COURT: Wait one second. Ask --

25 COURT CLERK: Mr. Foreman, is that your -- is that

1 y'all verdict?

2 MR. FOREMAN: Yes, ma'am, it is.

3 THE COURT: Mr. Foreman, ladies and gentlemen of the
4 jury, are these your verdicts regarding the defendant Gary
5 Grant? If so, please indicate by raising your right hand.

6 (All members of the jury raise their right hands.)

7 THE COURT: You may put your right hands down.

8 Mr. Bolus, is there any request to poll the jury
9 regarding the verdicts?

10 MR. BOLUS: No.

11 THE COURT: (To Mr. Grant) Sir, you may take your
12 seat.

13 Mr. Hartwell, if you would please stand for the
14 publication of the verdicts.

15 (To Court Clerk) You may proceed.

16 COURT CLERK: *State of South Carolina vs. Jermaine*
17 *Hartwell*, 2007-GS-08-308. We, the jury, by unanimous
18 consent, find the defendant guilty of kidnaping.

19 *State of South Carolina vs. Jermaine Hartwell*, 2007-
20 GS-08-309. We the jury, by unanimous consent, find the
21 defendant guilty of kidnaping.

22 *State of South Carolina vs. Jermaine Hartwell*,
23 indictment number 2007-GS-08-310. We the jury, by
24 unanimous consent, find the defendant guilty of kidnaping.

25 *State of South Carolina vs. Jermaine Hartwell*,

1 indictment number 2007-GS-08-311. We the jury, by
2 unanimous consent, find the defendant guilty of kidnaping.

3 *State of South Carolina vs. Jermaine Hartwell,*
4 indictment number 2007-GS-08-312. We the jury, by
5 unanimous consent, find the defendant guilty of murder.

6 *State of South Carolina vs. Jermaine Hartwell,*
7 indictment number 2007-GS-08-313. We the jury, by
8 unanimous consent, find the defendant guilty of armed
9 robbery.

10 *State of South Carolina vs. Jermaine Hartwell, 2007-*
11 *GS-08-342.* We the jury, by unanimous consent, find the
12 defendant guilty of burglary first degree.

13 *State of South Carolina vs. Jermaine Hartwell,*
14 indictment number 2007-GS-08-345. We the jury, by
15 unanimous consent, find the defendant guilty of first
16 degree.

17 THE COURT: Guilty of -- you need to publish that one
18 again, Ollie. Part of it I didn't hear.

19 COURT CLERK: 2007-GS-08-345. We the jury, by
20 unanimous consent, find the defendant guilty of burglary
21 first degree.

22 If this be your verdict, please signify by raising
23 your right hand at this time.

24 (All members of the jury raise their right hands.)

25 THE COURT: Mr. Barnwell, are there any requests to

1 poll the jury?

2 MR. BOLUS: No, Your Honor.

3 THE COURT: (To Mr. Hartwell) You may take your seat.

4 Marquita Smith, if you would stand for publication of
5 verdict.

6 (To Court Clerk) You may proceed.

7 COURT CLERK: *State of South Carolina vs. Marquita C.*
8 *Smith*, Indictment No. 2007-GS-08-1751. We the jury, by
9 unanimous consent, find the defendant guilty of accessory
10 before the fact of a felony, armed robbery.

11 *State of South Carolina vs. Marquita C. Smith*,
12 indictment number 2007-GS-08-1748. We the jury, by
13 unanimous consent, find the defendant guilty of accessory
14 before the fact of a felony, murder.

15 If this be your verdict, please signify by raising
16 your right hand at this time.

17 (All members of the jury raise their right hands.)

18 THE COURT: Any request to poll the jury?

19 MR. JONES: No, Your Honor.

20 THE COURT: (To Ms. Smith) You may take your seat.

21 Mr. Foreman, ladies and gentlemen, on behalf of the
22 State, as well as the defendants and defense counsel, we
23 thank you for your time and your attention to this case.
24 We know that jury service is thankless. It is a great
25 sacrifice both to your personal and professional lives and

1 we grossly underpay you. And so the best that I can do is
2 to give you my profound thanks.

3 I hope that you have learned something by serving on
4 services -- by serving on jury duty this week. I hope that
5 you've learned it is nothing like television. I hope
6 you've also learned how indispensable you are to our system
7 and that -- how unique our system is, in that we have 12
8 individual citizens who sit as fact-finders and determine
9 the facts of case, and then apply a very complicated set of
10 laws to those facts and render verdicts.

11 You are welcome to stay for any -- for the remainder
12 of the proceedings if you would like. I will have the --
13 actually, probably there's no room in the gallery, so we
14 would have to allow you to remain in the jury box. If you
15 do not wish to remain, that is fine also. But I'm going to
16 have you to retire to your jury room, and you can make that
17 decision and you can let the bailiffs know if you desire to
18 stay for the remainder of the proceedings.

19 If you need a work excuse, please let us know; we will
20 have one furnished for you today. If not, those, as well
21 as your checks, will be mailed out to you.

22 You may discuss this case if you would like. If you
23 do not want to discuss this case and someone should persist
24 in trying to speak with you, please make us aware of it by
25 reporting it to the clerk's office so that we can make sure

1 that your privacy is maintained.

2 Again, I would thank you on behalf of the State and
3 the defendants. And I'm going to ask -- I'm going to
4 excuse you to your jury room at this time, and I'm going to
5 then allow you to make the decision as to whether you wish
6 to remain with us. And if you do, you can let Mr. Hutto
7 know, and then he will escort you back into the courtroom.

8 We'll be at ease for a moment, after which I will hear
9 post-trial motions, as well as sentencing. I'll give you
10 all a few moments to get the documents you need to get
11 filled out, filled out.

12 (The jury exits at 3:22 p.m.)

13 **SENTENCING**

14 THE COURT: You may be seated. Are there any post-
15 trial motions? Are there any post-trial motions from the
16 State?

17 MR. JENNINGS: No, Your Honor.

18 THE COURT: Mr. Bolus?

19 MR. BOLUS: We just renew our directed verdicts for
20 armed robbery, the rest of them, I assume, for judgment of
21 acquittal notwithstanding the verdicts.

22 THE COURT: Okay. The Court would -- would the State
23 like to respond to the motions?

24 MR. JENNINGS: No, Your Honor.

25 THE COURT: The Court will note the motions for the
26 record and they are denied based on the Court's previous

1 ruling.

2 Any post-trial motions, Mr. Barnwell?

3 MR. BARNWELL: Move for a new trial based on
4 insufficient evidence and all the prior motions and
5 objections.

6 THE COURT: Okay. Would the State like to respond?

7 MR. JENNINGS: No, Your Honor.

8 THE COURT: The Court will stand on -- or rest on its
9 previous arguments and rulings regarding the previous
10 motions. The Court would find that there is no basis in
11 the record for a new trial and would deny that motion.

12 Anything further from --

13 MR. JONES: Your Honor, I'm going to echo the same
14 motions.

15 THE COURT: I'm sorry?

16 MR. JONES: I would echo the same motions, judgment
17 notwithstanding the verdict and renew the motion for
18 directed verdict, also.

19 THE COURT: Okay. The Court will note your motions
20 for the record and they are denied based on the Court's
21 previous ruling.

22 Okay. Are we ready to move forward with sentencing?
23 Is the State ready?

24 MR. JENNINGS: Yes, Your Honor.

25 THE COURT: Mr. Bolus, you ready?

26 MR. BOLUS: Yes, ma'am.

1 THE COURT: Mr. Barnwell?

2 MR. BARNWELL: Got some family -- I'm seeing if I can
3 find the family, ma'am.

4 THE COURT: We'll give you an opportunity to do that.
5 You may proceed.

6 MR. JENNINGS: Your Honor, Mrs. Connie Perry -- she's
7 Dexter's mother -- she would like to address, Your Honor.

8 THE COURT: Certainly. Uh-huh.. She needs to remain
9 -- uh-huh, for security purposes. Yes, ma'am. I would be
10 glad to hear from you.

11 MS. PERRY: My name is Connie Perry.

12 THE COURT: Yes, ma'am.

13 MS. PERRY: And I'm here on behalf of Dexter -- my son
14 Dexter Perry. All I would like to say is that I want them
15 to really know that they changed my life forever. They
16 have rocked my world and took part of my soul; that was my
17 son. What could you say about your child, but that I love
18 my son?

19 I ask you to take no mercy on any of them. Whatever
20 you sentence them to, I just have to accept that, but it
21 would never bring Dexter back. And I may have some peace
22 and closure to this part, but I will grieve for the rest of
23 my life until the Good Master call me home.

24 They took a son, a father, a brother, a friend, a
25 grandson, a uncle. And it's a hole in my heart that will
26 never be filled again. But they still have the opportunity

1 to see the sun rise and the sun set. All I can do from
2 this day on is go to the gravesite, put pictures on a T-
3 shirt, burn a candle, and just imagine in my mind that I'm
4 still talking to my son. I loved him. It didn't have to
5 be this way.

6 And I just want both parties to know that when we
7 leave this courtroom, let's leave it in respect and
8 dignity; because hatreds, it ain't going to solve anything.
9 And the world is really coming to a end --

10 THE COURT: Uh-huh.

11 MS. PERRY: -- you know. And then to know that,
12 Marquita, you was my family, girl. You didn't have to be
13 this way. You, and Kuku, and Fresh, y'all was friends.
14 Y'all was friends. You -- you can't even tell me you're
15 sorry. You show no remorse, so I show none for you. And I
16 can't say where your soul going to go. If it's going to
17 burn in hell or go to heaven, but I'll never see Kuku
18 again. I'll never see Dexter again, all because of you.
19 But you know what? I don't hate y'all. And I'll never
20 forgive you. God'll have to forgive you. But at least if
21 you're not on the outside, nobody else have to go through
22 this. You can't hurt nobody else.

23 You took a lot from me. Kuku was my dog. Dexter was
24 my child, my son. We talked about a lot of things, you
25 know, a whole bunch of things. And I love him. That's all
26 I can say. You took something that was so precious from

1 me, so precious. And for what reason? Hate? Jealousy?
2 What was the motive? Or just because you simply had
3 nothing to do but go get a lick?

4 And I can imagine him trying to call me, but he
5 couldn't call me. Shot his cell phone; beat him. I can
6 imagine in my mind him asking you, "Please don't hit me no
7 more."

8 Right now I'm numb. I can't even cry, but see, I know
9 when I go home, I go in my closet and I grieve. You can
10 still talk on the phone. Somebody going to say they love
11 you; somebody going to send you a letter; you going to get
12 a phone call. I can't get that. I can just imagine. I
13 can imagine him trying to call Mama, trying to tell me all
14 about it. He can't do that.

15 So I ask you, Your Honor, I don't have no mercy for
16 them. And thank you for allowing me to speak.

17 THE COURT: Thank you, ma'am. The Court appreciates
18 your candor.

19 Is there anything further from the State?

20 MR. JENNINGS: Your Honor, do you want to address each
21 defendant individually or you want to -- the same?

22 THE COURT: You need to say everything you want to
23 say, because I'm going to take them each in order and allow
24 them to be fully heard and then --

25 MR. JENNINGS: Your Honor, as to Mr. Grant, he has
26 prior convictions from 2001 for disorderly conduct,

1 criminal domestic violence --

2 THE COURT: Wait one second for me. You said
3 "disorderly conduct"?

4 MR. JENNINGS: Yes, ma'am.

5 THE COURT: What else?

6 MR. JENNINGS: Criminal domestic violence and
7 trespassing.

8 THE COURT: You said that was in 2000?

9 MR. JENNINGS: 2001.

10 THE COURT: And what was the other, after the criminal
11 domestic violence?

12 MR. JENNINGS: Trespassing.

13 THE COURT: Were those all in Magistrate's Court?

14 MR. JENNINGS: It appears so.

15 THE COURT: Uh-huh.

16 MR. JENNINGS: And in 2001, he was also convicted of
17 failure to stop for a blue light. And on the same date,
18 was convicted of possession of crack cocaine, and two
19 counts of that.

20 THE COURT: That was also in 2001?

21 MR. JENNINGS: Yes, ma'am. In 2002, he was convicted
22 of strong-arm robbery, possession of a stolen vehicle, and
23 auto-breaking.

24 As of the time of this incident, Your Honor, he had
25 just bonded out when this incident took place, about two
26 weeks earlier, from Charleston County on two counts of

1 murder that are still pending.

2 As for Mr. Hartwell --

3 THE COURT: Wait one second for me.

4 MR. JENNINGS: Okay.

5 THE COURT: You said two weeks prior to this incident

6 he had just bonded out on two counts of murder in

7 Charleston County that are still pending?

8 MR. JENNINGS: That's correct.

9 THE COURT: Which would have been in 2004, correct?

10 When he bonded out?

11 MR. JENNINGS: 2006.

12 THE COURT: 2006. I'm sorry. You may continue. I'm
13 sorry.

14 MR. JENNINGS: Thank you, Your Honor. As to Mr.
15 Hartwell, he was convicted in 2003 on a possession of
16 crack, as well as a conspiracy to violate drug laws. In
17 2000 -- on the same date he also had a conviction for an
18 unlawful carrying of a weapon.

19 He also had in -- later in 2003, a conviction for
20 driving under suspension; that's the extent of his record.

21 Ms. Smith has no record.

22 Your Honor, on behalf of the Solicitor's Office and --
23 and the Berkeley County Sheriff's Department, I think Your
24 Honor obviously heard all the facts in this case, and I
25 would submit to you that they are almost unbelievable in
26 their brazenness and brutality. I think the things that

1 you heard during this trial are things that you might think
2 you would only see on TV or in a movie. This group of
3 people who kicked in two doors, abducted somebody at
4 gunpoint.

5 And I think it's significant to note that these guys
6 were doing nothing wrong. Dexter and Chris, for whatever
7 might have been alleged that they were involved in, or what
8 they might have been suspected to have been doing, on the
9 night that this happened, they were just hanging out,
10 visiting -- visiting friends. And no allegation that
11 either of them was armed; no allegation that either of them
12 has been armed in the past; and what happened to them that
13 night, it just borders on unbelievable, and what the Cobbs
14 went through in their home.

15 I can't imagine being in there and having people kick
16 in your door, armed with handguns, not knowing what's going
17 on, ransacking your home, bullets flying. I think it's the
18 grace of God that only one person was killed and nobody
19 else was shot in the house with the number of people and
20 the manner in which the bullets were flying.

21 And I am perfectly comfortable saying that these two
22 gentlemen never need to be out of prison. I think a life
23 sentence is entirely appropriate given the facts of this
24 case.

25 As to Ms. Smith, what she did, I -- and Ms. Wilson and
26 I have talked about this, and our analysis of the case I

1 put her almost at the top the heap.

2 THE COURT: Uh-huh. I agree with you.

3 MR. JENNINGS: What she did and -- what she did and
4 the manner that she did it, with the repetition of
5 contacting these guys, letting them know where Dexter was,
6 this was not -- as I said in my closing argument, this was
7 not just a case of her saying on one offhand occasion, "You
8 can rob my cousin." It's almost like she saw it through to
9 completion --

10 THE COURT: Uh-huh.

11 MR. JENNINGS: -- because every chance that there was
12 for this to fall apart and for nothing to happen, it was
13 Marquita Smith that kept it going and brought it back until
14 it finally was completed.

15 And I have to -- I have to agree with Ms. Perry. I
16 think she has shown absolutely no remorse for what
17 happened, has no -- whether it is no comprehension of what
18 she did, I'm not sure. But what she did and the level that
19 she was involved is shocking, and she was in it up to -- up
20 to her head. And she might as well have been there and
21 pulled the trigger --

22 THE COURT: Uh-huh.

23 MR. JENNINGS: -- for what she did, Your Honor. And
24 as you know, the least she can get is 30 years on the
25 accessory before fact to murder, but I would submit to you,
26 based on what she did, even though she's got no prior

1 record, I think she's just as bad as -- as these gentlemen
2 that were there shooting the guns.

3 THE COURT: Thank you. Do any of the victims wish to
4 be heard? Any of the Cobbs? Are they present? Or Mr.
5 Nelson or -- I just want to make sure, in compliance with
6 the statute, if anyone wishes to be heard that they are
7 heard.

8 (Sotto voce discussion between Mr. Jennings, Mr.
9 Cobbs, and Mr. Nelson.)

10 MR. JENNINGS: No, Your Honor.

11 (Sotto voce discussion between the Court and unknown
12 female.)

13 THE COURT: Mr. Bolus?

14 MR. BOLUS: (To the client) Do you want to address
15 the Court?

16 Judge, I have nothing to say. I'm appointed on this
17 case and he has -- (To Mr. Grant) You have nothing to say
18 to the judge?

19 THE COURT: You have nothing you want to say on behalf
20 of your client? You don't want to tell me how old he is,
21 where he's from, anything about his life to give the Court
22 some perspective? I think for the record you need to make
23 some attempt, unless he, of course, is instructing you not
24 to.

25 (Sotto voce discussion between Mr. Bolus and Defendant
26 Grant.)

1 MR. BOLUS: He says I don't need to tell you anything.

2 THE COURT: Can you tell me how old he is?

3 (Sotto voce discussion between Mr. Bolus and Mr.

4 Grant.)

5 MR. BOLUS: He's twenty-four.

6 (To Mr. Grant) You've lived here all your life?

7 MR. GRANT: (Nods head up and down.)

8 THE COURT: Okay.

9 MR. BOLUS: I mean, it is what it is.

10 THE COURT: Your hands are tied.

11 Mr. Barnwell, is there anything you'd like to state
12 for the record?

13 MR. BARNWELL: Your Honor, I believe -- I could
14 address the Court first, but I believe his aunt, Lola King,
15 would like to address the --

16 THE COURT: Certainly, I would be glad to hear from
17 her.

18 MR. BARNWELL: -- wants to address the Court as well.

19 THE COURT: Uh-huh.

20 MR. BARNWELL: Mr. Hartwell is 25 years old. He
21 completed the 11th grade at North Charleston High School.
22 I would ask Ms. King to address the Court.

23 THE COURT: Yes, ma'am. Just speak loudly for me and
24 state your name for the record.

25 MS. KING: My name is Lola King. I am Jermaine's
26 aunt. I would just like to start by saying, as I always

1 do, saying to Ms. Perry from the King family, that we
2 apologize for what happened to your child. You know, I
3 just want to say that, you know, please don't be angry at
4 us, for we weren't there that night. Each time we come to
5 court we try to look at you and just some way say that I'm
6 sorry, because I'm the mother of four, four sons and a
7 daughter. I've lost a father and a sister, but this is
8 nothing like losing a mother and a -- and a child.

9 So you know -- I -- I saw his picture in the newspaper
10 and what I did is, I did ask God to have mercy on him. I
11 am a Christian and I say it because I don't know whether he
12 was saved as the Lord. Because there is life -- there is
13 life after death. And I asked, you know, the Lord, you
14 know, to have mercy on him, that he made it into heaven.

15 And as for these -- the co-defendants -- now, for
16 Jermaine, my nephew, I have known of him to be arrested for
17 drugs, but never him to be a murderer. And I do ask, you
18 know, the Court, to please not have only mercy for him, but
19 to have mercy on all of the co-defendants, you know,
20 because Jesus is love. God is love. You know, it's not
21 going to bring your son back. No, ma'am, and I do
22 empathize with you. I'll never know how you feel.

23 I have -- I have a son. His head is hard. He's a
24 college student. Been blessed. But the head -- his head
25 is hard and I pray to God that he would yield to what I'
26 trying to tell him before something worser [sic] happen

1 where I can't help him.

2 But all I can say is, is that I pray for you, that --
3 that your days will get easier for you, day-by-day, one day
4 at a time. Because God can give you peace. He's the only
5 one that can give you peace while you're going through this
6 hard journey.

7 And I pray for these young people. No matter what --
8 what happens, y'all will -- you can pick up a Bible, read
9 it, and let Jesus be your strength. And I ask the Court, I
10 don't know whether y'all have already made up the
11 sentences, but please have some kind of mercy on them.

12 I rest there, but I just ask you, please have some --
13 please to have some mercy on them. Thank you so kindly.

14 THE COURT: You're welcome, ma'am.

15 Anything further, Mr. Barnwell?

16 MR. BARNWELL: Mr. Hartwell wants to --

17 THE COURT: Mr. Hartwell, I'll be glad to hear from
18 you.

19 MR. HARTWELL: I've been telling y'all since day one,
20 Joe Husser and Chris Nelson, Chris was -- Chris shot up
21 from outside. But I be the one in the car. I did not
22 shoot Kuk. I never attempted to rob Kukp. Joe Husser, you
23 know -- y'all did not see -- I did not beat Kuk nor shoot.
24 I never attempted to rob Kuk. I tell you this, I'm an
25 innocent man going down for nothing. Joe Husser, you know
26 that. Y'all know that, man. I would give them all the

1 money. Kuk did sell me bad weed. But I did nothing. I
2 did nothing, Joe Husser and Chris shot my side. How could
3 I beat Kuk and get shoot at the same time? I'm innocent.
4 I'm telling you, I'm innocent. I never beat Kuk. I never
5 was near Kuk. Never. I never shot Kuk. I did nothing.
6 (Crying) I'm so innocent, man. I'm innocent. I did not
7 beat Kuk. I did not do nothing. You all got the wrong
8 man. Please. I'm telling y'all, man. Kuk said go on into
9 the house. Joe Husser, I wasn't there. That's -- that's
10 so. I saw what I saw. Birdie was on the bed, sitting
11 down. I came out the room. I told her to call the police.
12 She said, "Don't worry. There's a phone in the bedroom."
13 That's what Kuk was saying. Kuk said, "Manny, look in the
14 bag." I took the bag and I put it down, and I said, "King,
15 come on. Let's go." And on the way out, Chris started
16 firing at me. I'm innocent, Joe Husser. You did not see
17 me, man. I'm going down for nothing. Nothing, man. I'm
18 innocent. That's real, dog. That's real dog. I'm going
19 down for nothing. Joe Husser, Chris Nelson, you all didn't
20 see me, man. (Crying.) I don't get down like this. I
21 don't get down like this, man. When I came in your house,
22 I don't put no sheet over your head, man. I didn't pistol-
23 whip you. You all pointed out the wrong man. (Crying.) I
24 did not shoot Kuk, man. I did not shoot Kuk, man. I done
25 promised y'all that, man. That's real talk. Y'all didn't
26 see my in that trailer, man.

1 MR. BARNWELL: Your Honor, I'd like to relate an
2 anecdote to you, and I'm not making light of the situation.

3 THE COURT: No. And I wouldn't take it that way.

4 MR. BARNWELL: This is a very tragic --

5 THE COURT: It is.

6 MR. BARNWELL: -- situation, Your Honor. But Jermaine
7 Hartwell all week has been telling me he's got a better
8 looking suit than I had. And I told his Aunt Lola that and
9 she laughed, she says, "That's my Jermaine."

10 And the reason I tell that anecdote is to show that he
11 does have some attractive qualities. He does have a -- a
12 personality -- attractive personality. He's very highly
13 valued by his family. I'm sure Dexter Perry is -- is
14 equally valued by his family.

15 I would ask the Court to consider 30 years concurrent.
16 I know when he gets out of prison, maxing out at 30 years,
17 he'll be well past middle age. And these are -- are
18 terrible, terrible facts. These are terrible -- terrible
19 facts, but I would ask the Court to -- to consider that. I
20 know you can't give any less than the law allows, but I
21 would ask that you consider that.

22 THE COURT: Thank you, sir, Mr. Barnwell.

23 Anything further, Mr. Jones?

24 MR. JONES: Yes, Your Honor. I know the family will
25 want to speak, I believe, and I'm not sure in what order.
26 And I know Ms. Smith would also like to speak to the Court.

1 I'm not sure which order you want --

2 THE COURT: Pardon me? I didn't hear you. Say that
3 one more time.

4 MR. JONES: Oh, I'm sorry. I know that some of the
5 family would like to speak on her behalf, and I know that
6 she would like to speak also. I've got a couple of things
7 I would like to say also.

8 THE COURT: Go in whatever order you feel comfortable.

9 MR. JONES: Your Honor, just briefly. Again, she is
10 20 years old. She does -- or was attending CCPI -- had a
11 3.0. Worked at BiLo's at this time. During this time, she
12 had two jobs. She's got a good family and they are here to
13 support her. She's got a good family and she's got a
14 pleasant demeanor. She's obviously made some bad choices.

15 You've heard -- I think you heard during jury
16 selection that she's active in her church and there are
17 some people here that actually knew her from that. She
18 also has a mentor here that she's been, I think, has
19 working with her since -- since all this happened.

20 I think I'd like the family to address you first, if
21 they may.

22 THE COURT: Sure.

23 PASTOR BROWN: I'm Pastor Joseph Brown. I've had the
24 privilege to actually serve both of these families. I'm
25 the pastor of the Canaan Christian Church for 16 years.
26 I've known Marquita practically all of her life. When I

1 came here, she was probably about four or five years old.

2 This young lady has participated in our youth choir. She's
3 been a Bible student, attending our Sunday School, Bible
4 School, has been very active in our church.

5 I just pray that you would consider the fact of her
6 character as I talk to you today, and also on behalf of the
7 family. My concerns are not only about what happens here,
8 but what happens after this is over. I listened to the
9 families, both of them are related. There has to also be a
10 healing process that takes place beyond this court. So I
11 say to the family, that somehow y'all will find a way, a
12 will, a means to amend y'all's relationship, because there
13 is a higher court after this that all of us must stand
14 before.

15 So I say to you that -- just take into consideration
16 mercy and -- and -- and just let God guide the decision
17 that you make here today.

18 And I say to the family that certainly find a means
19 and a way to get beyond this, that you can heal yourselves;
20 because you have other children, you have other family
21 members that you have to consider that go beyond this
22 courtroom. And when we move off the scene, our children
23 have to remain and live and continue life on. So I'm
24 saying for the betterment of your offspring that is behind
25 you, they are going to also be impacted by this incident.
26 So it is vitally important that after this is over, that

1 the family do something to mend that relationship and be
2 able to move on; because these children got to live in the
3 same community. They are going to run into each other
4 periodically in the street, and they're going to have to be
5 able to deal with one another on a different level. So I'm
6 saying I hope beyond this point, there can be healing for
7 both families after the decision is made. Thank you, Your
8 Honor.

9 THE COURT: You're welcome, sir.

10 THE COURT REPORTER: Your Honor?

11 THE COURT: Uh-huh?

12 THE COURT REPORTER: Could he say the name of the
13 church for me?

14 THE COURT: Sir, could you repeat the name of your
15 church please for the benefit of the court reporter?

16 PASTOR JOSEPH BROWN: Canaan Christian Church.

17 THE COURT: Canaan -- C-a-n-a -- C-a-n-a-a-n?

18 PASTOR JOSEPH BROWN: Yes, ma'am.

19 THE COURT: Thank you, sir.

20 ROSEMARY SMITH: I'm Rosemary Smith. I'm Marquita's
21 mother, and I'm speaking on behalf of the Smith family, the
22 Walker family, and the Perry family, which is my family. I
23 mean, it -- it -- it -- it just really torn us up.

24 I don't know what Marquita -- whatever she [sic] role
25 in it, it was wrong. I know it was wrong, whatever she
26 [sic] role in it. But, like I said, I was acting on that,

1 if you all wanted to communicate with me, that was fine. I
2 told you from day one, whatever happen, whatever the
3 outcome, I has no hate on my heart; I said that from day
4 one. I said I don't know because I never lost someone, so
5 I can't say how -- how you feel. I mean, I can't say -- I
6 can't say -- like I said, I know I never said anything bad
7 about the family. Anybody can tell you all, I never said
8 anything.

9 Marquita came from a good home. A good Christian
10 home. Her grandparents are evangelists; her daddy is a
11 preacher; her granddaddy is a preacher. I've got sisters-
12 in-law that's preachers in the family, one brother, I mean,
13 and like I said, she knows she came from a good home. She
14 never want for anything. She never. She was working two
15 jobs when this went down. She was going to school. So, I
16 mean, why it occurred or how it occurred, like I said, I
17 don't know. I wasn't there.

18 Like I said, I can't tell the family how she -- how
19 Connie feel, because I never experienced it. So like I
20 said, I only got two kids and they know we give them the
21 world. I mean, what they don't have, we can -- I mean, we
22 makes ends meet for them. Her dad works two jobs. I work
23 with the special needs kids at Stratford High School. And
24 I fall in love with these kids.

25 So like I said, I can't say, but I just ask the judge
26 or whoever, or Connie, just to forgive my family, because I

1 have no hate for y'all; that's from day one. I mean that
2 been from day one. You can't say, I never on the street
3 say nothing bad about your situation. I didn't. Right? I
4 didn't. I didn't. Like I said, I love you.

5 (Sotto voce discussion between Ms. Smith and unknown
6 female.)

7 ROSEMARY SMITH: I know that. I know that. Like I
8 said, I'm just speaking on behalf of Marquita, you know.

9 Like I said, sometime she goes to church. She goes to
10 a different church. She has a mentor here that's mentoring
11 with her. Well, he -- he must be out because he's spent
12 all week. Just have mercy on her. She need to finish
13 school. She goes to school. She's working still.

14 But like I said, I mean, I -- I -- like I said, just
15 have mercy on her. We all praying. We was just all
16 praying, the church family. We all get together and we
17 just pray and we have good time in the name of the Lord.
18 Like I said, her daddy is a pastor. He just couldn't take
19 it, so he went out. And her -- her mother-in-law -- her
20 grandmama here is a evangelist. Her granddaddy is a
21 preacher. Like I said, just have mercy; that's all I'm
22 asking.

23 THE COURT: Thank you, ma'am.

24 MR. JONES: Your Honor, I think --

25 MS. SMITH: What really happened was -- and you know,
26 like I said, it's all over. Kerry Hollins came in here --

1 you know the witness that testified -- okay, me and him, a
2 person told you that we was dating for like three and a
3 half years. Okay. He was in and out of jail for three and
4 a half years. I was -- I'm afraid of Kerry Hollins. Kerry
5 Hollins put a gun to my mouth one night. Kerry Hollins, I
6 mean -- he abused me. I was in an unhealthy and abusive
7 relationship. He broke my window. I mean, it was -- he
8 was really abusive.

9 And I know Connie said -- well, I know I tell them --
10 she said, you know, I didn't feel no remorse, but that's
11 not true. You can ask my mom or anybody. I cry every
12 night, because what Kerry Hollins told me was, you know, he
13 -- he basically put me in a situation where you're going to
14 do this, or I'm going to do this. You see what I'm saying?
15 He put me in that situation, but he never, ever told me
16 that he was going to have guns. He never told me -- he
17 always said he's not going to get hurt. He's not going to
18 get hurt. They was planning -- he was supposed to snatch
19 his jewelry and his money in his pocket, and that was it.
20 And nine times out of ten, and I put my hand -- right by
21 the hand of God, I was going to tell Dexter what happened,
22 because I mean, I've learned from this. I've learned from
23 this. I grew up and I've wised up. I mean, and what
24 happened, it was not supposed to happen. I did not foresee
25 that they were going to kill him. They were going to
26 kidnap him; or they were even going to have guns; I did not

1 foresee that.

2 I mean and it takes a lot, you know what I'm saying,
3 to be 20 years old, and to, you know, make one mistake, the
4 only mistake I've ever made, and I mean, I got to stand in
5 front of a judge because I made a bad choice in dealing
6 with a boyfriend who I was scared to even leave him.

7 I mean, we had broken up. I was scared to, you know,
8 leave him. I was -- I was afraid of him, and when he got
9 up there Tuesday, or yesterday, he lied. He basically
10 lied. I mean, he manipulated me and he -- I can't say if
11 it was Manny or Gary or whoever killed him, I really can't,
12 but it put me in a situation that I had to deal with; my
13 cousin was murdered. You feel me? I had to deal with
14 that, and I cry every night.

15 Every single night I cry, because I know that I'm not
16 that type of person. I'm not evil. I -- no -- there was
17 no motive for it. There was just no motive. There was no
18 motive for it at all, and like I say, I do apologize. Like
19 I said, I was manipulated into the whole thing. I never
20 knew. I never foresee an armed robbery, kidnaping, none of
21 that. I -- I would never -- everybody that knows me, I am
22 not that way. I would never, ever -- I would have never
23 allowed that. Tawana was my friend. I would have never
24 allowed them to go into her house. And I did -- when he
25 was walking out I did tell him, you know, I was like, "No.
26 Somebody is out there." I -- I -- and I did. You know, I

1 warned him, but Tawana said, "You know, it's my brother,"
2 and before you knew it, he was out there and it had all
3 begun.

4 Like I said, I can't say Kerry, Gary, or Manny, or
5 anybody killed him, but all I can say is, that I'm sorry
6 and I never knew -- never -- Lord knows I never knew that
7 it was going to happen that way. I never intended for it
8 to happen that way.

9 THE COURT: Anything further, Mr. Jones?

10 MR. JONES: Your Honor, just due to her age I would
11 ask that you consider the 30-year sentence. I mean, I
12 think clearly as it is, there's a lot of growing up that
13 can still be done over that time period. I would ask the
14 Court to be lenient, to be merciful with regard to that,
15 and give the 30-year sentence with regard to this matter.

16 THE COURT: Thank you, Mr. Jones.

17 Anything further from the State?

18 MR. JENNINGS: No, Your Honor.

19 THE COURT: What is going to happen with Mr. Hollins?

20 MR. JENNINGS: Despite the characterizations of
21 defense counsel, who I have the utmost respect for ---

22 THE COURT: Well, they did -- they were doing their
23 job. They were supposed to put them in the worst light
24 possible. I -- I'm sure it's the ---

25 MR. JENNINGS: I'm telling Your Honor now that we
26 offered Mr. Hollins accessory before the fact to armed

1 robbery, the same thing that was offered to -- actually not
2 even as good as was offered to Ms. Smith, with a straight
3 plea. He turned that down.

4 THE COURT: Uh-huh.

5 MR. JENNINGS: As we -- Ms. Kennedy and I have spoken.
6 My understanding he understands it's not getting any better
7 than that.

8 THE COURT: So he, at this point -- where's Ms.
9 Kennedy? Is she still here?

10 Ms. Kennedy, so your client's charges are still
11 pending. They are unresolved. Does he plan to enter a
12 plea this week?

13 MS. KENNEDY: I'm sorry, Your Honor?

14 THE COURT: Does he plan to enter a plea this week?

15 MS. KENNEDY: No, Your Honor. There's -- there's an
16 additional co-defendant in this case that needs to be
17 resolved and he might be involved in that trial, too.

18 THE COURT: So, in other words, there's never going --
19 there's not going to be a resolution to this case as long
20 as he has the potential to testify?

21 MS. KENNEDY: Your Honor, we -- Mr. Jennings and I
22 have not discussed that.

23 THE COURT: Uh-huh.

24 MS. KENNEDY: My understanding is with Mr. Jennings
25 and with my client, is that he was made that offer, that --
26 that we --

1 THE COURT: Are the same charges pending against him
2 as these gentlemen were convicted on?

3 MR. JENNINGS: He has the same charges as Ms. Smith --
4 accessory before the fact to murder, accessory before the
5 fact to armed robbery.

6 THE COURT: And?

7 MR. JENNINGS: So at this point he has no offer. And
8 despite their characterization of some sweetheart deal
9 coming in at the last minute, there's certainly no plans
10 that the State has on that.

11 THE COURT: Well, let me ask: Worst case scenario,
12 what is -- and he testifies in this other trial absent this
13 person deciding to enter a plea -- what is the worst case
14 scenario of what will be offered to Mr. Hollins? Of
15 course, you're not bound by it, but I need to know, because
16 I think -- well, I'm not really -- I'm not sure I'm going
17 to tell you exactly what I think, but as a judge, my
18 perspective is a little more holistic; because I think
19 everybody needs to be fed out the same spoon based on their
20 level of culpability.

21 MR. JENNINGS: Uh-huh.

22 THE COURT: And I don't intend for him to be treated
23 any less. Because as far as I'm concerned, he and Ms.
24 Smith started the ball rolling, and without them there
25 would have been no impetus; there would have been no
26 catalyst, and this never would have happened.

1 MR. JENNINGS: And Ms. Smith had the best offer of
2 anybody this whole week.

3 THE COURT: She did. She did. I agree, she did. I
4 had a long discussion with her about it.

5 MR. JENNINGS: I certainly would say that we will not
6 offer him anything better than what was offered to Ms.
7 Smith. And as Your Honor knows, she was offered accessory
8 before the fact of voluntary --

9 THE COURT: That's correct.

10 MR. JENNINGS: It was at the beginning of the week
11 where she would have had the opportunity to have a sentence
12 of 2 to 30 years --

13 THE COURT: Uh-huh.

14 MR. JENNINGS: -- as well as an accessory before the
15 fact of kidnaping, so that -- that is apparent. He was
16 certainly not ever put in the position that Ms. Smith was
17 not put in and chose not to take advantage.

18 THE COURT: And of course, my -- you know, my concern
19 is a little broader than yours would have to be, because
20 unfortunately as a member of a court of about 51 judges who
21 rotate throughout this state, who don't have exclusive
22 jurisdiction, it is possible that Mr. Hollins could appear
23 before someone else and get a substantially reduced penalty
24 than other -- and then it looks disproportionate.
25 Sometimes that -- and -- and of course, I have to take all
26 of that into consideration. It's not something you need to

1 be concerned about, but it is something that I am concerned
2 about, and I think is a legitimate concern on my part; and
3 that's why I asked the question.

4 Okay. Anything further from the State?

5 MR. JENNINGS: Nothing.

6 THE COURT: Anything further, Mr. Bolus?

7 Anything further, Barnwell?

8 Anything further, Mr. Jones?

9 MR. JONES: Nothing, Your Honor.

10 THE COURT: Mr. Barnwell?

11 MR. BARNWELL: Nothing, Your Honor.

12 THE COURT: Mr. Bolus?

13 MR. BOLUS: No, Your Honor.

14 THE COURT: As I understand it, the maximum on
15 kidnaping is 30 years; murder, the minimum is 30, maximum
16 life; burglary the minimum is 50 and the maximum is life;
17 on the armed robbery, the minimum is 10, the maximum is 30,
18 and on the accessories, basically she has the same exposure
19 as a principle. Is that everyone's understanding?

20 MR. JONES: Yes.

21 MR. BOLUS: Yes, Your Honor.

22 MR. BARNWELL: Yes.

23 THE COURT: I've listened very intently to the facts
24 of this case over the course of this week. The one great
25 luxury I have is that I get -- I don't have to be the fact-
26 finder and we have had an astute jury who, frankly, have

1 listened to this case and have rendered their verdicts, and
2 I believe the verdicts that are supported by the evidence
3 in this case as the case was presented to them.

4 When the verdicts came back, I have to be quite frank,
5 my heart was very heavy. And my heart was heavy because I
6 was sitting here and I didn't know whether it was a
7 function of me getting older or more mature, or whether it
8 was just a function of me being very tired in my body. But
9 I sat here and I looked at the victim's mother, and I
10 thought that's one dead child. And then I looked over at -
11 - I thought about Mr. Nelson, and I thought that's going to
12 be another dead child if he doesn't make some changes in
13 his life. And then I thought of the fact of his behavior,
14 bringing this egregious behavior into his family's home, a
15 group of unsuspecting people. I can't imagine being in my
16 kitchen making a sandwich and somebody kicking my door in.
17 I don't even know how I would -- physically how my body
18 would respond to that. And then I looked over to my left
19 and I saw three children whose lives are over.

20 And not to diminish, ma'am, your loss, because I --
21 you know, you said something very profound. I have a very
22 good friend who is on the Court. He and I used to be on
23 the family court. And I'll never forget, we were together
24 one day. He had a grandchild who was born and who had had
25 a very serious heart defect when she was born, but they had
26 repaired it. But while playing on the playground one day

1 at three years old, she just dropped dead. Couldn't
2 explain it, they didn't know why, and he is of the Orthodox
3 Jewish persuasion and they have different ceremonies and
4 other things that they observe. And he said, for a child
5 they only observe seven days of mourning because their law
6 recognizes that you never end the grieving of a child. So
7 they sort of arbitrarily impose a seven-day limit on
8 themselves, because they recognize that no parent is ever
9 prepared for the loss of their child. They are never
10 prepared for their child to leave this earth before them.
11 He said, unlike a parent, where it's 30 days, because they
12 recognize that a parent should leave the earth before their
13 child, and in that -- in that circumstance they acknowledge
14 that there must come an end to the grieving. And I thought
15 about that as you talked about your child, so please don't
16 take any of my comments as any diminishment of your loss,
17 because I cannot -- and I listened to Mr. Hartwell's mother
18 and she's correct. She's never experienced your loss. She
19 doesn't know what it's like -- I'm sorry, Ms. Smith's
20 mother. She does not know what it is like for you, and you
21 have this Court's sympathy.

22 And please, again, when I said that, I looked at these
23 other -- again, I have a different view of everything. My
24 view is more of global sort of a perspective, because I do
25 this everyday, and it seems everyday I put more and more
26 young people in prison, and the lightbulb just isn't coming

1 on. It just doesn't seem that anybody is getting a clue,
2 but something has to change.

3 Based on what has been presented to the Court, and
4 while I have listened very intently to the evidence in this
5 case, and while the hand of one is the hand of all, and
6 there is sufficient evidence of accomplice liability, based
7 on my perception of this case there are different levels of
8 culpability and behavior in this case. They are different
9 -- each of them have different levels of record and other
10 things and -- other things that play into how the Court
11 comes to its decision-making process regarding each of
12 these offenses. Especially in light of the fact that Mr.
13 Grant, at the time of being arrested on this offense, had
14 just bonded out, although he is presumed innocent on the
15 Charleston charge, it's just very, very telling to this
16 Court the direction in which his life was traveling, and
17 other factors, of course, that the Court will take into
18 consideration in terms of sentencing.

19 Mr. Grant, if you would, stand for sentencing.

20 THE COURT: Sir, on the offense of armed robbery, you
21 are sentenced to the State Department of Corrections for a
22 period of 30 years.

23 How long have they been in -- has he been in jail, Mr.
24 Bolus?

25 MR. BOLUS: Since a couple of days after the --

26 THE COURT: So about a year?

1 MR. BOLUS: Yeah. Over a year -- about a year and two
2 weeks, something like that.

3 THE COURT: On the offense of kidnaping on each of the
4 indictments, those being 07-315, 07-316, 07-317, and 07-
5 318, sir, it is the sentence of the Court that you be
6 sentenced to the State Department of Corrections for a
7 period of 30 years.

8 Bear with me on moment. You can take a seat, sir. I
9 need to check the statute on something right quick. I need
10 to pull up the statute.

11 (Sotto voce discussion between the Court and the law
12 clerk.)

13 THE COURT: (To Defendant Grant) On each of the
14 offenses of kidnaping -- you may stand, sir. On each of
15 the offenses of kidnaping, you're sentenced to the State
16 Department of Corrections for a period of 30 years.

17 On the offense of murder, sir, you are sentenced to
18 the State Department of Corrections for a period of your
19 natural life.

20 And on the offenses of burglary in the first degree,
21 you are sentenced to the State Department of Corrections
22 for a period of 30 years.

23 (Sotto voce discussion between the Court and the law
24 clerk.)

25 On each of those offenses, sir, you are sentenced to
26 the State Department of Corrections for a period of 30

1 years. You will get credit pursuant to 24-13-40 to be
2 calculated and applied by the Department of Corrections for
3 any time that you have served, and these sentences will run
4 concurrently with one another.

5 Mr. Hartwell, if you will stand for sentencing.

6 Mr. Hartwell, on the offenses of kid -- of kidnaping,
7 you are sentenced to the State Department of Corrections
8 for a period of 30 years on each of the offenses.

9 On the offense of murder, you are sentenced to the
10 State Department of Corrections for a period of 30 years.

11 On the offenses of armed robbery, you are sentenced to
12 the State Department of Corrections for a period of 30
13 years.

14 On the offenses of burglary in the first degree, you
15 are sentenced to the State Department of Corrections for a
16 period of 30 years.

17 All of these sentences are to run concurrently with
18 one another. You are to get credit pursuant to 24-13-40 to
19 be calculated and applied by the Department of Corrections.

20 Ms. Marquita Smith, if you would stand for sentencing.

21 MR. HARTWELL: Be strong, Baby.

22 THE COURT: On the offense of accessory before the
23 fact of a felony of -- before the fact of a felony, that
24 being murder, Ms. Marquita Smith, you are sentenced to the
25 State Department of Corrections for a period of 30 years.

26 On the offense of accessory before -- before the fact

1 of armed robbery, you are sentenced to the State Department
2 of Corrections for a period of 30 years.

3 These sentences are to run concurrently with one
4 another. You are to get credit pursuant to 24-13-40 to be
5 calculated and applied by the Department of Corrections.

6 Is there anything further for the record from the
7 State?

8 MR. JENNINGS: No, Your Honor.

9 THE COURT: From the defense?

10 MR. BOLUS: No, Your Honor.

11 MR. BARNWELL: No, Your Honor.

12 MR. JONES: No, Your Honor.

13 THE COURT: I want to thank both the State -- both
14 State's counsel.

15 Mr. Bolus, Mr. Barnwell, and Mr. Jones, you all have
16 made what was a very arduous task a lot less taxing for the
17 Court. I appreciate the professionalism with which you all
18 have handled yourselves during the course of this trial,
19 and I just wanted to give you the Court's profound thanks.

20 MR. BOLUS: Thank you.

21 MR. JONES: Thank you.

22 MR. BARNWELL: Thank you.

23 THE COURT: You're welcome. Y'all have a -- well,
24 survive the torrential -- of course, I left my umbrella in
25 the car.

26 MS. WILSON: Also, Your Honor, we'd like to thank the

1 jurors who remained on their time and attention.

2 THE COURT: Yes, most certainly.

3 MS. WILSON: I know it's difficult to watch this ---

4 THE COURT: Uh-huh.

5 MS. WILSON: --- and hear all of this, but you did
6 what you're supposed to do and you applied the law to the
7 facts that you had before you.

8 THE COURT: And I think it's also wonderfully
9 educational for them to see the other part of the process.
10 The things that you don't get to see, because as the fact-
11 finders we don't want you to be prejudiced by it while
12 you're making your decisions.

13

14 -- END OF TRANSCRIPT OF RECORD --

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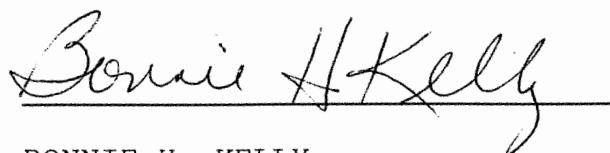
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CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL COURT REPORTER FOR THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR SUMTER COUNTY, SOUTH CAROLINA, ON THE NINTH DAY OF AUGUST, 2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

A handwritten signature in cursive script, reading "Bonnie H. Kelly", is written over a horizontal line.

BONNIE H. KELLY

OFFICIAL COURT REPORTER

COLUMBIA, SOUTH CAROLINA

APRIL 23rd, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of General Sessions

The Honorable Deadra Jefferson, Circuit Court Judge

Case No.: 2007-GS-08-1748, 1751

THE STATE,

RESPONDENT,

V.

MARQUITA SMITH,

APPELLANT.

BRIEF OF APPELLANT

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ISSUES PRESENTED

1. Whether the lower court erred by denying the Appellant's motion for a continuance.
2. Whether the lower court erred by denying the Appellant's motion for a severance and a separate trial.

STATEMENT OF THE CASE

During the August 2007 term of the Berkeley County Grand Jury, the Appellant was indicted for Accessory Before the Fact of a Felony (Murder) (2007-GS-08-1748), Accessory Before the Fact of a Felony (Burglary First Degree) (2007-GS-08-1749), Accessory Before the Fact of a Felony (Kidnapping) (2007-GS-08-1750), Accessory Before the Fact of a Felony (Armed Robbery) (2007-GS-08-1751). ROA p. 782. On August 27-30, 2007, a jury trial was held in front of the Honorable Deadra Jefferson at the Berkeley County Courthouse. The Appellant was called to trial with Gary Grant and Jermaine Hartwell.

The State proceeded against the Appellant on the indictments for Accessory Before the Fact of a Felony (Murder) (2007-GS-08-1748) and Accessory Before the Fact of Felony (Armed Robbery) (2007-GS-08-1751). ROA p. 55. The State proceeded against Mr. Hartwell on indictments for two counts of Burglary First Degree (2007-GS-08-342, 345), four counts of Kidnapping (2007-GS-08-308-311), Murder (2007-GS-08-312), and Armed Robbery (2007-GS-08-313). The State proceeded against Mr. Grant on indictments for Armed Robbery (2007-GS-08-314), four counts of Kidnapping (2007-GS-08-315-318), Murder (2007-GS-08-319), and two counts of Burglary First Degree (2007-GS-08-343, 347).

At trial, the Appellant was represented by V. Craig Jones, Jr., Esquire. Mr. Hartwell was represented by N. Elliott Barnwell, Esquire. Mr. Grant was represented by Michael Tommy Bolus, Esquire. The State was represented by Blair Jennings, Deputy Solicitor of Berkeley County, and Scarlett Wilson, Solicitor for Berkeley and Charleston County. At the time of the trial, Solicitor Jennings and Solicitor Wilson were actively

running elections for the upcoming GOP primary for the vacant seat of Solicitor for Charleston and Berkeley Counties. ROA p. 792.

Prior to the selection of the jury, Appellant's counsel made a motion for a continuance and a motion for severance and a separate trial. ROA pp. 11-23. The trial court denied both motions, and the case proceeded to trial. ROA pp. 32-34.

At the close of the State's case, the Appellant chose not to testify or to introduce any evidence on her behalf. Since Attorney Bolus introduced a line-up picture on cross-examination of a State witness, the Appellant lost the right to open and close during closing arguments. ROA pp. 336, 648. As a result, Solicitor Wilson and Solicitor Jennings each presented a closing argument. ROA pp. 633, 674.

On August 30, 2007, the case went to the jury. The jury found the Appellant guilty as indicted on both charges. The jury also returned guilty verdicts on each indictments that pertained to Mr. Grant and Mr. Hartwell. ROA pp. 741-44. Following the publishing of the verdict, the State informed the trial court of Mr. Grant and Mr. Hartwell's prior records. ROA pp. 751-3. The State further informed the trial court that the Appellant did not have a prior record. ROA p. 753. The Appellant was sentenced to concurrent terms of thirty years on each indictment. Mr. Grant was sentenced to a total term of thirty years plus a life sentence. Mr. Hartwell was sentenced to a total term of thirty years.

A timely Notice of Intent to Appeal was filed on the Appellant's behalf. This Brief follows.

ARGUMENT

I. The Lower Court Erred By Denying the Appellant's Motion for A Continuance.

The Appellant submits that the lower court erred by denying the Appellant's motion for a continuance when the State failed to provide the Appellant with adequate notice of trial. Due to this lack of notice, the Appellant was unable to call witnesses and present evidence to establish her defense.

A. Standard of Review

It is well established that the denial of a motion for continuance is a matter within the sound discretion of the lower court. State v. Holland, 261 S.C. 488, 493, 201 S.E.2d 118, 120-1 (1973). On appeal, the lower court's decision will not be reversed absent an abuse of discretion resulting in prejudice to the Appellant. Id.

B. Trial Record

At the beginning of the trial, Appellant's counsel (Mr. Jones) submitted a motion for a continuance. ROA p. 11. Mr. Jones explained: "I received notice of this trial date on Friday, August the 17th, just by virtue of a phone call. I've never had a status conference, never received any notice in writing or anything." ROA p. 11, lines 9-13. Mr. Jones further explained that the other co-defendants had written notice four to six weeks before the trial and it was his understanding that those co-defendants would be called to trial prior to his client. ROA p. 12. Mr. Jones also informed the court that the Appellant was indicted on August 22, 2007, just one week prior, and that he had not received notice that an indictment had been obtained for the offense of Accessory Before the Fact of a Felony (Burglary First Degree). ROA p. 12, lines 5-15.

Regarding discovery, Mr. Jones informed the court that he received a call from the attorney of Mr. Hollins', the Appellant's prior boyfriend and co-defendant, and his attorney indicated that Mr. Hollins would be testifying against the Appellant. She further indicated that Mr. Hollins gave a statement on August 4, 2007, which implicated the Appellant as the "principal actor and originator of this." ROA pp. 12, 14, lines 17-25, 2-7. Mr. Jones informed the court that he received a copy of the statement on Friday. ROA p. 13, lines 4-7. Mr. Jones also raised concerns regarding his ability to effectively cross-examine Mr. Hollins. ROA pp. 14-17.

Finally, Mr. Jones informed the court that he was unable to arrange for necessary witnesses to testify due to the lack of notice. Mr. Jones told the court that he had two witnesses that he had intended to call, a North Charleston police officer and a friend that took the Appellant to the North Charleston police following an assault by Mr. Hollins. ROA pp. 21-22. Mr. Jones explained that he was unable to subpoena the officer in advance due to the lack of notice. ROA pp. 22, lines 9-24. He indicated that he had subpoenaed the officer on Tuesday, but he had not received a response. ROA p. 22, lines 9-11. As a result, Mr. Jones concluded that he would be unable to address a police report that the Appellant had filed against Mr. Hollins during his cross-examination of Mr. Hollins. ROA p. 22, lines 11-19. As to the other witness, Mr. Jones informed the court that she was a witness to the assault and she took the Appellant to the police department to file the report. ROA p. 22, lines 1-6. Mr. Jones informed the court that she lived in North Carolina and was unable to arrange to attend the trial due to the lack of notice. ROA p. 22, lines 6-8.

In response, the State indicated that the Appellant had turned down a plea offer that morning for a “sentence of 2 to 30 years.” ROA p. 26, lines 2-7. As a result, the court urged the Appellant to discuss the offer with her family and to put her decision regarding the plea on the record. ROA pp. 28-32. In conjunction with the court’s comments regarding the plea offer, the court denied the Appellant’s motion for a continuance. ROA pp. 32-34. The court found that the Appellant received adequate notice, which did not inhibit trial counsel’s ability to cross-examine Mr. Hollins or call witnesses on the Appellant’s behalf. ROA pp. 32-34.

After the State rested, Appellant’s counsel did not present any witnesses or offer any evidence on the Appellant’s behalf. ROA pp. 556. During sentencing, the Appellant informed the court about the abuse she suffered at the hand of Mr. Hollins. ROA pp. 767-69. Unfortunately, this information was not presented to the jury due to the unavailability of the two witnesses and the inadmissibility of the police report.

C. Argument

In State v. Motley, 251 S.C. 568, 570, 164 S.E.2d 569, 572 (1968), the Supreme Court of South Carolina noted that it is rare for the lower court’s decision to be reversed regarding a motion for continuance that is brought due to lack of time to prepare. Nevertheless, the Court concluded that the “particular facts and circumstances of each case” must be reviewed to determine if the denial of the motion is proper. Motley, 251 S.C. at 570, 164 S.E.2d at 572 (citing State v. Livingston, 233 S.C. 400, 105 S.E.2d 73 (1958)). Upon review of the facts, the Court determined that the “Appellant does not point to any specific testimony or other evidence that he could have produced had his motion been granted.” Motley, 251 S.C. at 571, 164 S.E.2d at 573. After finding a lack

of prejudice, the Court upheld the lower court's denial of the motion for a continuance.

Id.

Similarly, in State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996), the Supreme Court of South Carolina upheld the denial of a motion for a continuance, which involved a request to relieve counsel. The Court held:

Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of the motion for continuance is not an abuse of discretion.

Williams, 321 S.C. at 459, 469 S.E.2d at 51-52 (citing State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966)).

Here, the Appellant would submit that the lower court's denial of her motion for a continuance was an abuse of discretion due to the resulting prejudice. Upon review of the facts and circumstances, it is clear that trial counsel did not receive adequate notice of the trial date nor did he receive notice of an additional indictment. Not only did trial counsel explain to the court that he did not have time to properly prepare with his client, he also informed the court that he was unable to secure two vital witnesses for the defense. The Appellant would submit that the unavailability of these two witnesses forced her to remain silent regarding an abusive relationship with the State's key witness. Without the corroborating witnesses and the police report, trial counsel was unable to properly cross-examine Mr. Hollins, and the Appellant's defense was not made known to the jury. Unfortunately, the Appellant's defense was only raised in mitigation during sentencing.

The Appellant would urge this Court to find that the lower court's denial of her motion for continuance was not proper. The Appellant would submit that counsel's lack of notice was evident from the lack of defense that was offered on her behalf during the trial. Furthermore, the Appellant would urge this Court to find that the lack of notice kept her from producing witnesses and evidence on her behalf. Therefore, the Appellant would respectfully request that this Court reverse the lower court's denial of the Appellant's motion for continuance due to the resulting prejudice.

II. The Lower Court Erred By Denying the Appellant's Motion for a Severance and a Separate Trial.

A. Standard of Review

It is well established that the denial of a motion for severance and a separate trial is a matter within the sound discretion of the lower court. State v. Holland, 261 S.C. 488, 493, 201 S.E.2d 118, 120-1 (1973). On appeal, the lower court's decision will not be reversed absent an abuse of discretion resulting in prejudice to the Appellant. Id.

B. Trial Record

In conjunction with trial counsel's motion for a continuance, trial counsel also moved for a severance and a separate trial. Mr. Jones informed the court that the severance was "necessary to protect both the co-defendants and my client." ROA p. 23, lines 9-11. Mr. Jones explained to the court that impeachment of Mr. Hollins statement, which alleged the Appellant was the "principal actor", was vital to the Appellant's case. ROA p. 15, lines 1-20. He further explained that he could not effectively cross-examine Mr. Hollins on that statement without addressing the character and criminal history of Mr. Grant and Mr. Hartwell. ROA p. 14, lines 11-24. Mr. Jones submitted that his

intended line of questioning would be prejudicial to the co-defendants, so Mr. Jones requested a severance and a separate trial. ROA p. 14, lines 21-24.

After the State's response, the trial court denied the Appellant's motion for a severance and a separate trial. ROA p. 34, lines 16-19. The court determined that "there's no indication in the record that you will not have a meaningful opportunity to cross-examine Mr. Hollins." ROA p. 34, lines 8-10. The court further found that the Appellant's basic argument was that the defenses of the co-defendants were antagonistic. ROA p. 34, lines 22-25. The court held that it is well established that such a claim did not entitle the co-defendants to separate trials. ROA p. 35, lines 3-15.

Following the denial of the Appellant's motion, Mr. Barnwell, on behalf of Mr. Hartwell, made a motion for a severance and a separate trial. ROA pp. 38-39. The trial court also denied this motion for a severance and a separate trial. ROA p. 40, line 16.

As the joint trial progressed, the State called Joe Husser to the stand. ROA p. 296. Mr. Husser was a witness to the murder at issue. ROA p. 300-302. During Mr. Barnwell's cross-examination of Mr. Husser, Mr. Barnwell showed Mr. Husser a photo line-up. ROA p. 335. Through his questioning, Mr. Barnwell was able to establish that Mr. Husser identified Mr. Hollins in that photo line-up. ROA pp. 335-340. During the course of his questioning, Mr. Barnwell admitted the photo-line up into evidence. ROA pp. 335-336.

At the close of the State's case, the court noted that the State would open and close during closing arguments. ROA p. 631, lines 2-3. The court further noted that Solicitor Wilson would be opening on the law and Solicitor Jennings would be closing on the facts. ROA p. 631, lines 3-7. In response, Mr. Bolus, on behalf of Mr. Grant,

entered an objection. ROA p. 631. Against precedent, Mr. Bolus argued that one exhibit entered during the State's case by co-defendant's counsel should not preclude him from having the opportunity to open and close during closing arguments. ROA pp. 631-32. Mr. Barnwell and Mr. Jones joined in the objection. ROA p. 632, lines 2-10.

To begin closing arguments, Solicitor Wilson opened on the law. In his closing argument, Mr. Barnwell informed the jury: "Under the rule, the State gets the last argument because I did introduce some evidence, which was the line-up where Kerry Hollins was identified as being present." ROA p. 648, lines 18-21. Mr. Jones, on behalf of the Appellant, presented his closing argument after Mr. Barnwell. ROA p. 653. In conclusion, Solicitor Jennings presented his argument to the jury on the facts in which he described the Appellant as having an "integral role" in the crimes at issue. ROA p. 674.

C. Argument

In South Carolina, the courts have repeatedly held that defendants who are jointly tried for the offense of murder are not entitled to separate trials as a matter of right. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999), State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). It is also well established that the denial of a motion for severance is within the sound discretion of the trial court and that prejudice must be shown to warrant a reversal. Crowe, 258 S.C. 258, 188 S.E.2d 379, Holland, 261 S.C. 488, 201 S.E.2d 118.

In Dennis, the Supreme Court of South Carolina determined that lower court should act cautiously in considering a motion for a severance and must consider the problems that may arise from a joint trial. 337 S.C. at 281-2, 523 S.E.2d at 176. The

Court also concluded that lower court must assure protections of the defendants' rights, such as confrontation rights. *Id.* Furthermore in Dennis, the Court considered the Appellant's argument, which relied upon Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993), and found the reasoning set forth in Zafiro was consistent with South Carolina precedent. Dennis, 337 S.C. at 282-3, 523 S.E.2d at 176; See Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001).

In Zafiro, the Supreme Court of the United States held that a severance should only be granted when there is "a serious risk that a joint trial would compromise a specific right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." 506 U.S. at 539, 113 S.Ct. at 938. The Court further held: "When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened." *Id.* The Court concluded that the risk of prejudice is case specific. *Id.*

In the instant case, the Appellant would urge this Court to find that the lower court failed to protect her right to confront the State's key witness against her. Mr. Hollins statement implicated the Appellant as the "principal actor." Yet, the Appellant was unable to ask Mr. Hollins about the culpability of the co-defendants that were participants in the joint trial, one of which was considered the triggerman by the State. It only follows that this inability to effectively confront Mr. Hollins prevented the jury from making a reliable judgment. In essence, the jury was given Mr. Hollins testimony to consider in a vacuum created by the lower court's ruling.

The Appellant would further submit that the case at hand is a complex case due to the total number of co-defendants and the alleged offenses. In addition to being

complex, it is also apparent from the alleged offenses that the Appellant had a "markedly different" degree of culpability than her co-defendants. Here, the Appellant was charged with Accessory Before the Fact of a Felony, while the co-defendants were facing eight indictments for Armed Robbery, Burglary First Degree, Kidnapping, and Murder. Despite the obvious difference in culpability, the State was allowed to repeatedly single out the Appellant in an attempt to secure convictions for all three co-defendants.

The Appellant would submit that she was irreparably prejudiced by the court's refusal of her motion for a severance and a joint trial. This prejudice is derived from the forfeiture of her confrontation rights, the complexity of the trial, the differing levels of culpability, and the loss of a second closing argument. In State v. Crowe, the defendant lost the right to open and close during closing arguments because a co-defendant entered a piece of evidence. 258 S.C. at 268, 188 S.E.2d at 383-4. After finding no prejudice, the Court determined that the loss of a closing argument did not merit a separate trial. Id. at 268, 188 S.E.2d at 384.

Here, the Appellant lost the right to open and close during closing arguments when Mr. Barnwell introduced a photo line-up on cross-examination of the State's witness. The Appellant did not testify nor did counsel offer any evidence on her behalf, so she did not forfeit the right to a second closing argument. This right was only forfeited as a result of the joint trial.

The Appellant would submit that the second argument was vital to the State in the context of this specific case. It was publicly known at the time of trial that Solicitor Wilson and Solicitor Jennings were actively running elections for the same office. The

trial also became the focus of several newspaper articles, one of which was titled "9th Circuit Face-Off: It Has All the Makings of Getting Ugly." ROA p. 792. Only by virtue of the joint trial were the Solicitors provided the opportunity to go toe to toe in front of the media and most importantly the jury. The Appellant would urge this Court to find that the loss of a closing argument was highly prejudicial due to the "face-off" between the Solicitors during their closing arguments.

In sum, the Appellant would urge this Court to find that the lower court erred by denying the Appellant's motion for a continuance and a separate trial due to the resulting prejudice. This prejudice is derived from the forfeiture of her confrontation rights, the complexity of the trial, the differing levels of culpability, and the loss of a second closing argument. Therefore, the Appellant would respectfully request that this Court reverse the lower court's denial of the Appellant's motion for a severance and a separate trial.

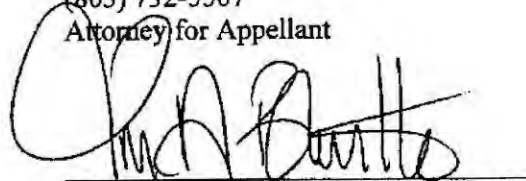
CONCLUSION

For the foregoing reasons, the Applicant respectfully requests that this Court reverse the above-mentioned findings of the lower court and order a new trial.

Respectfully submitted,



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December 31, 2008

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal From Berkeley County
The Honorable Deadra L. Jefferson, Circuit Court Judge**

THE STATE,

Respondent,

vs.

MARQUITA SMITH,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err by denying Appellant's motion for a continuance?**
- II. Did the trial judge err by denying Appellant's motion for a severance and a separate trial?**

COUNTER STATEMENT OF ISSUES ON APPEAL

- III. Did the trial judge abuse her discretion by denying Smith's motion for a continuance because Smith failed to comply with Rule 7(b), SCRCrim.P, and because Smith was not prejudiced by the trial judge's ruling?**
- IV. Did the trial judge abuse her discretion by denying Smith's motion for a severance where Smith failed to demonstrate any prejudice resulting from the trial judge's ruling, since the ruling did not prevent Smith from presenting admissible evidence in support of a defense to the charges against her?**

STATEMENT OF THE CASE

Appellant (Smith) is currently confined in the South Carolina Department of Corrections pursuant to commitment orders from the Berkeley County Clerk of Court. The Berkeley County Grand Jury indicted her at the August 2007 term of court for accessory before the fact of a felony (murder) (07-GS-08-1748); accessory before the fact of a felony (burglary in the first degree) (07-GS-08-1749); accessory before the fact of a felony (kidnapping) (07-GS-08-1750); and accessory before the fact of a felony (armed robbery) (07-GS-08-1751). These charges arose from Smith's plot to kidnap, rob and murder her cousin, Dexter Perry. Kerry Hollins, Gary Grant, Kareem King and Jermaine Hartwell were also charged with various crimes, in connection with the case.

On August 27, 2007, Smith and Messrs. Grant, and Hartwell were jointly tried before the Honorable Deadra L. Jefferson and a jury. The State tried Smith on the charges of accessory before the fact of murder and accessory before the fact of armed robbery. **R. p. 25.** The State tried Grant for armed robbery (07-GS-08-314); four counts of kidnapping (07-GS-08-314 through -318); murder (07-GS-08-319); and two counts of burglary in the first degree (07-GS-08-342 & -345). The State tried Hartwell for two counts of burglary in the first degree (07-GS-08-343 & -347); four counts of kidnapping (07-GS-08-308 through -311); murder (07-GS-08-312); and armed robbery (07-GS-08-313). W. Craig Jones, Jr., represented Smith, while Michael Tommy Bolus, Esquire, represented Grant. N. Elliott Barnwell, Esquire, represented Hartwell. Ninth Circuit Solicitor Scarlett A. Wilson and Deputy Solicitor Blair Jennings prosecuted the case.

Judge Jefferson denied Smith's pretrial motions for a continuance and for a severance. The jury found Smith guilty of both offenses, and Judge Jefferson sentenced her to consecutive thirty year sentences for each offense. Grant and Hartwell were also convicted as charged. Grant received a life sentence or murder and concurrent thirty year sentences for the remaining convictions. Hartwell

received concurrent thirty year sentences for each conviction.

Smith timely served and filed a Notice of Appeal. This appeal follows.

ARGUMENTS

- I. The trial judge did not abuse her discretion by denying Smith's motion for a continuance because Smith failed to comply with Rule 7(b), SCRCrim.P, and because Smith was not prejudiced by the trial judge's ruling.**

Smith first claims that the trial judge erred by failing to grant her motion for a continuance based upon her assertion that, because the Solicitor failed to give adequate notice of the trial date, two key witnesses were unavailable. Respondent submits that the trial judge did not abuse her discretion by denying Smith's motion because Smith failed to comply with Rule 7(b), SCRCrim.P, and because Smith was not prejudiced by the trial judge's ruling.

A. Smith's pretrial motions.

Before jury selection, Smith's trial counsel moved for a continuance and a severance. Counsel argued that he did not receive notice of the trial date until Friday, August 17, 2007. He admitted that the case had been on the docket since August 2006. However, his recollection of his conversations with the prosecution was that "they were going to try the principals, then try [Smith]." Counsel also asserted that the other defendants had received written notice of the trial day, whereas counsel had only received a telephone call ten days before trial. **R. pp. 11-12.**

Smith's counsel further noted that, although the original indictments were "done in January," the State added a charge of "burglary first." This charge was not presented to the Grand Jury until August 22, 2007, and trial counsel had not received any correspondence about it. When asked if he had full discovery, counsel stated that he had originally been provided with Kerry Hollins' initial statement from the Public Defender. When the Public Defender spoke to counsel "on Thursday," she told him that Hollins was going to be testifying; and she alerted him to another statement that Hollins had given. Counsel admitted that he had obtained a copy of this statement on the same day. Hollins' statement was dated August 4, 2006, and it incriminated Smith. **R. pp. 12-13.**

When the trial judge surmised that counsel knew the substance of the prosecution's case and that the allegations did not surprise counsel, counsel admitted that he did know the allegations. However, he claimed that there was a "twist" on the allegations because Hollins "says my client was in essence the principal actor and originator of this." This was prejudicial because "if he's lying about that, then . . . all of his statements may be false. And . . . the only way that I can flush that out" is to delve into the substantial criminal histories of the three co-defendants, including Hollins, as opposed to Smith. Counsel argued that he could not do this unless Smith's case was severed from that of her co-defendants. Thus, he asserted that Smith would lose the "ability of a defense . . . or at least some mitigating factor." **R. pp. 14-15.**

In response to further inquiry by the trial judge, trial counsel admitted that he could cross-examine Hollins; but he maintained that he could not elicit the collective nature of her co-defendants' criminal histories. The trial judge stated that he would not be able to get present this evidence, even if there was a severance. Counsel was unable to explain how he could get the co-defendants' rap sheets before the jury, even if the trial judge granted a severance; and the trial judge noted that he could not compel any of Smith's co-defendants to testify, even if her trial was severed. While trial counsel hypothesized that the co-defendants could, in theory, testify on Smith's behalf, the trial judge expressed her doubt; and Grant's counsel indicated that Grant would not do so. **R. pp. 15-16.**

Smith's counsel then argued that there was "no way" that he could adequately refute Hollins' statement, given the short notice of the trial date that he received. Counsel acknowledged that "the trial has been on since August," but argued it was not practical for counsel to prepare for trial the moment that he got the case. The trial judge observed that "as a practical matter, nobody gets six-weeks notice," and she found that it was "not unusual" or "unbelievable" that he would have gotten

a call ten days before trial because that was "the way it works." R. pp. 16-17.

Smith's counsel, however, insisted that he had never had an important case in which he received such short notice of the trial date. He also re-emphasized his belief that the other defendants had received written notice; and he asserted that he had to discuss the new charge with Smith, since he had not prepared for it because he had not received notice that she would be charged with it. He again explained that he received notice of the new charge (which was accessory before the fact of burglary and not burglary as counsel asserted) on August 17th, the case was presented to the Grand Jury on August 22nd, ... and a true billed indictment was returned on August 23, 2007. R. pp. 17-21. He further asserted that a severance was necessary to protect the interests of Smith and the other co-defendants. R. p. 23.

Smith's counsel then noted that he had two witnesses who were unavailable for the trial. The first witness was an officer from the North Charleston Police Department, whom counsel planned to present as a witness to a prior simple assault by Hollins on Smith, Hollins' girlfriend at the time. Counsel had subpoenaed this officer on the Tuesday after he received notice of the trial. The other witness lived in North Carolina; and counsel had spoken to her on Tuesday. However, "there wasn't any way that I could get jurisdiction" and "there's no way she could get down here for this." Counsel argued that he could not have subpoenaed the witnesses earlier because he did not have a trial date. R. pp. 21-23.

Deputy Solicitor Jennings noted that "I put . . . all five of these defendants . . . on our trial docket in which Judge Dennis held that meeting on Friday, June the 22nd. We faxed out notices like we always do." It was his recollection that Hollins' counsel was the only attorney physically present. "The case was originally docketed for August 6th and then based on peoples' schedules, we set it for this week." A formal letter was only sent to Mr. Bolus (Grant's attorney), and this was done at

his request because he had other cases pending. **R. pp. 23-24.**

Deputy Solicitor Jennings further observed that, in his conversations about the case, he had always intended to try the case on August 27. Moreover, he noted that "we have attempted to work out a resolution with Ms. Smith, Mr. Hollins, and Mr. King, whereby they would plead guilty to some charge[s] and then testify." Only Hollins accepted that opportunity. Mr. Jennings noted that there were discussions about the trial date before the telephone call, but even the phone call gave Smith ten days notice. Also, Smith had given a written statement admitting to the offenses with which she was charged, after receiving her *Miranda*¹ rights, and Mr. Jennings did not understand how she could be prejudiced by Hollins' portrayal of her. Mr. Jennings also outlined the substance of the inculpatory statement.

He represented that she had refused to accept a plea bargain to the offense of accessory before the fact to armed robbery. This would have limited Smith's exposure to between ten and thirty years. She had also refused a plea bargain to charges of accessory before the fact to voluntary manslaughter and accessory before the fact to kidnapping, with a sentencing range of between two and thirty years. At trial, she faced a possible life sentence for accessory before the fact to murder and the possibility of consecutive thirty year sentences for the other two charges. **R. pp. 26-27.**

Smith's counsel argued that the plea negotiations had been correctly represented. Counsel stated that he had explained the proposals to Smith, but he asked for permission to talk to her without her family present. **R. pp. 27-28.** The trial judge allowed counsel to speak with Smith privately, after briefly addressing Smith, herself. **See R. pp. 28-32; 35.**²

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966). Mr. Jennings noted that she had given two false statements on the night of the incident and the inculpatory statement on August 4, 2007.

² Smith ultimately refused to accept a plea bargain. **R. pp. 42-47.**

The trial judge denied both of Smith's motions. She specifically found that there was no basis to grant a continuance. She found that the case had been pending on the docket for over a year; that the case was placed on the trial docket at the June 22, 2007 hearing before Judge Dennis; that this was "more than substantial notice;" and that it was not unusual to get only three days notice of a jury trial, particularly when a case is as old as Smith's case. The trial judge did "not find persuasive [counsel's] argument regarding . . . getting the witnesses here" because she found that Smith would "have more than adequate time" to obtain the presence of potential witnesses. Also, she noted that Smith would have the same problem in obtaining the witness from North Carolina even if a continuance was granted because the witness was outside of the trial court's subpoena power. She found that this was an unfortunate but common occurrence. She likewise found that police officers also might be reluctant witnesses. R. pp. 32-34.

The trial judge further found that there had not been any indication that Smith would "not have a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness." She expressly rejected trial counsel's suggestion that he would not be able to fully explore his theory of defense. R. p. 34.

The trial judge likewise denied Smith's motion for a severance. She observed that a severance motion is addressed to the trial court's discretion. She further noted that the general rule permitting a joint trial applied "with equal force when a [defendant's] motion is based on the likelihood that he and a co-defendant would present mutually antagonistic defenses." She found that this was the essence of Smith's motion; and that this was not sufficient to warrant a severance. Finally, she observed that criminal defendants "are not entitled to separate trials as a matter of right;" that a severance was not required because the co-defendants had different trial strategies or because evidence might be admissible only against one defendant and not others; and a severance was not

required merely because a co-defendant might present evidence when the defendant did not. **R. pp. 34-35.** The trial thereafter denied Grant's motion for a severance. **R. pp. 38-40.**

B. Events at the trial.

During Hartwell's cross-examination of prosecution witness Joe Husser, one of the kidnapping victims and an eyewitness to the murder (**R. pp. 300-02**), Hartwell introduced a photographic lineup containing a picture of Hollins, whom Husser had identified as being involved in the kidnapping at the trailer of Hussers' aunt and uncle. **R. pp. 335-40.** This was contrary to Hollins' testimony about his involvement in the case.

At the close of the State's case, the trial judge observed that the State would have the right to last argument. She overruled Grant's objection, argued against precedent, that Hartwell's introduction of the photographic lineup (Defense Ex. 1) should not deprive Grant of the right to last argument. **R. p. 631-32.** Both Smith and Hartwell joined in this objection. **R. p. 632.**

C. Discussion.

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." *State v. Morris*, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)); *State v. Babb*, 299 S.C. 451, 385 S.E.2d 827 (1989). Reversals for the denial of a continuance "are about as rare as the proverbial hens' teeth." *State v. McMillian*, 349 S.C. at 21, 561 S.E.2d at 604 (citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859, (1957)). This rule also applies to continuance motions based upon the absence of a material witness. *See Logan v. Gatti*, 289 S.C. 546, 347 S.E.2d 506 (Ct.App.1986).

Here, Smith did not comply with the requirements of Rule 7(b), SCRCrimP. Rule 7(b) provides that:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the

testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

In this case, neither Smith nor her trial attorney provided a sworn affidavit or testimony in support of the continuance motion. It was, therefore, properly denied. *See Morris*, 376 S.C. at 209, 656 S.E.2d at 370. Moreover, and assuming compliance with Rule 7(b), Smith cannot show an abuse of discretion because she was not prejudiced by the trial judge's ruling.

Contrary to Smith's position, the trial judge's ruling did not prevent her from presenting any *admissible* evidence in support of a defense to the charges of accessory before the fact of murder and accessory before the fact of armed robbery. She wished to present evidence of a criminal act against her, *i.e.*, a simple assault, in order to refute Hollins' testimony that she orchestrated the plot to kidnap, rob and murder the victim. She also wanted to demonstrate the prior criminal histories of her co-defendants and juxtapose that against her absence of a record. However, she did not proffer how this evidence was admissible.

Smith did not establish that the criminal charge against Hollins was admissible as impeachment evidence under either Rule 608(b), SCRE, or Rule 609(a), SCRE. She likewise did not maintain that any violence by Hollins rose to the level of a battered spouse syndrome. *See Robinson v. State*, 308 S.C. 74, 76, 417 S.E.2d 88, 90 (1992) ("A battered woman is a woman who repeatedly is subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. ... The battered woman's syndrome is identified by a series of common characteristics that appear in women who are abused for an extended period of time by the dominant male figure in their lives") (citations omitted); *State v. Hill*, 287 S.C. 398, 339 S.E.2d 121 (1986) (expert testimony on battered woman's syndrome is

admissible to determine the defendant's state of mind for the purpose of establishing self-defense).

Indeed, she made no effort to impeach Hollins with this act on her cross-examination of him. **R. pp. 433-40.** Therefore, her argument is not preserved for review. *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). Moreover, it appears that Smith was attempting to introduce this evidence and evidence of the criminal histories of her non-testifying co-defendants as propensity evidence, and to thereby establish that she could not have been the person who actually orchestrated the crimes.

However, such propensity evidence is inadmissible, particularly where the defendant does not testify. This would have held true even if a severance had been granted. *Cf. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (S.C. 1998) (character evidence is not admissible for purpose of proving that accused possesses criminal character or has propensity to commit crime with which he is charged). Further, none of Smith's co-defendants attempted to refute evidence that she elicited establishing that she was not present at the trailer where the victim was murdered and her name was not mentioned. **R. pp. 199; 217.** They also did not attempt to refute her evidence that it was not unusual for her to go to Tawana Deas' apartment, from which the victim was kidnapped; Tawana never heard Smith giving instructions to the burglars/kidnappers; and there was nothing negative about the relationship between Smith and her cousin, the victim. **R. pp. 150-54.** Further, they did not impeach evidence that Nelson originally thought that a Nicole Spells, and not Smith, had set up the victim. **R. p. 275.**

Further, Smith maintains that "the unavailability of these two witnesses forced her to remain silent regarding an abusive relationship with the State's key witness." **Initial Brief of Appellant, p. 9.** Assuming for argument sake that evidence of the abusive relationship was admissible, the trial

judge's ruling did not "force[] her to remain silent" about it. She could have exercised her constitutional right to testify. *See Rock v. Arkansas*, 483 U.S. 44 (1987) (a criminal defendant's right to testify is constitutionally protected by the due process clause of the Fourteenth Amendment). Having elected to rely upon her right not to testify, she must live with the consequence that evidence she might have otherwise presented to the jury was not heard.

Also, her suggestion that "counsel's lack of notice was evident from the lack of defense that was offered on her behalf during the trial," **Initial Brief of Appellant**, p. 10, is disingenuous. It is true that she did not testify or present witnesses in her behalf. However, the record belies her claim that this was the result of the trial judge's ruling. After the jury had been sworn but before the trial began, the trial judge inquired, for purposes of court scheduling, as to whether each defendant would present a witness. Smith's counsel stated that he had "possibly two [witnesses], but they'd be very, very brief. **R. pp. 92-93**. However, when the trial judge later revisited the question of whether Smith was going to present any witnesses, trial counsel indicated that he had changed his mind and was not planning to present any witnesses. **R. p. 498**.

It is not possible from the record to determine whether Smith had secured the presence of one or both witnesses reference in her pretrial motions, or whether these were additional witnesses. Yet, it is clear that the trial judge's denial of Smith's continuance motion did not prevent her from presenting a defense. Rather, this was unquestionably a matter of trial strategy.

Additionally, Smith's theory of defense as expressed in arguing her pretrial motion was not a defense to the charge of accessory before the fact of a felony. Her intention was to rebut any suggestion that she was the mastermind behind the crimes committed on August 1-2, 2006. However, this was not a defense to the charges. For instance, accessory before the fact of murder requires a showing that the accused: (1) either advised and agreed, urged, or in some way aided some

other person to commit the offense; (2) was not present when the offense was committed; and (3) that some principal committed the crime. *State v. Farne*, 190 S.C. 75, 1 S.E.2d 912 (1939). The State need only prove that some principal committed the crime at the behest of the accessory. *State v. Cox*, 287 S.C. 260, 335 S.E.2d 809 (Ct.App.1985), *affirmed as modified*, 290 S.C. 489, 351 S.E.2d 570 (1986); *see also State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976). If anything, the information at issue was more relevant at sentencing; and Smith does not dispute that she was able to present it at sentencing.

Moreover, any testimony that she could have presented concerning her fear of Hollins and his domination of her, as well as his criminal history was generally cumulative to evidence presented by the State: her December 4, 2006 statement admitting her guilt as an accessory before the fact to murder and armed robbery. She began her statement by saying that “[t]he whole time we have been together, Kerry [Hollins] has been in trouble. I love Kerry, but I am also afraid of him.” She also claimed that Hollins had called her on July 31, 2006 and asked if she “knew someone we could rob.”

R. p. 545.

Later in her statement, she maintained that Hollins convinced her into going to Tawana’s house although she did not want to go. Also, she allegedly had second thoughts about the scheme and warned the victim, while in the parking lot with him, that someone was outside the apartment.

R. p. 547. Because the circumstantial propensity evidence would have been merely cumulative to the statement, Smith was not prejudiced by the trial judge’s refusal to grant a continuance. *See State v. Hess*, 279 S.C. 14, 18-19, 301 S.E.2d 547, 550 (1983) (finding no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury); *State v. Gault*, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007) (“Gault had already testified that the windows were tinted, so the photographs would have only served as cumulative evidence. Because the jury

was already informed of the tinted windows, the exclusion of the photographs showing the tint was not prejudicial to Gault").

- II. **The trial judge did not abuse her discretion by denying Smith's motion for a severance where Smith failed to demonstrate any prejudice resulting from the trial judge's ruling, since the ruling did not prevent her from presenting admissible evidence in support of a defense to the charges against her.**

Smith claims that the trial judge erroneously failed to grant a severance because she and her co-defendants had antagonistic defenses. Respondent disagrees and submits that the trial judge did not abuse her discretion because Smith failed to prove any prejudice resulting from denial of her severance motion, since the trial judge's ruling did not prevent Smith from presenting admissible evidence in support of a defense to the charges against her.

There was no error. Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. *E.g.*, *State v. Kelsey*, 331 S.C. 50, 73-74, 502 S.E.2d 63, 75 (1998); *State v. Nichols*, 325 S.C. 111, 481 S.E.2d 118 (1997); *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993); *State v. Crowe*, 285 S.C. 258, 188 S.E.2d 379 (1972). Rather, a motion for a severance and separate trial is addressed to the discretion of the trial judge, and cannot be reversed absent an abuse of discretion. *Id.*; *State v. Boys*, 302 S.C. 345, 397 S.E.2d 529 (1990); *State v. Dennis*, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999); *State v. Britt*, 235 S.C. 395, 111 S.E.2d 669 (1959). *See also State v. Holland*, 261 S.C. 488, 201 S.E.2d 118 (1973). These principles are adhered to even in cases involving motions for a severance based upon antagonistic defenses. *State v. Allen*, 266 S.C. 175, 222 S.E.2d 287 (1976); *Britt, supra*; *State v. Atkins*, 205 S.C. 450, 32 S.E.2d 373 (1944); *State v. Mathis*, 174 S.C. 344, 177 S.E. 318 (1934); *State v. Jeffords*, 121 S.C. 443, 114 S.E. 415 (1922). *See also State v. Leonard*, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986), *rev'd. on other grds.*, 292 S.C. 133, 355 S.E.2d 270 (1987).

In *Zafiro v. United States*, 506 U.S. 534 (1993), the United States Supreme Court held that Rule 14 of the Federal Rules of Criminal Procedure does not require severance as a matter of law even when co-defendants present mutually antagonistic defenses. The Court noted that it had

repeatedly approved of joint trials, and the Court held that severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. Further, the defendant must show how he was prejudiced by a joint trial. The Supreme Court left the decision to the sound discretion of the district court. *Id.* at 537-41.

Despite *dicta* in the South Carolina Supreme Court's decision in *State v. Bellamy*, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987), joint trials are generally favored. As the United States Supreme Court explained in *Zafiro*:

Joint trials 'play a vital role in the criminal justice system They promote efficiency and' serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. . . . For these reasons, we repeatedly have approved of joint trials.

506 U.S. at 537. (Citations omitted). Indeed, *Zafiro* makes clear that it does not violate the United States Constitution for a trial judge to deny a severance motion even when the defendant(s) show prejudice resulting from a joint trial, particularly if the trial judge gives appropriate limiting instructions to the jury, which thereby minimize any potential prejudice. *Id.* at 540-541.

In the present case, the trial judge did not abuse her discretion because Smith cannot show how she was prejudiced by being tried jointly with her co-defendants. The South Carolina Supreme Court has previously affirmed denial of severance motions under circumstances where the defendants had antagonistic defenses. In *Britt*, two defendants moved for severance based upon antagonistic defenses because there was a dispute as to who fired the fatal shot. Both denied that they had fired the fatal shot, and one defendant, corroborated by a third defendant, averred that the other did the shooting. The Court found no abuse of discretion in denial of the severance motion and affirmed. 235 S.C. at ___, 111 S.E.2d at 674-675. The Court in *Britt* relied upon *Atkins, supra*, *Jeffords, supra*, and *State v. Brown*, 108 S.C. 490, 95 S.E. 61 (1918). A similar result was also

reached by the Court in both *Holland* and *Allen*, *supra*. See also *Leonard*, *supra*.

Further, it does not appear that the co-defendants had antagonistic defenses. In fact, Hartwell attempted to establish that Hollins had planned the robbery and he was testifying against the remaining co-defendants to get himself out of trouble. *R. p. 432*. Also, and contrary to Smith's position, the trial judge's ruling did not prevent her from presenting any *admissible* evidence in support of a defense to the charges of accessory before the fact of murder and accessory before the fact of armed robbery. She wished to present evidence of a criminal act against her, *i.e.*, a simple assault, in order to refute Hollins' testimony that she orchestrated the plot to kidnap, rob and murder the victim. She also wanted to demonstrate the prior criminal histories of her co-defendants and juxtapose that against her absence of a record. However, she did not proffer how this evidence was *admissible*.

Smith did not establish that the criminal charge against Hollins was *admissible* as impeachment evidence under either Rule 608(b), SCRE, or Rule 609(a), SCRE. She likewise did not maintain that any violence by Hollins rose to the level of a battered spouse syndrome. See *Robinson*, 308 S.C. at 76, 417 S.E.2d at 90; *Hill*, *supra*.

Indeed, she made no effort to impeach Hollins with this act on her cross-examination of him. *R. pp. 433-40*. Therefore, her argument is not preserved for review. *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). Moreover, it appears that Smith was attempting to introduce this evidence, and evidence of the criminal histories of her non-testifying co-defendants as propensity evidence, and to thereby establish that she could not have been the person who actually orchestrated the crimes.

However, such propensity evidence is inadmissible, particularly where the defendant does

not testify. This would have held true even if a severance had been granted. *Cf. Nelson, supra* (character evidence is not admissible for purpose of proving that accused possesses criminal character or has propensity to commit crime with which he is charged). Further, none of Smith's co-defendants attempted to refute evidence that she elicited establishing that she was not present at the trailer where the victim was murdered and her name was not mentioned. *R. pp. 199; 217*. They also did not attempt to refute her evidence that it was not unusual for her to go to Tawana Deas' apartment, from which the victim was kidnapped; Tawana never heard Smith giving instructions to the burglars/kidnappers; and there was nothing negative about the relationship between Smith and her cousin, the victim. *R. pp. 150-54*. Further, they did not impeach evidence that Nelson originally thought that a Nicole Spells, and not Smith, had set up the victim. *R. p. 275*.

Additionally, Smith's theory of defense as expressed in arguing her pretrial motion was not a defense to the charge of accessory before the fact of a felony. Her intention was to rebut any suggestion that she was the mastermind behind the crimes committed on August 1-2, 2006. However, this was not a defense to the charges. For instance, accessory before the fact of murder requires a showing that the accused: (1) either advised and agreed, urged, or in some way aided some other person to commit the offense; (2) was not present when the offense was committed; and (3) that some principal committed the crime. *Farne, supra*. The State need only prove that some principal committed the crime at the behest of the accessory. *Cox, supra; see also Massey, supra*. If anything, the information at issue was more relevant at sentencing; and Smith does not dispute that she was able to present it at sentencing.

Moreover, any testimony that she could have presented concerning her fear of Hollins and his domination of her, as well as his criminal history was generally cumulative to evidence presented by the State, her December 4, 2006 statement admitting her guilt as an accessory before the fact to

murder and armed robbery. She began her statement by saying that "[t]he whole time we have been together, Kerry [Hollins] has been in trouble. I love Kerry, but I am also afraid of him." She also claimed that Hollins had called her on July 31, 2006 and asked if she "knew someone we could rob." R. p. 545.

Later in her statement, she maintained that Hollins convinced her into going to Tawana's house although she did not want to go. Also, she allegedly had second thoughts about the scheme and warned the victim, while in the parking lot with him, that someone was outside the apartment. R. p. 547. Because the circumstantial propensity evidence would have been merely cumulative to the statement, Smith was not prejudiced by the trial judge's refusal to grant a severance. *See Hess*, 279 S.C. at 18-19, 301 S.E.2d at 550 (finding no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury); *Gault*, 375 S.C. at 574, 654 S.E.2d at 100 ("Gault had already testified that the windows were tinted, so the photographs would have only served as cumulative evidence. Because the jury was already informed of the tinted windows, the exclusion of the photographs showing the tint was not prejudicial to Gault").

Nor was Smith prejudiced by being deprived of the right to last closing argument, even though she would have had the last argument if tried alone, since she did not introduce any evidence. The Court held in *Crowe* that:

The fact that, upon a trial of defendants jointly indicted, the introduction of evidence by one defendant may operate to deprive a co-defendant, who offers no evidence, of the right to the closing argument, to which such co-defendant would be entitled if tried separately affords no ground upon which to order separate trials. The election by a defendant to offer testimony or not is so intertwined with trial strategy, the development of the State's case, and the basic rights of the defendant until the order of argument to the jury can only be finally determined in the light of the facts developed at the trial. The right of the defendants to argue to the jury can be adequately in a joint trial.

Crowe, 188 S.E.2d at 384. A similar argument was rejected in the more recent capital case of *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221, 226-227 (1981), even though both defendants had the statutory right to last argument.

Likewise, there is no merit to Smith's assertion that she was prejudiced because she was precluded from eliciting evidence of his co-defendants' culpability on her cross-examination of Hollins. Only the propensity evidence discussed, *supra*, was barred. Furthermore, "... it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540.

More importantly, the trial judge thoroughly instructed the jury on the substantive law of the offenses with which the defendants were charged; the State's burden of proving each defendant guilty beyond any reasonable doubt; the presumption of innocence; principles of accomplice liability; and, that the defendants's failure to testify could not be considered against them in any fashion. **R. pp. 703-19.**

She likewise charged the jurors that:

... [T]here are three separate defendants in this case, each of whom is charged with different crimes. ...

The case of each defendant, and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one defendant guilty or not guilty beyond a reasonable doubt should not control your verdict as to the other defendants.

Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other; or you may acquit both or you may convict both. It will depend upon your view of the testimony and evidence.

You must take each defendant and consider the evidence as to that defendant and my instructions to you on the law. You will write a separate verdict of guilty or not guilty for each individual defendant.

R. pp. 719-20. She then instructed jurors of the individual charges faced by each defendant, and

explained separate verdicts were to be returned as to each offense.

Because jurors are presumed to follow their jury instructions, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the trial judge's charge cured any conceivable prejudice that might have otherwise existed from the joint trial. *Zafiro*, 506 U.S. at 540. See also *Holland* and *Crowe*, *supra*. For these reasons Smith's argument lacks merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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By. 

WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

February 17, 2009

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal From Berkeley County
The Honorable Deadra L. Jefferson, Circuit Court Judge**

THE STATE,

Respondent,

vs.

MARQUITA SMITH,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to her attorney of record, Tricia A. Blanchette, at P.O. Box 12725 Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 17th day of February, 2009.



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FILED

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THE STATE OF SOUTH CAROLINA
In The Court of AppealsMARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

The State,

Respondent,

v.

Marquita Smith,

Appellant.

Appeal From Berkeley County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4662
Submitted December 1, 2009 – Filed March 24, 2010

AFFIRMED

Tommy Arthur Thomas, of Irmo; Tricia A.
Blanchette, of Columbia, for Appellant.Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, and Senior Assistant Attorney General
William Edgar Salter, III, all of Columbia; Solicitor
Scarlett Anne Wilson, of Charleston, for Respondent.

SHORT, J.: In this criminal case, Marquita Smith argues the trial court improperly denied her motions for a continuance and severance. We affirm.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

KSP

FACTS

Smith was tried on charges of accessory before the fact of murder and accessory before the fact of armed robbery. These allegations arose from Smith's involvement in a scheme to kidnap, rob, and murder her cousin, Dexter Perry. The State also tried Gary Grant and Jermaine Hartwell for armed robbery, murder, four counts of kidnapping, and two counts of burglary in the first degree in connection with the case. Smith, Grant, and Hartwell were jointly tried.

Smith made pretrial motions for continuance and severance. The trial court denied these motions and the case proceeded to trial. The jury found Smith guilty of both offenses and she was sentenced to thirty-years' imprisonment for each offense, to run consecutively. Grant was found guilty of all the offenses, and received a life sentence for murder and concurrent thirty-year sentences for the remaining convictions. Likewise, Hartwell was found guilty of each offense and received concurrent thirty-year sentences for each conviction. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The court is bound by the trial court's factual findings unless they are clearly erroneous. Id. This court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. Id.

LAW/ANALYSIS

I. Continuance

Smith first claims the trial court erred by failing to grant her motion for continuance. We disagree.

The trial court's decision to deny a motion for continuance is a matter within the trial court's discretion. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Therefore, this court will not reverse the trial court unless there was an abuse of discretion that resulted in prejudice. Id.

A. Adequate Notice

Smith argues the trial court should have granted the motion for continuance because the State failed to give adequate notice of the trial date. She also contends the trial court should have granted her motion because she was informed of a new charge, accessory before the fact of burglary, only one week before trial. We disagree.

Prior to trial on August 27, 2007, Smith made a motion for continuance and argued she did not receive notice of the trial date until August 17, 2007. However, she conceded the case had been on the docket since August 2006. The trial court stated Smith knew the substance of the State's case and that the accessory before the fact of burglary arose out of the same facts as the other charges. The trial court concluded there was no basis to grant a continuance, especially in light of the fact that the case had been on the docket for more than one year, Smith had substantial notice of the trial date, and she was not surprised by the new charge.² We find no reversible error in the trial court's decision. See State v. Motley, 251 S.C. 568, 571, 164 S.E.2d 569, 570 (1968) ("When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal.").

B. Cross-Examination

Smith contends the trial court erred in denying her motion for continuance because she was unable to cross-examine Kerry Hollins, another individual charged in connection with the case. We disagree.

The trial court found nothing indicated Smith would not have a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness as to the weight the jury should give his testimony. The trial court also stated, "I have not heard anything that convinces me that you will not be able to fully explore your argument or your theory which is that your client was the least culpable in these alleged incidences." We find no reversible error in the trial court's decision. See State v. McMillian, 349

² Smith was tried on charges of accessory before the fact of murder and accessory before the fact of armed robbery; however, the State did not proceed with the accessory before the fact of burglary charge.

S.C. 17, 21, 561 S.E.2d 602, 604 (2002) ("Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth.").

C. Witness Availability

Smith also argues the trial court erred by denying her motion for continuance because two witnesses were unavailable. We disagree.

Rule 7(b), SCRCrimP, speaks to the subject of continuances in the context of unavailable witnesses. This Rule provides:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP.

In the present case, Smith did not comply with Rule 7(b) because she did not state under oath that the testimony of the witnesses was material to the support of her defense, the motion was not intended for delay, or due diligence had been exercised to secure the testimony of the witnesses. Thus, the trial court did not commit reversible error in denying the motion for continuance.

II. Severance

Smith next contends the trial court erred by denying her motion for severance. We disagree.

A motion for severance is left to the sound discretion of the trial court. State v. Kelsey, 331 S.C. 50, 73-74, 502 S.E.2d 63, 75 (1998). An appellate

court will not disturb the trial court's ruling unless there is an abuse of discretion. Id.

A. Cross-Examination of Co-Defendant

The basis for Smith's motion for severance was her assertion that she would be unable to effectively cross-examine Hollins. Hollins was also charged in connection with the case but testified for the State. Prior to his testimony, Hollins made a statement that implicated Smith as the principal actor. Smith argues she could not effectively cross-examine Hollins on that statement without addressing the character and criminal history of Grant, Hartwell, and Hollins. We disagree.

The trial court expressed concern as to how Smith would be able to present the character and criminal history of each of the defendants even if a severance was granted. Smith was unable to explain how she would be able to present this evidence for the jury to consider. Additionally, the trial court specifically found Smith would have "a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness as to the weight the jury should give his testimony." The trial court also stated, "I have not heard anything that convinces me that you will not be able to fully explore your argument or your theory which is that your client was the least culpable in these alleged incidences." We see no reversible error in the trial court's decision to deny Smith's motion. See id. (holding the granting of a motion for severance is within the discretion of the trial court and its ruling on such a motion will not be disturbed on appeal unless an abuse of discretion is shown).

B. Closing Argument

Smith also argues the trial court should have granted the severance motion because she lost her right to have the last closing argument to the jury as a result of being tried together. We disagree.

In a criminal case in which a defendant is separately tried and introduces no testimony, she is entitled to the closing argument to the jury. State v. Crowe, 258 S.C. 258, 268, 188 S.E.2d 379, 384 (1972). When defendants are jointly indicted and any one of them introduces evidence, the State is entitled to the closing argument. Id. "The fact that, upon a trial of defendants jointly indicted, the introduction of evidence by one defendant may operate to deprive a co-defendant, who offers no evidence, of the right to

the closing argument, to which such co-defendant would be entitled if tried separately, affords no ground upon which to order separate trials." Id.

In the present case, Smith did not testify, but one of her co-defendants offered a photo lineup into evidence. The trial court admitted this lineup, and as a result, Smith lost her right to have the last closing argument to the jury. Based on Crowe, the trial court properly denied the motion for severance on this ground.

CONCLUSION-

Accordingly, the trial court's decision is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF GENERAL SESSIONS

THE HONORABLE DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

THE STATE,

RESPONDENT,

vs.

MARQUITA SMITH,

APPELLANT.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING *EN BANC*

In State v. Marquita Smith, Op. No. 4662 (S.C. Ct. App., filed March 24, 2010) this Court affirmed the lower court's denial of the Appellant's motions for a continuance and a severance. Pursuant to Rule 221, SCACR, Appellant, through undersigned counsel, requests rehearing on the points overlooked or misapprehended by this Court. Pursuant to Rule 219(b), SCACR, the Appellant also requests a rehearing *En Banc*.

I.

In its opinion, this Court stated:

In the present case, Smith did not comply with Rule 7(b) because she did not state under oath that the testimony of the witness was material to the support of her defense, the motion was not intended for delay, or due diligence had been exercised to secure the testimony of the witnesses. Thus, the trial court did not commit reversible error in denying the motion for a continuance.

State v. Marquita Smith, Op. No. 4662 (S.C. Ct. App., filed March 24, 2010). In the Brief of Appellant, it was explained in detail that trial counsel requested a continuance due to lack of notice. Trial counsel informed the lower court that two witnesses were unavailable to testify regarding an assault committed against the Appellant by co-defendant Hollins. Specifically, trial counsel stated:

Again, there's no way I can subpoena people in advance when I don't have notice there's a trial period at some point coming up, which is the whole reason why typically notice is given, so that you can get relevant witnesses there. You know, that -- that -- you can't do that when you -- when you get notice on a Friday afternoon. And -- and -- and again, I think they are -- I think they do go to -- to the fear she discusses in her statement. And -- and I think -- I think they are relevant to the case and are necessary witnesses.

ROA pp. 22-23, lines 20-25, 1-4.

The Appellant respectfully submits that this Court overlooked the Appellant's argument that due to lack of actual notice of the trial date, trial counsel was unable to secure the testimony of two material witnesses. As a result of trial counsel's detailed explanation on the record, which was summarized in the Brief of Appellant, the Appellant submits that trial counsel did state that the testimony of the witnesses were material to her defense, that his request was not intended for the purposes of delay, and that he had exercised due diligence in trying to secure their testimony.

As this Court noted: "Reversals of refusal of continuance are about as rare as proverbial hens' teeth." See State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). Nevertheless, after making this comparison, the South Carolina Supreme Court reversed the trial court's refusal to grant a continuance in McMillian, 349 S.C. at 24, 561 S.E.2d at 605-6. The Appellant would urge this Court to review the arguments set for the

in the Brief of the Appellant and the testimony contained in the Record on Appeal and find that rarity does not preclude reversal in this case.

II.

In the Brief of Appellant, the Appellant submitted the following in support of her argument regarding the lower court's denial of her motion for a severance:

Here, the Appellant lost the right to open and close during closing arguments when Mr. Barnwell introduced a photo line-up on cross-examination of the State's witness. The Appellant did not testify nor did counsel offer any evidence on her behalf, so she did not forfeit the right to a second closing argument. This right was only forfeited as a result of the joint trial.

The Appellant would submit that the second argument was vital to the State in the context of this specific case. It was publicly known at the time of trial that Solicitor Wilson and Solicitor Jennings were actively running elections for the same office. The trial also became the focus of several newspaper articles, one of which was titled "9th Circuit Face-Off: It Has All the Makings of Getting Ugly." Only by virtue of the joint trial were the Solicitors provided the opportunity to go toe to toe in front of the media and most importantly the jury. The Appellant would urge this Court to find that the loss of a closing argument was highly prejudicial due to the "face-off" between the Solicitors during their closing arguments.

Brief of Appellant pp. 14-15.

Despite addressing the loss of the closing argument, this Court failed to address the Appellant's argument regarding the prejudicial impact of the "face-off" that occurred during the State's closing arguments. The Appellant would submit that the political implications outlined in the newspaper article played a prejudicial role in her trial and respectfully requests that this Court address the merits of this issue.

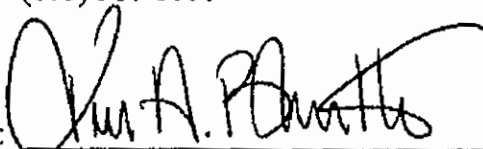
WHEREFORE, for the foregoing reasons, Petitioner requests this Court grant the Petition for Rehearing and/or Petition for Rehearing *En Banc* and rehear the case.

Respectfully submitted,

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Columbia, South Carolina
April 1, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Berkeley County
The Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

Respondent,

vs.

MARQUITA SMITH,

Appellant.

OPINION NO. 4662

RETURN TO PETITION FOR REHEARING

INTRODUCTION

On March 24, 2010, this Court filed a published Opinion affirming Petitioner's 2006 Berkeley County convictions and sentences for murder, kidnapping, armed robbery and conspiracy to commit armed robbery. All of the convictions stemmed from the October 5-6, 1989 murder of Kimberly Ann Quinn. *State v. Marquita Smith*, ___ S.C. ___, ___ S.E.2d ___, Opinion No. No. 4662, 2010 WL 1189431 (S.C. Ct. App., Mar. 24, 2010). Petitioner filed a Petition for Rehearing dated April 2, 2010. On April 5, 2010, the Court directed Respondent to file a Return addressing the rehearing petition. In compliance with that Order, Respondent would submit the following Return to Petition for Rehearing:

At the outset, Respondent submits that this Court's Opinion correctly rejected the issues presented. Also, Respondent incorporates by reference the arguments from the Final Brief of

Respondent.

I.

In rejecting Smith's argument that Smith's claim is that the trial court erred in denying her motion for a continuance based upon the unavailability of two witnesses, this Court reasoned that:

Smith also argues the trial court erred by denying her motion for continuance because two witnesses were unavailable. We disagree.

Rule 7(b), SCRCrimP, speaks to the subject of continuances in the context of unavailable witnesses. This Rule provides:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP.

In the present case, Smith did not comply with Rule 7(b) because she did not state under oath that the testimony of the witnesses was material to the support of her defense, the motion was not intended for delay, or due diligence had been exercised to secure the testimony of the witnesses. Thus, the trial court did not commit reversible error in denying the motion for continuance.

Smith, Slip Opinion at p. 4.

On rehearing, Smith claims that this Court "overlooked the Appellant's argument that due to lack of actual notice of the trial dated, counsel was unable to secure the testimony of two material witnesses." She further argues counsel's argument stated "that the testimony of the witnesses were material to her defense, that his request was not intended for the purpose of delay, and that he had exercised due diligence in trying to secure their testimony." **Petition at p. 2.**

Again, Respondent submits that this Court correctly analyzed the issue. Further, this Court's decision is in accordance with well-settled precedent from the South Carolina Supreme Court, *see State v. Morris*, 376 S.C. 189, 209, 656 S.E.2d 359, 370 (2008), and Respondent is unaware of any exception to the affidavit requirement. Further, while one may infer from trial counsel's pretrial argument that counsel was asserting that his motion was not for purposes of delay, that the witnesses were material to Petitioner's defense and that he exercised due diligence to secure the witnesses, counsel never expressly stated these matters on the record. **R. pp. 21-23.**

Respondent would further note that the trial judge did "not find persuasive [counsel's] argument regarding . . . getting the witnesses here" because she found that Smith would "have more than adequate time" to obtain the presence of potential witnesses. Also, she noted that Smith would have the same problem in obtaining the witness from North Carolina even if a continuance was granted because the witness was outside of the trial court's subpoena power. She found that this was an unfortunate but common occurrence. She likewise found that police officers also might be reluctant witnesses. **R. pp. 32-34.**

More importantly and contrary to Smith's position, the trial judge's ruling did not prevent her from presenting any *admissible* evidence in support of a defense to the charges of accessory before the fact of murder and accessory before the fact of armed robbery. Smith wished to present evidence of a criminal act against her, *i.e.*, a simple assault, in order to refute Hollins' testimony that she orchestrated the plot to kidnap, rob and murder the victim. She also wanted to demonstrate the prior criminal histories of her co-defendants and juxtapose that against her absence of a record. However, she did not proffer how this evidence was admissible.

Smith did not establish that the criminal charge against Hollins was admissible as

impeachment evidence under either Rule 608(b), SCRE, or Rule 609(a), SCRE. She likewise did not maintain that any violence by Hollins rose to the level of a battered spouse syndrome. See *Robinson v. State*, 308 S.C. 74, 76, 417 S.E.2d 88, 90 (1992) ("A battered woman is a woman who repeatedly is subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. ... The battered woman's syndrome is identified by a series of common characteristics that appear in women who are abused for an extended period of time by the dominant male figure in their lives") (citations omitted); *State v. Hill*, 287 S.C. 398, 339 S.E.2d 121 (1986) (expert testimony on battered woman's syndrome is admissible to determine the defendant's state of mind for the purpose of establishing self-defense).

Indeed, she made no effort to impeach Hollins with this act on her cross-examination of him. **R. pp. 433-40.** Therefore, her argument is not preserved for review. *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"). Moreover, it appears that Smith was attempting to introduce this evidence and evidence of the criminal histories of her non-testifying co-defendants as propensity evidence, and to thereby establish that she could not have been the person who actually orchestrated the crimes.

However, such propensity evidence is inadmissible, particularly where the defendant does not testify. This would have held true even if a severance had been granted. Cf. *Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998) (character evidence is not admissible for purpose of proving that accused possesses criminal character or has propensity to commit crime with which he is charged). Further, none of Smith's co-defendants attempted to refute evidence that she elicited establishing that she was not present at the trailer where the victim was murdered and her name was not mentioned. **R. pp.**

199; 217. They also did not attempt to refute her evidence that it was not unusual for her to go to Tawana Deas' apartment, from which the victim was kidnapped; Tawana never heard Smith giving instructions to the burglars/kidnappers; and there was nothing negative about the relationship between Smith and her cousin, the victim. **R. pp. 150-54.** Also, they did not impeach evidence that Nelson originally thought that a Nicole Spells, and not Smith, had set up the victim. **R. p. 275.**

Additionally, Smith's argument in her Brief was that "the unavailability of these two witnesses forced her to remain silent regarding an abusive relationship with the State's key witness." **Final Brief of Appellant, p. 9.** Assuming for argument sake that evidence of the abusive relationship was admissible, the trial judge's ruling did not "force[] her to remain silent" about it. She could have exercised her constitutional right to testify. *See Rock v. Arkansas*, 483 U.S. 44 (1987) (a criminal defendant's right to testify is constitutionally protected by the due process clause of the Fourteenth Amendment). Having elected to rely upon her right not to testify, she must live with the consequence that evidence she might have otherwise presented to the jury was not heard.

II.

In connection with her argument that the trial judge erroneously failed to grant a severance because she and her co-defendants had antagonistic defenses, Smith further argues that this Court failed to address her claim of "the prejudicial impact of the 'face-off' that occurred during the State's closing arguments." She maintains that the "the political implications outlined in the newspaper article played a prejudicial role in her trial."

Respondent notes that there was no objection to either the State's opening statement (*see R. pp. 109-18*) or the State's closing argument (*p. 633, l. 14-p. 639, l. 23; p. 674, l. 9-p. 699, l. 2*) on this basis. Also, Respondent has been unable to locate where in the record Smith presented this same

argument to the trial judge. R. pp. 11-40; 44-47; 98-99; 109-18; 294-95; 559-62; 589, l. 2-p. 630, l. 2 (charge conference); 631, l. 2-p. 632, l. 8 (objection to State having last closing argument); p. 633, l. 14-p. 639, l. 23; p. 674, l. 9-p. 699, l. 2 (State's closing argument); p. 725, l. 13-p. 735, l. 9 (objections to charge); pp. 748-80 (sentencing). In fact, the only mention of media coverage on the record was the request of a media source to have a camera in the courtroom, a request that was granted without objection. R. pp. 98-99.

Thus, Smith's argument in this regard is not preserved for appellate review because an issue must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *See Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments"). *See also State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler's concurrence in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*,

[129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled").

Even if the argument was preserved for appellate review, it lacks merit for several reasons. First, the trial judge instructed jurors before the first break in the proceedings that "[d]uring the break it is essential that you have absolutely no communication about this case with anyone. This includes family members or friends or among one another. Please don't speculate about what you think this case may or could be about. You are the fact finders in this case, and as a result, it is essential that you remain fair and impartial until you've heard all of the evidence, the attorney's closing arguments, and the Court's instructions on the law; and until you are released to deliberate regarding this matter." **R. p. 95, ll. 16-24**. The trial judge also repeatedly instructed jurors to the effect that they were not deliberate talk about the case among themselves and that they were not to "watch, read, or listen to any media accounts about this case in any form of the media;" and, on two occasions, she emphasized the importance of jurors strictly complying with her instructions. *E.g.*, **R. p. 95, l. 25-p. 96, 22; p. 221, ll. 17-25; p. 374, l. 18-p. 375, l. 14; p. 496, ll. 21-22; 587, l. 25-p. 588, l. 22**.

"A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); *Old Chief v. United States*, 519 U.S. 172, 196 (1997) ("Any incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions"); *United States v. Olano*, 507 U.S. 725, 740-741 (1993) (" '[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them' ") (citing *Francis v. Franklin*, 471 U.S. 307, 324, n. 9 (1985)).

This leads to the second reason for rejecting Smith's argument. There is absolutely no

evidence in the current record that any juror was exposed to the media coverage of the case or, if exposed to it, that it prevented the juror from fairly and impartially trying the case, based solely upon the evidence presented at trial and the law charged.¹ Thirdly, there was never any hint of prosecutorial misconduct raised at trial; and, in the absence of any objection based on misconduct, it is not altogether clear how the race for Ninth Circuit Solicitor generates any basis for an objection. However accromoneous the race, both prosecutors were striving for the same objective: the conviction of the defendants.

CONCLUSION

Therefore, Respondent would ask the Court to deny the Petition for Rehearing.

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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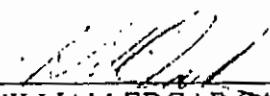
¹ The jury, however was not required to be ignorant of the media coverage. Some forty-nine years ago, the Court recognized in *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), that "in these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." This admonition is even more appropriate in the twenty-first century, in light of the proliferation of available media sources, not the least of which is the "information super highway" known as the computer. Indeed, it is hard to imagine that any jury in this Country could be composed of twelve individuals who have not heard anything, whatsoever, about a high profile crime in the community.

(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting St., Ste. 400
Charleston, South Carolina 29401
(843) 958-1900

April 14, 2010.

BY: 

WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Berkeley County
The Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

Respondent,

vs.

MARQUITA SMITH,

Appellant.

OPINION NO. 4662

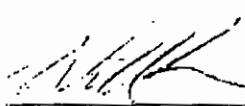
RETURN TO PETITION FOR REHEARING

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within *Return to Petition for Rehearing*, on Appellant by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to her attorney of record, Tricia A. Blanchette, Esq., P.O. Box 12725, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 14th day of April, 2010.


WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549

Columbia, South Carolina 29211
(803) 734-6305

April 14, 2010.

ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State,

Respondent,

v.

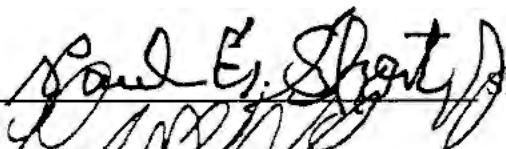
Marquita Smith,

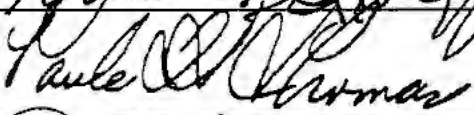
Appellant.

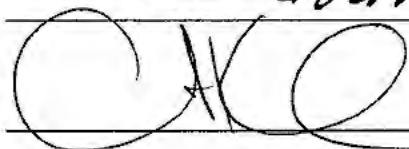
The Honorable Deadra L. Jefferson
Berkeley County
Trial Court Case No. 2007-GS-08-01748
2007-GS-08-01751

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.


Short, J.


Thomas, J.


Konduros, J.

Columbia, South Carolina

June 4

, 2010



The South Carolina Court of Appeals

FILED
2010 JUL 22 PM 1:25

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

TANYA A. GEE
CLERK
V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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July 13, 2010

REMITTITUR

The Honorable Mary P. Brown
300-B California Ave
PO Box 219
Moncks Corner, SC 29461-0219

Re: The State v. Smith, Marquita
2007-GS-08-01748
2007-GS-08-01751

Dear Mrs. Brown:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

V. Claire Allen

V. Claire Allen
Deputy Clerk of Court

VCA/lf

cc: Tommy Arthur Thomas, Esquire
Tricia A. Blanchette, Esquire
Senior Assistant Attorney General William Edgar Salter, III
Scarlett Anne Wilson, Esquire

cc:501

KB

LAW OFFICE OF



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E-Mail: jthompson@eshurlinglaw.comJeremy A. Thompson
Associate Attorney

August 24, 2010

VIA HAND-DELIVERY

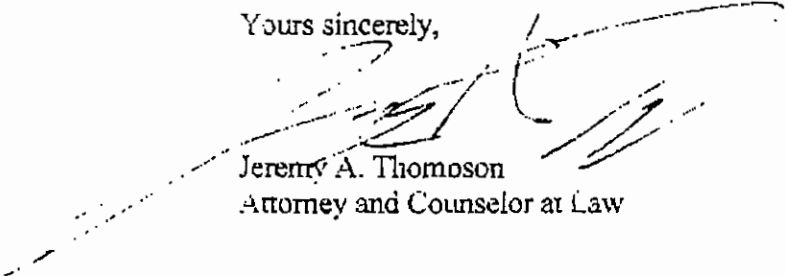
The Honorable Mary P. Brown
Berkeley County Clerk of Court
500 California Avenue
Moncks Corner, SC 29461

RE: Marquita Smith, #323834 v. State of South Carolina

Dear Ms. Brown:

Enclosed please find the original and five copies of my client's Application for Post-Conviction Relief. Please note that since I have been *retained* to represent my client in this matter, an attorney does not need to be appointed to represent her in this case. I would appreciate your filing the original and returning the five copies to me in the enclosed self-addressed, stamped envelope. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,


Jeremy A. Thompson
Attorney and Counselor at LawJAT/
Enclosurescc: Marquita Smith, #323834 (via U.S. mail on August 25, 2010) (w/ enclosure)
Namon W. and Rosemary Smith (via U.S. mail on August 25, 2010) (w/ enclosure)

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

MARQUITA SMITH, #323834

Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVER SHEET

2010 -CP- 018285

(Please Print)

Submitted By: Jeremy A. Thompson

Address: Law Office of Tara Dawn Shurling

3614 Landmark Dr., Suite D

Columbia, SC 29204

SC Bar #: 76091

Telephone #: 803-738-8622

Fax #: 803-738-1600

Other:

E-mail: jthompson@shurlinglaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action Is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -CP- - ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: 3/23/10

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

MARQUITA SMITH, #323834

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

2010 CP-08-2985

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 Camille Griffin Graham Correctional Institution
2. Name and location of Court which imposed sentence Berkeley County Court of General Sessions; 300-B California Avenue, Moncks Corner, SC 29461
3. Name(s) of co-defendant(s) (if any) Gary Grant, Jermaine Hartwell, Kerry Hollins
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-08-1748: Accessory Before the Fact of Murder
 - (b) 2007-GS-08-1751: Accessory Before the Fact of Armed Robbery
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 30, 2007: 30 years imprisonment
 - (b) August 30, 2007: 30 years imprisonment (concurrent)

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (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. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. March 24, 2010 (Opinion)
- ii. July 13, 2010 (Remittitur)
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Marquita Smith, Op. No. 4662
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The Applicant received ineffective assistance of counsel prior and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

(b) The judgments and sentences against the Applicant were entered in violation of her rights to the due process of law and to the effective assistance of counsel.

(c) The Applicant received ineffective assistance of counsel on direct appeal in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial counsel failed to provide the Applicant effective assistance of counsel prior to and during her trial proceeding, inasmuch as counsel failed to recognize errors which occurred during her trial and failed to make appropriate objections with supporting legal arguments relating thereto. Counsel's failure to make these objections may have changed the outcome of the Applicant's trial and deprived her of the opportunity to have these issues addressed on their merits on direct appeal.

(b) Trial counsel failed to conduct a sufficient investigation into the Applicant's factual circumstances and failed to present witnesses who would testify favorably on the Applicant's behalf at trial.

(c) Appellate counsel failed to present all potentially meritorious issues on direct appeal to the South Carolina Court of Appeals.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(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. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

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. N/A

- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. N/A
- 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) N/A
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (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? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Victor Craig Jones, Jr., Esquire; Law Office of V. Craig Jones, Jr.; 225 Seven Farms Dr., Suite 109, Daniel Island, SC 29492
- ii. Tricia A. Blanchette, Esquire; Law Office of Tricia A. Blanchette, LLC; P.O. Box 12725, Columbia, SC 29211
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial and sentencing
- ii. Direct appeal
- iii. _____

19. State clearly the relief you seek in filing this application:

Vacation of judgments and sentences; the Applicant seeks a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Berkeley)

I, Jeremy A. Thompson, retained counsel for the Applicant, 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.

SWORN to and subscribed before me this 23rd
day of August, 2010

Jananne R. Graham (L.S.)
Notary Public

My Commission Expires: 3/12/2013

2010 AUG 24 PM 1:03
CLERK OF COURT
BERKELEY COUNTY, SC



ALAN WILSON
ATTORNEY GENERAL

February 4, 2011

The Honorable Mary P. Brown
Berkeley County Clerk of Court
P.O. Box 219
Moncks Corner, SC 29461

Re: Marquita Smith, #323834 v. State of South Carolina
2010-CP-08-2985

Dear Ms. Brown:

Enclosed please find the original **Return** of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

Matthew J. Friedman
Assistant Attorney General

MJF/nb

Enclosure

Berkeley County Clerks Records
SCDC Records
PCR Application
Record on Appeal, Final Brief of Appellant, Final Brief of Respondent
Court of Appeals Opinion
Petition for Rehearing and Petition for Rehearing En Banc
Return to Petition for Rehearing
Order Denying Petition for Rehearing and the Remittitur dated July 13, 2010

cc: Tara Dawn Shurling, Esquire

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

Marquita Smith, #323834,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

RETURN

FILED
2011 FEB -7 AM 11:02
HARRY P. DUNN
CLERK OF COURT
BERKELEY COUNTY, SC

The Respondent, making its Return to the Application for post-conviction relief filed August 24, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Berkeley County. The Applicant was indicted at the August 2007 term of the Berkeley County Grand Jury for accessory before the fact of murder (2007-GS-08-1748) and accessory before the fact of armed robbery (2007-GS-08-1751). V. Craig Jones, Jr., Esquire, represented the Applicant. The Applicant proceeded to trial on August 27-30, 2007, after which a jury found her guilty as indicted. The Honorable Deadra L. Jefferson sentenced the Applicant to confinement for thirty (30) years for each conviction. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Tommy A. Thomas, Esquire, and Tricia A. Blanchette, Esquire, represented the Applicant on appeal. Following full briefing by both sides, the Court of Appeals affirmed the conviction and sentence. State v. Smith, Op. No. 4662 (S.C. Ct. App. filed March 24, 2010). The Court of

Appeals denied Applicant's Petition for Rehearing and Petition for Rehearing *En Banc* by Order dated June 4, 2010. The Remittitur was issued on July 13, 2010.

Attached herewith and incorporated herein by reference are the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Record on Appeal, the Final Brief of Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction and sentence, the Petition for Rehearing and Petition for Rehearing *En Banc*, the Return to Petition for Rehearing, the Order Denying Petition for Rehearing, and the Remittitur dated July 13, 2010.

II.

In her application, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to recognize errors during trial and make appropriate objections thereto.
 - b. Failed to conduct a sufficient investigation into Applicant's factual circumstances.
 - c. Failed to present witnesses who would testify favorably on Applicant's behalf at trial.
2. Ineffective assistance of appellate counsel in that counsel failed to present all meritorious issues on direct appeal to the South Carolina Court of Appeals.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington,

466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State,

302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

V.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

2/3, 2011.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

MARQUITA SMITH, #323834)
)

Applicant,)
)

VS)
)

STATE OF SOUTH CAROLINA,)
)

Respondent.)
)

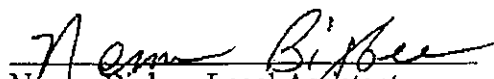
AFFIDAVIT OF SERVICE

FILED
 2011 FEB -7 AM 11:02
 CLERK OF COURT
 BERKELEY COUNTY, SC

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esquire
 3614 Landmark Dr., Suite D
 Columbia, SC 29204

DATED this 4th day of February, 2011.


 Norma Bigbee, Legal Assistant

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

MARQUITA SMITH, #323834

FILED
2011 NOV 17 AM 9:40
JULIE J. ARMSTRONG
CLERK OF COURT
Applicant,
BY _____

2010-CP-08-2985

v.
THE STATE OF SOUTH CAROLINA
Respondent.

AMENDED APPLICATION
FOR POST-CONVICTION RELIEF

The Post-Conviction Relief Application previously filed on August 24, 2010 under docket number 2010-CP-08-2985 is hereby amended as follows:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.
5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.

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SB

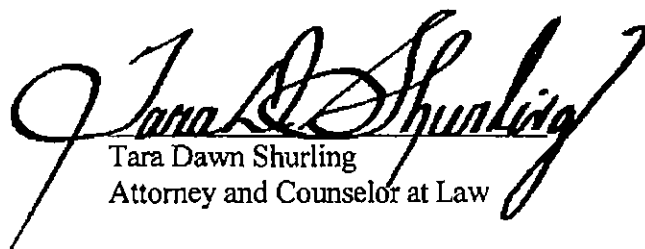
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.
7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her co-defendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.
10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she *was not present* during the commission of the principal offenses.
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.
12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.

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14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."
15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.
16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "*to commit a crime*," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing *any* crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

The Applicant has no further amendments at this time. Copies of these amendments have been served on opposing counsel, Trial Counsel for the Applicant and Appellate Counsel for the Applicant.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 15th day of November, 2011.
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

MARQUITA SMITH, #323834)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA)
Respondent.)

2010-CP-08-2985

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one copy of the Amended Application for Post-Conviction Relief in the above-entitled case has been served upon opposing counsel, Matt Friedman, Assistant Attorney General, Post Office Box 11549, Columbia, SC 29211, by email to mfriedman@scag.gov this 15th day of November, 2011.

Tara Dawn Shurling
TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR APPLICANT

SWORN TO BEFORE me this 15th day
of November, 2011.

Durham
Notary Public for South Carolina
My Commission Expires: 3/12/2013

MAILED
2011 DEC -6 AM 11:16
CLERK OF COURT
BERKELEY

MAILED
2011 NOV 17 AM 9:40
CLERK OF COURT
BERKELEY

FILED
2011 DEC -6 AM 11:16
FILED
2011 NOV 17 AM 9:40

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

NOVEMBER 17, 2011

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD

THE HONORABLE KRISTI HARRINGTON, JUDGE

TARA DAWN SHURLING, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

MATTHEW J. FRIEDMAN, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

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Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
Exhibits

3

PLAINTIFF'S EXHIBITS

NO	DESCRIPTION	ID	EV
	(NONE)		

DEFENDANT'S EXHIBITS

	(NONE)		

COURT'S EXHIBITS

	(NONE)		

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
PCR Hearing

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1 **November 17, 2011**

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had.)

4 THE COURT: Whenever you're ready.

5 MS. SHURLING: Thank you, Your Honor, for that
6 time to get set up. I assume the State is going to call
7 its case.

8 MR. FRIEDMAN: Yes, this Marquita Smith, 2010-
9 CP-08-2985.

10 THE COURT: And Ms. Shurling, you represent Ms.
11 Smith?

12 MS. SHURLING: I do, Your Honor.

13 THE COURT: And are there any pre-trial matters
14 that we need to address?

15 MS. SHURLING: Only, Your Honor, that there has
16 been an amended application for post conviction relief.
17 It was actually physically filed this morning, although I
18 provided opposing counsel and other involved parties with
19 copies earlier.

20 Your Honor, I would note for the record that the
21 application was actually filed by my former associate,
22 Jeremy Thompson, who originally began handling this
23 matter. He has subsequently left my firm. And while the
24 firm retained the case, I took over as lead counsel.

25 In addition, Your Honor, I would note that in the

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
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1 amended application for post conviction relief that was
2 filed, the opening paragraph indicates that the previous
3 filed application is amended as follows. I certainly
4 intended to go with that was, of course, predicate
5 language that she maintains her general allegations that
6 of her right to effective assistance of counsel as
7 guaranteed by the Sixth and Fourteenth Amendments to the
8 United States Constitution as well as Article I of the
9 South Carolina Constitution, was violated prior to and
10 during her jury trial. And the intent of the amended
11 application was merely to set forth with further
12 specificity specific allegations of errors and/or
13 omissions that would be pertinent the Strickland versus
14 Washington Standard**.

15 THE COURT: All right. And are there any other
16 pre-trial motions or matters?

17 MS. SHURLING: No, ma'am.

18 THE COURT: Okay. We've had an at-bench
19 conference regarding my former employment with the
20 Solicitor's office.

21 MS. SHURLING: Pardon me, Your Honor.

22 THE COURT: Are you waiving any of that?

23 MS. SHURLING: No, ma'am. And Your Honor is
24 correct. I was remiss -- I was about to do what I
25 criticize other lawyers for, which is forgetting to put a

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
PCR Hearing

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1 bench conference on the record.

2 Your Honor, at the time this case was docketed, the
3 Honorable Roger Young was listed as presiding over this
4 term of post conviction relief matters. I did not
5 realize until this morning that the scheduled had been
6 changed and that Your Honor would be presiding over this
7 term of post conviction relief cases.

8 This case involves an incident which occurred in
9 2006 and the trial took place in August of 2007. It is
10 my understanding, at least from the website, the Judicial
11 website, that Your Honor was elected to this bench in
12 2008. And it is my understanding that prior to being
13 elevated to the bench, that Your Honor was employed by
14 the Solicitor's Office in Richland County -- I mean,
15 pardon me -- in Charleston County.

16 For that reason, I feel it's incumbent upon me to
17 raise the potential for a conflict of interest in this
18 matter, since Your Honor could have been actively
19 employed by the very Solicitor's Office that was
20 prosecuting this matter. I believe that it would be in
21 everyone's best interest that this matter be continued
22 until a subsequent term where a Judge who had not been so
23 employed could preside over the matter. Because it is my
24 understanding from our previous bench conference, at
25 which, of course, opposing counsel was present, that Your

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
PCR Hearing

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1 Honor is disinclined to grant that motion. I would ask
2 that the record reflect my objection to Your Honor
3 presiding and ask that Your Honor -- I believe in the
4 interest of a full and accurate record, if Your Honor
5 could indicate for the record whether you had any
6 involvement in this case, whether or not you were
7 involved in any preparation ---

8 THE COURT: Well, let me ask you, Ms. Shurling,
9 was there any indication in any of the documents that
10 you've reviewed and prepared for this hearing that I had
11 any involvement in this case whatsoever?

12 MS. SHURLING: Nothing, Your Honor, that I am
13 aware of. I did not make note of your involvement in the
14 case at all. I am, however, aware from my involvement in
15 trying cases in Richland County, for example, that
16 frequently I'm up against Luck Campbell trying murder
17 cases, but that they're certainly -- she has a small army
18 of assistant solicitors at her disposal that are involved
19 at various stages of the preparation of the case for
20 trial. And on other occasions in my experience there may
21 be multiple assistant solicitors present in the courtroom
22 and watching a proceeding, ferrying back and forth
23 various documents, interviewing witnesses, and so forth
24 and so on, and I obviously would not be privy to whether
25 Your Honor had had any such peripheral involvement in

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
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1 this case.

2 THE COURT: Ms. Shurling, is there anything
3 that you can indicate to the Court that would indicate
4 any actual bias, simply because of my employment with the
5 Solicitor's Office during that time?

6 MS. SHURLING: Your Honor, absolutely not. And
7 I would certainly, as an officer of the Court, state that
8 in my, although admittedly somewhat limited experience
9 with Your Honor, that I have no personal reason for
10 believing that Your Honor would not be unbiased in this
11 matter. However, the case law is clear. Each and every
12 post conviction relief applicant gets, barring some
13 extraordinary circumstances not likely to be present in
14 this case, one bite at the apple. And this is a serious
15 case involving a very lengthy sentence. And given that
16 fact, I am concerned that there is at least the
17 appearance of impropriety when her only post conviction
18 relief effort is being presided over by a Judge who was
19 still actively practicing in the office that prosecuted
20 the case. And I feel it's appropriate for me to raise
21 the issue.

22 THE COURT: I am glad that you raised it, Ms.
23 Shurling.

24 Mr. Jones, do you recall any dealings with me during
25 this time in this particular case?

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
PCR Hearing

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1 MR. JONES: I do not.

2 THE COURT: And Mr. Jones, you do remember that
3 I was employed during that time?

4 MR. JONES: I do remember when you were there.

5 THE COURT: And it is your recollection that
6 you had no contact with me limited, extensively and
7 clearly the transcripts do not indicted my name
8 whatsoever, that you do not recall, as Ms. Shurling
9 indicated, you know, making an appearance at a prelim or
10 anything of that nature?

11 MS. JONES: It is, Your Honor. I do not recall
12 you having any -- making any appearances or me
13 interacting at all with you with regard to this case.

14 THE COURT: All right. Thank you, Mr. Jones.

15 And the reason for that, Ms. Shurling, is I don't
16 recall this particular case at all. I had my own
17 caseload and at that time was actively seeking election
18 to the bench. I do not recall this case whatsoever and
19 you have presented no indication of an actual bias. I
20 have just -- for the record, because I understand the
21 very serious nature in what we are doing here today. And
22 if I had any recollection that I had touched even one
23 piece of paper regarding this matter, I would recuse
24 myself. I do not recall, and even in my review of the
25 file getting ready today, and even after you have brought

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
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1 that to my attention, I didn't even really -- because
2 we're doing Berkeley's cases, I didn't even remember that
3 this case was even tried in '08. That's how limited my
4 interaction was regarding this case.

5 I will note this. I believe it is thoroughly
6 preserved for the record and I -- but I am declining your
7 request to recuse myself. I just do not feel that it
8 rises to the level of any impropriety and there is no
9 actual bias that is shown.

10 MS. SHURLING: Thank you, Your Honor, very
11 much. Your Honor, I would -- as I've already noted,
12 we're proceeding on a general allegation of ineffective
13 assistance of counsel and have outlined with specificity
14 the specific acts and omissions, errors and omissions
15 that we believe support that claim in the amended
16 application for post conviction relief. I do believe
17 that in the interest of a hearing that would make some
18 sense, both on the record and to Your Honor, I should
19 give you the benefit of some background.

20 This case involved by client being tried for two
21 counts, accessory before the fact of murder and accessory
22 before the fact to armed robbery. She was tried along
23 with two co-defendants who were being charged as
24 principals in this matter. There was a pre-trial motion
25 for severance in this case, which was denied, and the

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
PCR Hearing

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1 case proceeded to trial with my client on trial with co-
2 defendants who were on trial for the principal offenses
3 of murder and armed robbery, as well as kidnaping and
4 burglary. It is our position, among others, that the
5 motion for severance could have been argued more
6 effectively. I will go over each of our allegations in
7 my examination of trial Counsel, Mr. Craig Brown [sic].

8 So at this time, I am going to forego any lengthy
9 opening argument. I do believe, Your Honor, that the
10 legal questions involved in this case are extremely
11 complex, that the factual analysis required in order to
12 effectively make a determination on the legal questions,
13 is one that is equally complex and will require
14 considerable thought on the part of, not only the bench
15 but myself, to make the arguments. For that reason, I
16 would ask that as the Court hears this case that we
17 consider that this would be an appropriate case for us to
18 be allowed to submit either briefs in support of or
19 proposed orders at the conclusion of the presentation of
20 the case. And, if Your Honor would indicate that we
21 would be allowed that privilege, then I will be somewhat
22 less verbose during the hearing itself, knowing that I
23 will have the opportunity to flesh out my arguments in
24 writing and pleadings to be submitted later.

25 THE COURT: I will allow you the opportunity to

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
Trisha A. Blanchette - Direct Examination by Ms. Shurling

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1 do both, Ms. Shurling, ---

2 MS. SHURLING: Thank you very much.

3 THE COURT: --- submit briefs and a proposed
4 order.

5 MS. SHURLING: Your Honor, I am -- with the
6 Court's permission I'm going to call a witness out of
7 order. Trisha Blanchette was the appellate lawyer in
8 this case, one of them. Her husband has recently had
9 surgery and she has graciously taken time away from his
10 bedside to be with us, and I would like to get her up and
11 out as quickly as possible. So I would call Ms. Trisha
12 Blanchette as our first witness, if the State has no
13 objection.

14 MR. FRIEDMAN: No objection.

15 THE CLERK: Place your left hand on the bible
16 and raise your right hand.

17 Do you swear or affirm the testimony you shall give
18 the Court shall be the truth, so help you God?

19 WITNESS: I do.

20 THE CLERK: Have a seat, please. Give us your
21 full name, and spell your last name.

22 WITNESS: My name is Trisha A. Blanchette. My
23 last name is spelled B-l-a-n-c-h-e-t-t-e.

24 TRISHA A. BLANCHETTE,

25 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

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1 DIRECT EXAMINATION

2 BY MS. SHURLING:

3 THE COURT: Ms. Shurling.

4 Q. Good morning, Ms. Blanchette, how are you?

5 A. Good, Ms. Shurling, thank you.

6 Q. At the time you represented Marquita Smith on direct
7 appeal, where were you employed?

8 A. I was employed at the law firm of Tommy A. Thomas in
9 Irmo, South Carolina.

10 Q. And the appellate pleadings that were filed in this
11 matter actually reflect that the briefs were filed under
12 both of your names. Is that correct?

13 A. That is correct.

14 Q. And do you recall this case fairly clearly?

15 A. I do. And once I learned that Mr. Thomas would not
16 be subpoenaed here today, we actually discussed it twice
17 yesterday.

18 Q. All right. Now, I suppose in the interest of full
19 disclosure, you referred this client to me for this post
20 conviction relief action. Is that correct?

21 A. Yes. I handle -- I now have my own law firm, since
22 2008. I handle strictly PCR direct appeal and PCR
23 appeals and I thought this would be an excellent PCR
24 case, so I referred it to your firm.

25 Q. Thank you very much. It's been a while since this

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1 trial, but have you had an opportunity to review the
2 trial record and the appellate pleadings filed in this
3 case?

4 A. I actually reviewed yesterday, made about eighteen
5 pages of notes on the transcript, so I reviewed those
6 notes and then reviewed the transcripts.

7 Q. Thank you. Have you also had an opportunity to
8 review the amended application for post conviction relief
9 that I filed in this matter?

10 A. I did. I received it from you via email and I
11 reviewed that yesterday, also.

12 Q. Thank you. As this case was tried, do you recall
13 trial counsel making a motion for a directed verdict of
14 acquittal on both counts that pertained to Marquita
15 Smith?

16 A. I did. And I actually used my transcript notes
17 yesterday to look back over that. And I had indicated
18 that in my notes, that he made that directed verdict
19 motion.

20 Q. And it was the position of trial counsel that the
21 record was devoid of any evidence, direct or
22 circumstantial, that she had knowledge that an armed
23 robbery or murder was going to be committed or that she
24 had in any way participated in planning such offenses.
25 Isn't that correct?

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1 A. If that is what the transcript reflects, I would
2 agree with you.

3 Q. Can you tell us why that was not briefed as an
4 appellate issue on direct appeal?

5 A. To best answer that question I can go through the
6 process that Mr. Thomas and I used. We both read the
7 transcript. We both made transcript notes and do what a
8 lot of attorneys call issue spotting. All the issues
9 that we thought were properly objected to or preserved
10 for appeal, since we're a preservation State, we were
11 looking to make sure they were all preserved. We both
12 make a list. And then we have a series of, what we call,
13 pow wow's, where him and I go back and forth and debate
14 what are the best issues. When I worked at his firm, a
15 majority of the writing fell as my responsibility. So
16 what I would do is draft -- start drafting a brief that
17 we would go back and forth with and narrow down to our
18 final issues. In this case, I do recall drafting an
19 argument on that, but after some time, which we discussed
20 yesterday, we just decided that was not one of our best
21 issues. Not to say it wasn't meritorious, we just
22 decided strategically that wasn't one of the best issues
23 to present, even though it was preserved.

24 Q. You anticipated my next question. You're familiar
25 with the contemporaneous objection rule in South

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1 Carolina, aren't you, Ms. Blanchette?

2 A. Unfortunately, yes.

3 Q. And in your experience as an appellate attorney this
4 issue was raised or argued and properly ruled upon by the
5 lower court?

6 A. It was, uh-huh (affirmative).

7 Q. Okay. And was there, in your opinion, any evidence,
8 direct or circumstantial, that Marquita Smith knew
9 weapons would be involved in this robbery?

10 A. Unfortunately, the directed verdict stage, I believe
11 it was her prior boyfriend, Kerry Hollins, if I'm
12 correct, had testified and implicated Marquita in that
13 manner. And just looking at the directed verdict stage,
14 it was just looking at the State's case. So
15 unfortunately, we just had the State's case to look at
16 and then her defense attorney's motion. And based upon
17 that analysis, we both decided it would not be best to
18 present that issue.

19 Q. And isn't it true that during cross-examination by
20 Mr. Volis [phonics], who represented one of the co-
21 defendants, that Kerry Hollins actually admitted that the
22 term lick could mean a strong-arm robbery just as easily
23 as an armed robbery, that it wasn't specifically an armed
24 robbery?

25 A. These are my words, not the transcripts. But my

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1 note says that he testified that a lick refers to a
2 robbery, not specifically carrying a weapon. But it did
3 mean to rob someone is what I took from his testimony.

4 MS. SHURLING: Madam Court Reporter, I
5 apologize. I didn't mean speak over the witness. I'll
6 be careful.

7 Q. Was there any testimony at the trial that Marquita
8 Smith knew weapons would be involved in this case?

9 A. Again, I just reviewed my notes yesterday. If you
10 could point me in a direction, I'd be happy to look at
11 it, but it was my recollection that Kerry Hollins was the
12 main one that implicated her in that regard.

13 Q. And, again, he -- the only aspect of his testimony
14 that could even arguably be said to indicated that it was
15 an armed robbery was his assertion that a lick could mean
16 an armed robbery?

17 A. I would need a little bit more time to review, just
18 because I'm trying to quickly look over each witness. I
19 don't know that I can answer that question. I'm sorry.

20 Q. Well, in any event, the record will speak for
21 itself.

22 A. Yes. The record speaks for itself.

23 Q. Okay. If there was no evidence, direct or
24 circumstantial, that Marquita Smith knew weapons would be
25 involved in this case, then in your estimation would that

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1 not leave you with a very strong position on a question
2 of directed verdict with regard to accessory before the
3 fact of armed robbery?

4 A. If that were the case, yes. And since I no longer
5 work at Mr. Thomas' office, I didn't have access to
6 anything that I did on his database, so I couldn't pull
7 the draft of the brief, which is what I wanted to see
8 what I'd written on that issue and why we decided not to
9 use it. So I can't speak to that specifically. But, I
10 agree with you, yes, as to your question.

11 Q. And if there was no testimony, direct or
12 circumstantial, no evidence, direct or circumstantial,
13 including testimony, that there had been any discussion
14 of harming the victim in any way, would that not leave
15 you with a very strong position with regard to directed
16 verdict on the charge of accessory before the fact of
17 murder?

18 A. I couldn't disagree with that, Ms. Shurling.

19 Q. Pardon?

20 A. I couldn't disagree with that. Yes, as you stated
21 it, I would agree.

22 Q. Thank you. Now, in addition, at some point during
23 the charge colloquy, counsel for Marquita Smith requested
24 a jury charge on strong armed robbery. Do you recall
25 that?

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1 A. Yes, I do.

2 Q. And that request to charge was denied, correct?

3 A. If you could direct me to a page number, that would
4 be really helpful at this point.

5 Q. I'm delighted to.

6 A. Thank you.

7 MS. SHURLING: One moment, please, Your Honor.

8 Q. Specifically page 603 is where it was denied. So it
9 may start on 602.

10 THE COURT: 597 is the first time Mr. Jones
11 requests the strong arm charge.

12 MS. SHURLING: Pardon me, Your Honor. I'm
13 sorry?

14 THE COURT: 597, line 5. It's appears that's
15 where Mr. Jones starts the request.

16 MS. SHURLING: Thank you.

17 Q. Okay. So trial counsel expressly requested an
18 instruction on strong arm robbery. If there was no
19 evidence, direct or circumstantial, that Marquita Smith
20 knew that this case was going -- this crime was going to
21 involve the use of weapons, would that not provide a
22 basis for a jury charge on strong arm robbery as it
23 pertained to her?

24 A. I can't remember the specifics, but looking at the
25 Court's ruling on 603, and in speaking with Mr. Thomas

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1 yesterday, we both agreed with the Court's reasoning that
2 there was evidence of guns, specifically once the victim
3 was in the possession -- or was with the assailants in
4 this case. So to argue after -- at this stage that it
5 was not a strong -- I'm sorry. Looking at the defense
6 attorney's argument and the Court's ruling, we decided
7 that was not one of the strongest issues to raise in the
8 case.

9 Q. This issue sort of points to a whole area of concern
10 in this case, doesn't it? That the evidence against the
11 co-defendants is very different from the evidence against
12 Marquita Smith who was only charged as accessory before
13 the fact of these crimes, correct?

14 A. That is correct.

15 Q. So whether or not the co-defendants were in the
16 possession of weapons when they all got together and were
17 actually carrying out their plan, is not something that
18 she was necessarily privy to, correct?

19 A. Correct. But I'd like to explain. In looking at
20 this case, and why I thought it was an excellent case for
21 PCR, is based upon the record, I understood the facts and
22 Ms. Smith's involvement, but I don't believe that that
23 was presented to the Court or to the jury. The State put
24 together a very strong case against Ms. Smith using all
25 these witnesses, including her prior boyfriend. And I

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1 don't think her position and her involvement was ever
2 properly explained throughout this entire record.

3 Q. And you anticipate my next line of questioning. In
4 truth, your client was not indicted as a principal, was
5 she?

6 A. She was not, nor do I ever believe she was.

7 Q. And so a lesser included offense of strong arm
8 robbery is not exactly what defense counsel needed to be
9 asking for, is it?

10 A. I would say absolutely not.

11 Q. If, in fact, from her point of view the evidence
12 supported, if anything, a charge of accessory before the
13 fact to strong arm robbery, not accessory before the fact
14 to armed robbery, then the proper request to charge would
15 have been a request for a charge on an accessory before
16 the fact to strong arm robbery, correct?

17 A. Yes. In reviewing my notes yesterday, I actually
18 saw where I wrote myself a question, where is the
19 accessory at this portion in the trial, still asking and
20 pleading for the accessory charge that I believe she was
21 originally charged with.

22 Q. And so based on what you've just said, would the
23 fact that counsel's specific request to charge was not
24 exactly what was needed in this case, did that contribute
25 to your decision in not briefing this as a potential

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1 meritorious appellate issue?

2 A. You are entirely correct. Mr. Thomas and I talked
3 yesterday for over an hour about how we pulled our hair
4 out literally wishing issues would have been presented
5 differently, so we could have evaluated them differently
6 for the direct appeal.

7 Q. Okay. Now, do you recall during the jury
8 instruction charge discussion, both with defense counsel
9 for Marquita Smith and with the solicitor, the fact that
10 a potential accomplice liability instruction need to be
11 given with reference to the accessory before the fact
12 charges?

13 A. Yes. Let me look here at my notes. I believe, if
14 I'm correct, the State presented a number of cases and
15 then the party agreed, but if you could direct me.

16 Q. Certainly.

17 A. Are you referring to the consequences language where
18 they debate that on page -- well, they finally agree on
19 page 618. Or are you referring to something else?

20 Q. One moment. On page 606 through 611, the State is
21 requesting a charge on accomplice liability with
22 reference to Marquita Smith. And eventually, a charge on
23 natural and probable consequences is given at
24 approximately page 613. And it's granted at 613 and
25 given on 618. Does that aid you?

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1 A. Yes. And what was your question?

2 Q. My question was, you recall that particular colloquy
3 concerning giving an accessory charge with reference to
4 Marquita Smith. Are you familiar with that part of the
5 record?

6 A. Now that you point it out to me, I am, yes.

7 Q. Okay. Now, can I get you to specifically take a
8 look at the portion of the jury charge -- pardon me.

9 MS. SHURLING: My apologies, Your Honor. My
10 flag fell off.

11 THE COURT: Take your time.

12 Q. If I could turn your attention to page 733, please.
13 Defense counsel objects to the fact that in its
14 accomplice liability instruction the Court states that it
15 would be necessary that the State prove that Marquita
16 Smith advised, encouraged, participated in planning, et
17 cetera, a crime, to commit a crime as opposed to the
18 crime. Do you see that objection?

19 A. I do.

20 Q. Can you explain to us why you did not brief that as
21 a preserved meritorious appellate issue?

22 A. I don't have specific notes, once again, just
23 because I don't have access to everything I had at Mr.
24 Thomas' office. My best recollection would be the
25 Court's response, beginning on page 734, line 24, through

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1 735. I do think it was clear as the Court said, that he
2 was referring to -- and let me use his language here --
3 that it was clear that she was not charged with other
4 offenses and he was only referring to the charges she was
5 -- she had been charged with, only those charged
6 offenses. The Court's explanation there is all that I
7 can go on, though.

8 Q. Okay. Well, let's look at a couple of other matters
9 then. Isn't it true that from the very beginning defense
10 counsel advised the jury that his client was involved in
11 a crime, that she did participate in the crime, and that
12 it was all a question of what she was guilty of and what
13 degree she was involved in this incident?

14 A. I haven't re-read his opening statement, but if
15 that's what the transcript reflects, I would agree.

16 Q. Okay. And if, in fact, the charge given by the
17 lower court indicates that she could be found guilty of
18 accessory before the fact as charged, if the jury found
19 that she had knowingly participated in the planning,
20 aided, assisted, in the planning of a crime, as opposed
21 to the crimes, would that not create an inherent danger
22 that the jury would find that, well, she's admitted --
23 her lawyer's admitted she was involved in committing a
24 crime, so they've essentially admitted that she has
25 accomplice liability for the whole ball of wax?

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1 A. I think I followed your question correctly. And,
2 yes, that could be a valid argument. If you're asking
3 why we didn't raise it, I just know that we discussed
4 everything that was probably objected to and preserved
5 and I did have that marked as one of the issues and we
6 chose not to raise it.

7 Q. Okay. During the closing argument by the
8 prosecution in this case, the solicitor makes an argument
9 that anytime a homicide occurs during the commission of
10 another felony, it's murder. I'm looking, by the way, at
11 page 693 of the record, with specific reference to lines
12 17 through 20. The law says, and Judge Jefferson will
13 charge you, if the victim was killed in the course of
14 another felony, then his death is murder, end of story.
15 Do you see that?

16 A. I do.

17 Q. Is that a proper statement of the law in South
18 Carolina?

19 A. I had marked on my notes, improper malice
20 instruction.

21 Q. And, in fact, our Supreme Court has in fairly recent
22 history in the case of Lowery versus State** in 2008,
23 found that South Carolina does not have a felony murder
24 rule, per se. Isn't that accurate?

25 A. I believe you handled that case. So I would agree

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1 with you on that one.

2 Q. It's always fun to do that. So, there was no
3 objection made to that portion of the State's closing
4 argument, was there?

5 A. As far as my notes indicate, the only exception was
6 on the generic use of the word offense.

7 Q. Had that portion of the State's closing argument
8 been objected to, would you agree with that issue?

9 A. Most likely, yes.

10 Q. Now, going back to the issue before this one. If,
11 during the instructions given by the Court, the jury was
12 told that all the State had to prove was that she aided
13 and abetted, helped plan, advised, encouraged the
14 commission of a crime -- and that was objected to, but
15 not briefed -- doesn't the presence -- I understand that
16 you could not brief as reversible error the comments made
17 by the Solicitor where no objection was raised. I'm not
18 saying that you could. But doesn't the presence of this
19 argument by this person in authority, the solicitor,
20 enhance the possibility that the inaccurate or at least
21 incomplete instruction of the lower court could be
22 improperly interpreted by the jury to mean that all they
23 had to find was that she did encourage, advise, consent,
24 aid and abet the commission of some crime?

25 A. I believe I understand what you're saying, your

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1 legal argument. And I do get appointed to complex cases.

2 And if this was an Anders** brief, I would have

3 definitely put that in. But with it being a merits

4 brief, if I followed your argument correctly, it seems

5 like a little bit of a stretch.

6 Q. Okay. I think I've been less articulate than I like

7 to pride myself on being. I'm not asking you why you

8 didn't brief ---

9 A. Okay.

10 Q. --- the impropriety of the solicitor's closing

11 argument. I'm saying that with regard to the improper

12 jury instruction, or at least the inadequate or confusing

13 jury instruction, isn't the potential for prejudice to

14 the client enhanced by the fact that moments earlier the

15 jury had heard the authority figure of the solicitor

16 stating, without objection, that the law says, and Judge

17 Jefferson will charge you, that if the victim was killed

18 in the course of another felony, then his death is

19 murder. End of story.

20 A. Yes. And to further expand, I think that Ms. Smith

21 was prejudiced throughout the entire case and how it was

22 presented.

23 Q. Thank you. You indicated that throughout your

24 review of this transcript, both you and your former boss,

25 were struck by a number of issues that you wished had

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1 been preserved. Would you care to share with us any
2 additional issues that you wish you could have preserved
3 if they -- I mean, presented if they'd been properly
4 preserved?

5 A. I did contact Mr. Thomas' office to see if they
6 could check the database because I had done that. And I
7 believe there may have been a letter to Ms. Smith where I
8 set those issues out. They could not retrieve it for me.
9 So I do not have that. And I just -- if there are
10 certain issues you'd like to point out to me, I'd be
11 happy to let you know if those were issues we spotted or
12 not, but I don't have a list in front of me, today.

13 MS. SHURLING: Your Honor, may I have a moment
14 with my client?

15 THE COURT: You may.

16 MS. SHURLING: Your Honor, when we were
17 scheduling this matter, as always when you're trying to
18 get a number of people here, we determined that we could
19 get Ms. Blanchette but we could not get Tommy Thomas on
20 the same day, and Counsel for the Respondent and I agreed
21 that since typically appellate issues can be resolved
22 based on the record that we could go forward with Ms.
23 Blanchette here. Her testimony indicates, and my client
24 has just confirmed, that when she lost her direct appeal
25 she did get a letter from Ms. Blanchette setting forth

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1 additional issues that she wished she could have
2 presented as meritorious, but they were not properly
3 preserved. Ms. Blanchette is no longer with Tommy
4 Thomas' firm and has testified that she doesn't have
5 access to his database. I would ask that the record be
6 held open for a copy of that letter so that we can obtain
7 that from Mr. Thomas' office and submit it. And I'll be
8 happy to do it very promptly.

9 THE COURT: All right. Mr. Friedman, do you
10 have any objection to handling it that way?

11 MR. FRIEDMAN: No, Your Honor.

12 THE COURT: All right. Thank you.

13 MS. SHURLING: Thank you.

14 A. If I may add to the record, I do believe I provided
15 a copy of that letter to Jeremy Thompson when he was
16 formerly with your office. I did check with Mr. Thomas'
17 head of his office and it appears that they've changed
18 systems and they don't know if they can retrieve that,
19 but I will -- I can follow-up with them.

20 Q. Thank you. Did you do any research on accomplice
21 liability law as it applies to accessories before the
22 fact when you were preparing this case?

23 A. I don't have access to my Lexus research history,
24 but I know I researched accomplice liability in great
25 detail in her case.

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1 Q. And with regard to the law pertaining to accessory
2 before the fact, the law is fairly well established that
3 in order for one to be convicted as an accessory before
4 the fact, there are certain factors that have to be
5 demonstrated. Isn't that true?

6 A. I would agree.

7 Q. And those factors pursuant to S.C. Code, Section 16-
8 3-655(b) are that the accused advised and agreed, urged
9 or in some way aided some other person to commit the
10 offense; two, the accused was not present when the
11 offense was committed; and, three, that some principal
12 committed the offense. Does that sound correct?

13 A. I would not disagree.

14 Q. And based on your review of the record, isn't it
15 true that at least during a portion of this crime that
16 our client, Marquita Smith, was present?

17 A. She was present, yes, at the apartment if I -- well,
18 at the restaurant and then at the apartment.

19 Q. Did you consider arguing with regard to whether or
20 not a directed verdict should have been granted, the fact
21 that the evidence produced at trial, including the
22 State's introduction of Ms. Smith's own statement,
23 demonstrated that she was present during the commission
24 of a portion of this series of crimes?

25 A. If my recollection and brief review of the record

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1 serves me correctly, I don't believe that defense counsel
2 made that argument.

3 Q. Had defense counsel argued that absence from the
4 scene was a necessary element of the crime of accessory
5 before the fact, would you have argued as a meritorious
6 issue on direct appeal the fact that the evidence
7 introduced at trial established that she was there for a
8 portion of the series of crimes that were committed and,
9 therefore, could not be an accessory before the fact?

10 A. Most likely, yes. Because not only in South
11 Carolina does our Appellate Courts require preservation,
12 but I also have to argue on the same grounds that were
13 submitted by the defense attorney. So if that argument
14 would have been there, I would have definitely done the
15 research, prepared a my brief for Mr. Thomas to look over
16 and we would have debated presenting that issue, but it
17 wasn't available for us.

18 Q. Do you recall testimony from a co-defendant, Mr.
19 Kerry Hollins, in which the State elicited testimony
20 concerning a discussion about a lick, hitting a lick or
21 words to that effect?

22 A. Yes. I would say the word lick was one of the most
23 damaging things to Ms. Smith's case. They used it over
24 and over again.

25 Q. And the State elicited testimony, initially at

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1 least, from this witness that a lick in his understanding
2 of the street parlance would mean an armed robbery?

3 A. Yes. He testified to that and he testified to the
4 fact that Ms. Smith called him and said that she had a
5 lick set up for him, if I call correctly.

6 Q. A lick? Subsequently, on cross-examination by Mr.
7 Volis, the same witness admitted that, well, a lick
8 doesn't necessarily mean armed robbery. It could just
9 mean a robbery. But at least on direct examination the
10 State successfully elicited testimony that a lick meant
11 an armed robbery. Isn't that correct?

12 A. Yes. And the transcript, I know, will more properly
13 reflect than my memory, but I do not think that was the
14 only time they got the word lick in throughout the course
15 of the trial.

16 Q. Well, as an appellate lawyer, you know, I'm certain
17 that an objection must be raised the first and every time
18 objectionable testimony comes in, in order to preserve an
19 issue for appellate review, correct?

20 A. Yes. I've lost many wonderful cases on that exact
21 recitation of the law.

22 Q. As have I. So, in your judgment if trial counsel
23 had objected and made a motion for a mistrial based on
24 the fact that there was a lack of evidentiary foundation
25 for the conclusory testimony that a lick meant armed

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1 robbery, would you have briefed that?

2 A. Yeah. I've been looking at it and I don't believe
3 the State laid the proper foundation. So, therefore, it
4 was objectionable.

5 Q. And, again, had that objection been made the first
6 and every time that line of evidence was approached by
7 the State, would you have briefed that as a meritorious
8 appellate issue?

9 A. Not to be redundant, but it would have gone through
10 the same process where I would have written up a draft
11 argument, we would have discussed it. And one other
12 factor that we always looked at, and I look at in my
13 practice now are, kind of what are the hot button issues
14 for the court right now? What are the issues that are
15 going to get their attention. So it would have been
16 evaluated in the same regard.

17 Q. Well, I believe you testified a few seconds ago that
18 one of the major problems in this case was this testimony
19 about a lick being an armed robbery -- and I'm
20 paraphrasing. I apologize.

21 A. Uh-huh (affirmative).

22 Q. But isn't true that this bold-faced assertion that a
23 lick was an armed robbery was one of the very serious
24 evidentiary points in this trial?

25 A. Yes. And just to clarify, if I didn't in my prior

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1 testimony, the fact that he said that she set up the
2 lick, and what a lick was, were very damaging to her
3 case, in my opinion.

4 Q. Thank you.

5 MS. SHURLING: Your Honor, I would have no
6 further questions of this witness.

7 THE COURT: All right. I'm trying to get --
8 we'll get through her testimony and then we'll break for
9 lunch. Mr. Friedman, your witness.

10 MR. FRIEDMAN: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. FRIEDMAN:

13 Q. How are you doing, Ms. Blanchette?

14 A. I'm good, thank you, Mr. Friedman.

15 Q. I believe you testified that you and Mr. Thomas read
16 the transcript to look for issues that would be
17 preserved. Is that correct?

18 A. Yes. We both would read it independently and make
19 our own notes.

20 Q. Okay. And how do you decide which issues ultimately
21 get briefed?

22 A. In this case, there were a lot of verbal discussions
23 and probably discussions over the phone when he was
24 returning from parole hearings. But it's usually all
25 face-to-face where we sit down and refer to both of our

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1 notes. And, at that time, I had much less experience
2 than Mr. Thomas. He'd been practicing over twenty years.
3 And so I would usually defer to his opinion and then
4 provide him research to back up my opinion.

5 Q. Do you recall how many issues you brief in this
6 appeal?

7 A. Let me check the brief just to be correct. I
8 believe it was two. And the first issue then, when the
9 appellate court addressed it, I think they broke it into
10 three sub issues.

11 Q. Ms. Shurling asked you about Kerry Hollins testimony
12 about what a lick means. I believe you indicated, you
13 said it was a robbery or an armed robbery. Is that
14 correct?

15 A. On direct he said armed robbery. Mr. Volis had him
16 clarify on cross-examination.

17 Q. Do you remember when the State asked him what he
18 needed for a robbery? He indicated that you need a
19 weapon. Do you remember that testimony?

20 A. If that's what the transcript reflects, I would not
21 disagree with you, Mr. Friedman.

22 Q. Was there any evidence that anyone that committed
23 armed robbery and did not have a gun?

24 A. I believe if we're -- the witnesses in the trailer,
25 I believe, all identified a gun. I can't remember off

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1 the top of my head.

2 MR. FRIEDMAN: I have nothing further, Your
3 Honor.

4 REDIRECT EXAMINATION

5 BY MS. SHURLING:

6 Q. Was there any evidence that Marquita Smith knew a
7 gun was going to be involved in this case, with the
8 exception of this claim that she referred to a lick and a
9 lick meant an armed robbery?

10 A. Not that I'm aware of and that's why Kerry's
11 testimony was, I believe, so vital to the State. If I
12 may refer to one of the issues we did brief was the
13 motion for continuance. In one of the -- like I said,
14 the Appellate Court broke it into three separate issues.
15 One of those was witness availability. And it was my
16 understanding, I believe, that Ms. Smith had a witness
17 that could have refuted or impeached his testimony, which
18 would have been very vital. Unfortunately, in the
19 Appellate Court's ruling, they found that trial counsel
20 did not properly present that request for a continuance,
21 and I'm referring to page three of the appellate court
22 decision. I raised that issue on the petition for
23 rehearing. But it was very unfortunate that the Court
24 took the kind of preservation route on that issue,
25 because his testimony was so vitally important to the

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1 State, so the Court correlating to that, I think, any
2 witness that could have impeached him or attacked his
3 credibility. But anything to refute what he had to say,
4 would have been very important to Ms. Smith.

5 Q. Actually, I'd like to focus your attention on the
6 other argument you presented, which was the failure of
7 the lower court to grant a severance and a separate trial
8 for Marquita Smith. As an appellate lawyer with
9 extensive experience in criminal law, you're familiar
10 with accomplice liability law, are you not?

11 A. Yes. To the extent it has been involved in the
12 cases I've handled.

13 Q. And it is true, is it not, that with regard to the
14 co-defendants, the two that were on trial as principals
15 charged with acting with Kerry Hollins, that the standard
16 for them would be whether or not the crimes they were
17 charged with were either things they knowingly
18 participated in or whether they were reasonably
19 foreseeable as consequences of the acts agreed upon by
20 the parties to commit, correct?

21 A. I would agree.

22 Q. Okay. Now, with regard to someone who is charged as
23 an accessory before the fact, the question of accomplice
24 ability analysis becomes a little more complicated,
25 doesn't it?

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1 A. It does.

2 Q. And the operative question with regard to an
3 accessory before the fact would be whether, based on her
4 knowledge before the fact, the acts that were eventually
5 committed by the co-defendants were either things that
6 she actively aided, abetted and encouraged or were
7 reasonably foreseeable consequences of the things she did
8 knowingly aid, abet or encourage. Is that fair to say?

9 A. I would agree.

10 Q. Given that fact, do you believe that it was
11 problematic for a jury to be given instructions which
12 properly enabled them to understand that they needed to
13 engage in a separate foreseeability analysis for
14 Margueritte -- pardon me, Marquita, than for the co-
15 defendants who were present and actively involved in the
16 principal offenses?

17 A. I think it was near impossible for the jury to
18 differentiate her from the other co-defendants in this
19 case. And, therefore, the severance was vital. Looking
20 at -- I was just looking at the first point in the
21 Appellate Court decision where they actually say Hollins
22 made a statement that implicated Smith as the principal
23 actor. She was portrayed throughout all of this, I would
24 say, as a principal actor not as someone being tried as
25 an accomplice.

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1 Q. And isn't it true that the relative impossibility of
2 giving jury instructions that would be complete and
3 appropriate with regard to charges of accessory before
4 the fact, while at the same time giving appropriate and
5 necessary charges for a principal, was never argued by
6 trial counsel as a basis for obtaining a severance?

7 A. No. We were very limited on the severance motion.
8 There was much more I would have liked to have raised.

9 Q. If trial counsel had pointed out the practical
10 problems with giving jury instructions that would be
11 appropriate and thorough with regard to a charge or
12 charges of accessory before the fact, at the same time as
13 giving instructions concerning accomplice liability for
14 principals, as a basis for seeking a severance, would you
15 have argued that ground as part of your Appellate review
16 of the decision of the lower court not to grant a
17 severance?

18 A. Absolutely. Because we included the argument
19 regarding closing argument. Unfortunately in this case,
20 because it was not severed, I believe one of her co-
21 defendants only introduced a photo lineup. And as a
22 result, she lost her opportunity for last closing
23 argument. In a case that was as complicated as this was
24 and where you had two solicitors vying for the solicitor
25 position and going head-to-head like they did, it was all

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1 time, the applicant will call her trial attorney, Craig
2 Brown [sic].

3 MR. JONES: Jones, Your Honor.

4 MS. SHURLING. Or Jones. I apologize.

5 MR. JONES: A very common name. I understand.

6 MS. SHURLING: Your Honor, and while he's
7 coming around ---

8 THE CLERK: Do you swear or affirm the
9 testimony you give will be the truth, so help you God?

10 WITNESS: I do.

11 THE CLERK: Have a seat. State your full name
12 and spell your last name.

13 WITNESS: Victor Craig Jones, Jr. J-o-n-e-s.

14 VICTOR CRAIG JONES, JR.,

15 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

16 MS. SHURLING: And, Your Honor, let me take
17 this opportunity to -- I was hoping I wouldn't do it, but
18 I did. I am on the Board of the South Carolina Women's
19 Lawyers with a lawyer named Marguerite Willis. And
20 because Marguerite and Marquita are so close, I have --
21 my staff has admonished me that I have fairly often in
22 working on this case referred to poor Marquita as
23 Marguerite. I believe before lunch there was at least
24 one occasion where I said Marguerite on the record. I do
25 apologize. I work too often with Marguerite Willis and

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1 it just came out. I do mean Marquita. Thank you.

2 DIRECT EXAMINATION

3 BY MS. SHURLING:

4 Q. Okay. Mr. Jones.

5 A. Yes.

6 Q. You were kind enough to give me access to your trial
7 file in this case. Isn't that true?

8 A. I did.

9 Q. And did I have the opportunity to review your entire
10 file?

11 A. As much as I could find. We moved in between,
12 actually moved, I think, maybe -- well, at least -- yeah,
13 I guess once in between. All of that stuff was in
14 storage. I tried to recollect everything and I think
15 it's fairly complete. I can't promise that there may not
16 be a piece here or there, but it would -- I think the
17 significant stuff you did have access to.

18 Q. As far as you know, you showed me everything?

19 A. As far as I know, I did.

20 Q. Thank you. That's what I needed to establish for
21 the record. Do you recall representing Marquita Smith?

22 A. I do.

23 Q. And do you recall, in preparing this case for trial,
24 considering the applicability of accomplice liability law
25 to the charge of accessory before the fact?

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1 A. I do recall it back then. I have not refreshed on
2 it since then, but I do recall back then.

3 Q. Okay. I had my staff email you a copy of the
4 amended application for post conviction relief that I
5 intended to file in this case, and I believe I gave you a
6 clocked copy this morning. Do you have that with you?

7 A. I have your clocked -- I did not get a chance to get
8 to my emails this morning. I go -- there was a wreck on
9 526. I couldn't get to my office, but I do -- so I never
10 got it open, but I do have it here.

11 Q. Thank you. Let's try, at least, to start out going
12 down that list as an organized way to approach this. To
13 the best of your recollection, was there any evidence of
14 any sort, including testimony, introduced at trial which
15 tended to demonstrate that Marquita Smith knew that
16 weapons were going to be involved in this crime?

17 A. I know that in reference to Kerry saying a lick and
18 at some point Kerry, I think Kerry Hollins defining lick
19 as having a weapon. But I don't -- to me there was no
20 other evidence and I do not think that she thought that
21 there were going to be any weapons involved.

22 Q. So with the exception of the Solicitors successfully
23 getting Kerry Hollins to say that in his mind a lick was
24 an armed robbery at some juncture, there was no other
25 evidence of your client having any knowledge beforehand

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1 that weapons would be involved in this case?

2 A. I would say that's accurate. He did reference a
3 lick as referring to a robbery, at one point, with a
4 weapon.

5 Q. And there was no evidence of any discussion with or
6 in the presence of Marquita Smith that the co-defendants
7 intended to kidnap the victim?

8 A. No, to my recollection there was no discussion that
9 she would have been aware they intended to kidnap
10 anybody.

11 Q. Was there any evidence, testimony or otherwise, that
12 there had ever been a discussion with or in her presence
13 of burglarizing anywhere in order to accomplish the
14 robbery?

15 A. Not to my knowledge.

16 Q. And was there any evidence that there had been any
17 discussion with your client or in her presence that
18 indicated a willingness on the part of her co-defendants
19 to physically harm Dexter?

20 A. I don't believe that there was. I can't remember
21 exactly what her statement was, but I don't believe that
22 she ever thought they were going to harm him or intended
23 to harm him.

24 Q. And we'll get into it in more detail in a little
25 while -- maybe not quite so little while, but later --

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1 that in fact her statement indicated that she had been

2 assured by her former boyfriend, Kerry Hollins, that

3 Dexter would not be harmed. Isn't that accurate?

4 A. I believe it is. I did not bring her statement up

5 here with me.

6 Q. Well, I can tell you ---

7 A. I've got it right there if I can grab it. I'm

8 sorry.

9 MS. SHURLING: A moment's indulgence, Your
10 Honor.

11 THE COURT: Yes, ma'am. Do you want to run and
12 get your statement?

13 MR. JONES: Could I?

14 Q. If you will ---

15 THE COURT: I'm going to let Mr. Jones get his
16 statement. He feels like he would be more prepared.

17 MS. SHURLING: Just so Your Honor knows, the
18 entire statement was brief and it's published at page 545
19 over to 549 of the transcript.

20 MR. JONES: That makes it easy.

21 THE COURT: What's the beginning page, Ms.
22 Shurling?

23 MS. SHURLING: 545 going over to 549.

24 Q. Mr. Jones, I don't want to interrupt you, but if
25 you'll just let me know when you've caught up with me.

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1 A. I do believe that is correct.

2 Q. Okay. Now, during the testimony of Kerry Hollins,

3 and let me give you a specific reference to where his

4 testimony begins. Sorry. On page 38 -- no, pardon me.

5 On page -- sorry. On page 395, beginning on page 395, is

6 the testimony of Kerry Hollins. During his testimony,

7 the State elicited testimony that your client set up a

8 lick, which he then, with the encouragement of the

9 prosecution, defined as an armed robbery. Is that

10 correct?

11 A. That is correct.

12 Q. Why didn't you object to that?

13 A. I mean, that was his statement of what was said to

14 me. I mean, they asked him what was said and that's what

15 he said, and that's what he heard and that's how he

16 defined it.

17 Q. Well, let's be very clear. He never claimed that

18 your client, our client, uttered the words armed robbery,

19 did he?

20 A. No. No.

21 Q. What he very specifically said was that she had

22 helped him set up a lick?

23 A. Correct.

24 Q. Which the prosecution went on to have him define as

25 an armed robbery, correct?

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1 A. That is correct. They did get him to say it was an
2 armed robbery.

3 Q. Okay. And my question is, what evidentiary
4 foundation had been laid for the fact that a quote, lick,
5 end quote, was definitively an armed robbery?

6 A. Well, and I didn't know -- I don't know that there
7 was any evidentiary. My perception of the testimony was
8 he was saying what he thought it was. They had asked him
9 the question and he had answered what he thought it was.
10 I ---

11 Q. Could I get you -- I'm sorry. I didn't mean to
12 interrupt. I apologize.

13 A. No, please.

14 Q. Could you look at page 404?

15 A. 404.

16 Q. The question at line 6 and 7 is, I asked you when
17 Marquita Smith used the term, quote, lick, end quote,
18 what does that mean? Armed robbery. Okay. An armed
19 robbery. And when you use the word lick on the street,
20 is there any confusion that that means an armed robbery?
21 No, sir. See that portion of the testimony?

22 A. I do.

23 Q. Now, Solicitor doesn't say what did you understand
24 lick to mean, does she?

25 A. Well, ---

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1 Q. It was he. Pardon me, it was Mr. Jennings at that
2 point?

3 A. I guess they didn't ask it in that way. I assumed
4 that's, in essence, what they were asking when they said,
5 what does that mean? And that was his definition of it.

6 Q. I understand. But re-reading the testimony as it
7 was elicited at trial, the Solicitor doesn't say, what do
8 you think of when you hear the word lick? Or what does
9 that mean to you? They asked him to define for the
10 record what a lick is, don't they?

11 A. Correct.

12 Q. And my question is, why didn't you raise an
13 evidentiary objection to the fact that no foundation had
14 been laid for this individual to define that term to the
15 exclusion of any other definition?

16 A. And I'm not really sure, you know, I think later on
17 when we came back that was what -- and I didn't follow up
18 on that as much because Mr. Volis followed back up there
19 and got him to say that a lick was actually a noun and
20 may be a person. So in my mind, again, is he then
21 equivocated on what lick meant. And ---

22 Q. There, again, you've got to love a smart witness.
23 You're anticipating where I'm heading next. But Mr.
24 Volis did actually get him to acknowledge at some point
25 ---

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1 MS. SHURLING: Your Honor, I'm referring to the
2 colloquy that takes place, really over the course of two
3 or three pages, from 423 to 426, wherein Kerry ultimately
4 admitted that a lick could mean just a robbery.

5 A. Correct.

6 Q. But he adds, does he not, that -- but he knew the
7 plan included weapons, involved weapons?

8 A. Right.

9 Q. And my question to you is, why didn't you question
10 Kerry Hollins, not about what he knew or what he thought,
11 but whether to his knowledge Marquita Smith had any idea
12 weapons were going to be used in this case?

13 A. And I guess my concern at that point was if Hollins
14 was getting up there testifying against Marquita, my
15 concern then is, we knew he was adverse to our position,
16 was going to do whatever it took to solidify hopefully
17 his and get a better deal. So my concern then is I
18 didn't know what he was going to say until he got up --
19 there and said, well, Marquita was in on it the whole
20 time. She was in the car watching us load them, you
21 know, guns and stuff like that, I didn't have any way to
22 contest that other than to put Marquita on the stand at
23 that time, and which I just didn't think -- so I felt
24 like we were able to do enough at that time to
25 distinguish between what Marquita would have thought a

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1 lick was with this common plan and what Kerry thought a
2 lick was.

3 Q. Well, let's back up for a few minutes. Was his
4 version of the facts really all of that divergent from
5 Marquita's?

6 A. Well, I never thought that Marquita knew they were
7 going to do what they -- I believe that Marquita thought
8 that they were going to snatch whatever money was owed
9 him or maybe jewelry or whatever off, and not hurt him,
10 push him down and run off. That's what I truly believe
11 she thought the whole time.

12 Q. Well, so let's -- I'm sorry.

13 A. No, please.

14 Q. Let's take a look at Kerry Hollins' testimony. You
15 know, the stories diverge in the sense that Marquita says
16 that he called her and said he wanted to rob somebody and
17 got her to give him a suggestion as to somebody to rob,
18 I'm paraphrasing.

19 A. Sure.

20 Q. But her statement essentially said that, correct?

21 A. Correct.

22 Q. And his statement claimed that Marquita called and
23 basically offered up this person to rob and said she had
24 a lick for him, okay?

25 A. Right.

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1 Q. But other than that, Kerry Hollins' statement,
2 except for this little nugget that the Solicitor was able
3 to elicit from him about a lick meaning an armed robbery,
4 he never alleged that Marquita said, you'd better go
5 packing heat because he's going to fight you. Or, you
6 know, you'd better take a whole bunch of people with you
7 because he's big and mean and he's going to fight. Or,
8 you know, he carries a gun so you better carry one.
9 There was absolutely no evidence of any such discussion,
10 was there?

11 A. No, there was not.

12 Q. Okay. So really Kerry Hollins' testimony and his
13 statements that you had in discovery were not divergent
14 with Marquita's version, except for who called who about
15 the idea to begin with. Except for the lick thing.
16 That's -- I realize the lick thing's a problem. I think
17 it's a big problem. That's why I'm raising it. But
18 except for that, his version and her version are really
19 not very different ---

20 A. Sure, sure.

21 Q. --- except for who called who?

22 A. Our problem was we just didn't know what his version
23 was going to be, because it was kind of a surprise that
24 he testified.

25 Q. Okay. Well, when did you find out he was going to

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1 testify?

2 A. I mean, it was -- I feel like and, again, I reviewed
3 this in light of the initial -- I found out about this in
4 September, I think, and then began reviewing this
5 November the 6th. So I am -- and then got your amended
6 complaint, I guess, November the 9th. So I have not had
7 a chance to totally review this thing from the standpoint
8 kind of. But, if I remember right, I mean, we found out
9 Kerry was going to testify, I believe, I guess the trial
10 was starting on a Monday, maybe, like that Thursday or
11 Friday and got his attorney to send us over his
12 statement. Because we did not think that Kerry was
13 testifying. All the way up until that point, Kerry had
14 never -- he ended up, and I think there's some discussion
15 in here -- I want to say something like two weeks before
16 the trial, there was some discussion at that time that
17 Mr. Volis had gotten into -- he'd changed and decided at
18 that point to testify. But we had not known he was going
19 to testify at, you know, before. The whole duration that
20 we had the case, we thought it was going -- nobody was
21 testifying. We thought everybody was going to clam up.

22 Q. Okay. May I stop you for a second?

23 A. Please, please.

24 Q.- Because you just said a mouthful and I need to break
25 up in little pieces.

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1 A. Sure. Sure.

2 Q. So you knew, let's say, at least two or three days
3 before trial that he was going to be a witness for the
4 State?

5 A. I think so. And I just don't -- I believe so. And
6 I think I may have discussed the timing in my motion to
7 continue, maybe. And I may not have. I just don't
8 remember. I just don't remember when I found out. But I
9 thought that -- I thought there was a discussion of that
10 when I asked for the continuance.

11 Q. You also said -- one thing that just caught my --
12 really caught my interest, is you just said that when you
13 did find out he was going to be a witness, that his
14 lawyer faxed over his statements to you?

15 A. I believe -- let's see. I have the statement now.
16 Yeah, I think that she had faxed it over Friday at five-
17 oh-one, I think is what I -- that's what's in the
18 transcript. And on page 13, line 4 of volume one. So I
19 believe that's when ---

20 MS. SHURLING: Actually, Your Honor, in the
21 record on appeal it is page 13, lines 4 through 7.

22 Q. And my question is, up to that point, hadn't Kerry
23 Hollins been a co-defendant?

24 A. He had, correct.

25 Q. Well, wouldn't his statement have been subject to

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1 discovery under Rule 5?

2 A. It should have been.

3 Q. And you hadn't gotten it?

4 A. We had not.

5 Q. Well, why didn't you raise the fact that you had not
6 been under Cosby Whitley** given his statement in a
7 timely fashion as support for your motion for
8 continuance?

9 A. I think I did. I think that's what that entire
10 discussion was for right there. If I had raised it on
11 there.

12 Q. Well, let's take a look at that real quickly.

13 MS. SHURLING: I'm sorry, Your Honor, I have
14 the wrong volume up here.

15 Q. Page 13, lines 4 through 7. Okay.

16 A. Because I also see ---

17 Q. Well, and it actually goes on -- starts out --
18 you're starting out on page 11, line 2. And you're
19 arguing all the basis for your continuance. You're
20 talking about the fact that the other co-defendants had
21 written notice four to six weeks in advance of the trial.
22 That you didn't have notice of some of the charges until
23 -- contemporaneously with the trial date than that. And
24 you say that a public defender called you on Thursday and
25 said her client was going to be testifying and informed

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1 you, well, there's another statement, which I didn't
2 have, which I'm not sure if she lost it or what the issue
3 was. The Court asked if you had that statement now and
4 you say you do. And you tell them when you got it. But
5 if I'm missing it, please point out to me, when did you
6 argue to the Court that the failure of the prosecution to
7 provide you that statement earlier was a Rule 5 violation
8 and that you had to have adequate time with the discovery
9 materials and, you know, perhaps cite Cosby Whitley** or
10 some other appropriate authority? Did you make that
11 argument and I'm just missing it?

12 A. I'm not sure. I see here where Judge Jefferson
13 says, well -- she makes some statement about, are you
14 saying you're not going to be able to cross-examine Mr.
15 Hollins? I go into the -- let's see -- the top of
16 fourteen, page 2, and I don't know the exact language,
17 but I guess it was kind of couched in there with a twist
18 on the allegations are, is that it's not a matter of he
19 says my client's involved. It's a matter of he says my
20 client, in essence, was in essence the principal actor
21 and originator of this, meaning the whole scheme and all.
22 So I guess that -- and I don't know if I said exactly in
23 Rule 5 terms or whatever, but I brought that to -- and
24 she said, when was this statement made? I said the
25 statement, I think, was made August the 4th of this year.

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1 And I said of the year when the act occurred in '06. And
2 she said, does it incriminate your client. I said, very
3 much so. She said, but I would imagine that the
4 allegations came as no surprise, with this being a year
5 old, you would know the substance of the State's case
6 against your client, and that's when I go into, well, I
7 know what the allegations are, but this is a twist on the
8 allegations that my client's the main brain behind the
9 whole thing, also. Again, I'm not sure if I couched in
10 those exact words and I probably should have. And
11 obviously, looking back, I wish I had used those words on
12 the ---

13 Q. Who was the public defender that was representing
14 Kerry Hollins?

15 A. Patty -- I can't remember -- I should know it, but -
16 --

17 THE COURT: Kennedy?

18 A. Kennedy, sorry. Patty Kennedy.

19 Q. Patty King?

20 A. Kennedy.

21 Q. Kennedy?

22 A. Yeah.

23 Q. Did you ask Ms. Kennedy for permission to interview
24 her client?

25 A. I did not. No, I ---

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1 Q. Why not?

2 A. Well, I did not -- I mean, one, we got it relatively
3 quickly and I wasn't sure, since he was testifying for
4 the State, I assumed he probably would not talk with me.
5 I typically don't let my clients speak to a co-defendant
6 if they're going to be a testifying witness. But I did
7 not ask that.

8 Q. Well, let's back up again. You say you don't
9 typically allow your client to. You mean you typically
10 advise your clients not to. Isn't that true?

11 A. Correct. Correct.

12 Q. I mean, you can't tell them ---

13 A. I'm sorry. Yeah. Correct.

14 Q. You can't tell them they can't talk to anybody?

15 A. Correct.

16 Q. And you don't know whether or not Kerry Hollins
17 would or wouldn't have been willing to talk to you?

18 A. That is correct. I don't.

19 Q. And the business about the lick came out at trial?

20 A. It did.

21 Q. So up to that point, based on his statements that
22 you had gotten, even from the one you'd gotten from the
23 public defender's office, his statement wasn't really
24 that divergent from Marquita's, was it?

25 A. If it didn't, I guess, in the statement he mentions

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1 lick. And, again, I'm re-reading the statement for the
2 first time right now. But if that's what's reflected,
3 then it isn't. I do see he mentioned lick in there. And
4 it's the first time I'm re-reading it.

5 Q. Now, I'll give you, I'll give you the fact that he
6 says, she offered up a lick. And she says he asked about
7 someone to rob. So we've got that difference. But other
8 than that, his statement isn't attributing to her
9 knowledge of an armed robbery or that weapons were going
10 to be used. His statement is not attributing knowledge
11 of violence going to be used or kidnaping or anything,
12 correct?

13 A. I don't -- and, again, I have not re-read this
14 statement, but I don't believe that his -- but I would
15 just have to re-read it. But I don't think so.

16 Q. And his testimony -- perhaps more important, his
17 testimony at trial didn't either, did it?

18 A. It wasn't that different from hers, I guess, that --
19 I guess it would be -- correct.

20 Q. Okay. Now, there's this discussion on the record
21 with the State getting him to say a lick was armed
22 robbery. And then your colleague gets him to admit that
23 it could be just a robbery ---

24 A. Correct.

25 Q. --- on cross? But was there any foundation, to your

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1 knowledge, for the fact that a lick was necessarily a
2 robbery at all?

3 A. I mean, as far as any foundation, I don't -- the
4 hard thing is I -- as a criminal defense attorney, I know
5 what a lick means and I know it from my days in law
6 enforcement. I mean, it's not a -- that's not a new term
7 to me. But it means different things to different
8 people, though, also. I mean, a lick can be, again, a
9 noun. And it can mean somewhat a target or it could have
10 been a -- so I don't -- I can't say that I absolutely
11 knew it was an armed robbery. And that's what I was
12 hoping to get him with -- Tommy getting him to back off
13 on that. I thought that I had been able to get them to
14 draw that distinction where it wasn't just an armed
15 robbery. It could have been a regular robbery. I wish
16 I'd gone into that further.

17 Q. Okay. Well, let's just -- I don't know. Let's give
18 another example. If I tell my housekeeper that she won't
19 be needed for the next two weeks because I'm going to be
20 on vacation and she tells her children that she's not
21 going to be working for the next two weeks because I'm
22 going to be on vacation. And her children, one of them,
23 tells one of his buddies, hey, I got a lick. I know
24 where there's a nice house with a lot of expensive stuff
25 and the owner's fixing to be gone for two weeks.

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1 Couldn't that be a lick.

2 A. I would say, if that's -- I would say so.

3 Q. But that wouldn't be a robbery, would it? It'd be a
4 burglary?

5 A. Correct.

6 Q. And a grand larceny?

7 A. Correct.

8 Q. So in the parlance, lick may mean doing something
9 criminal to get money, but it doesn't necessarily mean a
10 robbery, does it?

11 A. No, I agree with you.

12 Q. Okay. And, again, you didn't ask Kerry Hollins'
13 lawyer to see if her client would be willing to talk to
14 you?

15 A. I did not.

16 Q. Okay.

17 MS. SHURLING: A moment's indulgence, Your
18 Honor.

19 Q. All right. Let's move on for just a moment. Well,
20 first off, the first time that the State, and some
21 reference is seen throughout this record, but the first
22 time that the State got that out of Gary Hollins' mouth,
23 did you consider moving for a mistrial?

24 A. I did not.

25 Q. In retrospect, do you think you should have?

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1 A. Looking back from now, I mean, I probably would,
2 looking backwards now.

3 Q. Okay. Would you agree that the testimony that a
4 lick, quote, meant armed robbery was the only actual
5 evidence at trial that could be used to link your client
6 to knowledge beforehand that an armed robbery was going
7 to be committed?

8 A. I would say that was -- yeah, I would say that's the
9 only verbal evidence. But my further concerns were under
10 the hand of one hand of all is -- my concerns were once
11 that ball was rolling, you know, if they had grabbed him
12 and thrown him down the staircase, if he'd died, we could
13 be in the same position on there. So while I -- again,
14 looking backwards now, after all this discussion and
15 everything, would I have objected on there? I would
16 have.

17 Q. Okay.

18 A. But again, I was -- you know, in the midst of it
19 you're focusing on -- my intent was trying to break that
20 chain of probability and foreseeability on there, but I
21 would have objected if I -- you know, looking back now.

22 Q. Let's go backwards for a minute. What do you
23 consider the purpose of an opening argument to be for a
24 defense attorney?

25 A. I consider it to lay out your -- an outline of your

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1 telling of the story of how things occurred or how it
2 went. I don't know if I have a specific definition for
3 it.

4 Q. Well, is it the chance to draw the jury's attention
5 to aspects of the State's case you want them to pay
6 special attention to?

7 A. It is if you know certain aspects that you want to
8 highlight. It can be.

9 Q. Okay. And in your opening argument you point out to
10 the jury, and I'm looking specifically at your very brief
11 opening, page 125, line 3, to 126, line 12. You point
12 out that the jury must decide if your client actually
13 contemplated an armed robbery, not just whether an armed
14 robbery occurred. Agree?

15 A. Correct.

16 Q. If your client did not know guns were going to be
17 involved in this incident, would you not also want the
18 jury to consider whether the victim being harmed or even
19 killed was not a reasonably foreseeable consequence if no
20 weapons were going to be involved?

21 A. Yeah. I think so, yeah.

22 Q. So you didn't have any particular reason for saying,
23 I'm not going to be able to prove she was an accessory
24 before the fact of armed robbery. You didn't leave
25 murder out on purpose. You just didn't do it?

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1 A. Correct. Correct. I was hoping that, you know, I
2 was hoping not to over-emphasize. But I felt that their
3 strongest case was the armed robbery part. I was hoping
4 that the murder would be -- or the robbery part -- I was
5 hoping that the murder would be a further unforeseen --
6 even further unforeseen consequence from the robbery part.

7 Q. And my question is, did you have any kind of
8 strategic or tactical reason for sort of laying the
9 foundation for them to, you know, pay attention to the
10 fact that there's no evidence that she knew there was
11 going to be an armed robbery. So she, you know, armed
12 robbery wasn't foreseeable. It doesn't matter whether
13 there was an armed robbery. It's whether or not she knew
14 there was going to be an armed robbery, okay? You didn't
15 make the logical extension of that argument to murder in
16 the opening. And I'm asking you in retrospect if that's
17 something you believe you should have done?

18 A. I guess I would do it again. I mean, I guess I
19 would put that in there.

20 Q. Okay.

21 A. I mean, sure. I could, you know, I could ---

22 Q. Let's go to directed verdicts for a minute.

23 A. Okay.

24 Q. At the conclusion of the State's case, everybody
25 makes a motion for a directed verdict. No big surprise

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1 there. But let's look to where the directed verdict
2 motions were argued. And that would begin on page 556.
3 Co-defendant Hartwell moves for a directed verdict.
4 Grant moves for a directed verdict, and you move for a
5 directed verdict on the grounds that the evidence isn't
6 sufficient, no evidence of common plan, credibility
7 issues and the foreseeability of the murder, correct?

8 A. Correct.

9 Q. And did you somewhere in there -- I'll have to go
10 back and look real quickly -- did you specifically argue
11 that there was no evidence she knew guns were going to be
12 involved and, therefore, couldn't be an accessory before
13 the fact to armed robbery? Take a look at that right
14 quick.

15 A. I don't know. I mean, if it's not ---

16 Q. Take just a second.

17 MS. SHURLING: Your Honor, I beg the Court's
18 indulgence.

19 THE COURT: Yes, ma'am.

20 Q. Okay. Let's start looking at 559, line 14. Your
21 Honor, also with regard to the armed robbery, again, the
22 only evidence of any -- the element of the taking away
23 was the statement. There's no attempt to corroborate
24 that anything was taken. Accessory to armed robbery, my
25 client with the same basic grounds and also accessory

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1 before the murder, probable and natural -- probable and
2 natural consequence of the matter. Okay. Reading on
3 down through 560, line 16. Do you ever expressly argue
4 that there was no direct or substantial -- direct
5 evidence or substantial circumstantial evidence that your
6 client knew a weapon was going to be involved?

7 A. I don't think that I argued that. I don't see that
8 I argued that specifically in there.

9 Q. Now, harkening back even to what we do have on the
10 record, Kerry Hollins' testimony, Kerry Hollins said she
11 wanted him to hit a lick. A lick. That she had a lick
12 for him to do, words to that effect. And the State says,
13 well, what does a lick mean? And he says, it's an armed
14 robbery. But, again, there's no testimony that your
15 client knew guns were going to be used, is there?

16 A. No.

17 Q. And I'm not going to be redundant and waste the
18 Court's time. But there's no other testimony indicating
19 that she knew guns were going to be involved and it was
20 going to be an armed robbery in any way?

21 A. Correct.

22 Q. Okay. So was there any particular reason you didn't
23 argue that line of analysis in your directed verdict
24 motion?

25 A. Well, I guess I didn't argue specifically that there

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1 weren't going to be guns used in there. I thought that
2 the argument was that she didn't even know that it was
3 going to be an armed robbery, which, again I inferred
4 that if it was an armed robbery that guns were included
5 in that. I mean, again, my mindset was that she thought
6 it was going to be basically something where they'd just
7 snatch whatever he had readily available. Nobody got
8 hurt, moved off. And so I thought that my argument was
9 that she didn't know that there was going to be an armed
10 robbery and by inference there weren't going to be
11 weapons involved.

12 Q. So if the record doesn't reflect that you ever
13 specifically argued that there was no evidence that she
14 knew it was going to be an armed robbery, that was
15 unintentional on your part?

16 A. I would guess I would say it was unintentional on
17 there.

18 Q. That's an argument you would have meant to advance
19 if you did not?

20 A. Yeah. Because, I mean, I guess here I assumed -- I
21 said, again, there's no evidence of common plan and
22 scheme to commit armed robbery or to the murder. And,
23 again, while I didn't specifically address guns, I think
24 I meant in general whether they pulled out a knife or
25 whether they'd picked up a rock or a bat or whatever it

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1 was, I don't think that she ever thought or intended that
2 any of that would happen.

3 Q. Okay. Let's approach the directed verdict argument
4 from another standpoint.

5 A. Sure.

6 Q. Did you do significant research on the whole concept
7 of an accessory before the fact before this trial?

8 A. I don't know what significant -- I did ---

9 Q. Did you do any research on it?

10 A. I did.

11 Q. And, in fact, accessory before the fact is actually
12 defined by statute, isn't it?

13 A. Correct.

14 Q. SC Code Annotated 16-1-40 specifically states ---

15 MS. SHURLING: If I may publish it, Your Honor.

16 THE COURT: You may.

17 Q. --- a person who aids in the commission of a felony
18 or is an accessory before the fact in the commission of a
19 felony like counseling, hiring, or otherwise procuring
20 the felony to be committed is guilty of a felony. Okay?
21 However, there is no dearth of case law in South Carolina
22 for the proposition that one who is charged with
23 accessory before the fact has to have not been at the
24 scene of the crime. Isn't that accurate?

25 A. Not present.

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1 Q. Not present?

2 A. Correct.

3 Q. Correct. So, under subsection (b) of -- well, 16-3-

4 -- excuse me. 16-3-655(b) the State must prove the
5 accused advised and agreed, urged or in some way aided or
6 abetted some other person to commit the offense, that's
7 number one. Number two, the accused was not present when
8 the offense was committed. And three, some principal
9 committed the offense. Is that an accurate statement of
10 the law concerning accessory before the fact, to your
11 knowledge?

12 A. I believe it is. I've got that pulled up. Can I
13 pull up that -- I've got it already up. May I open that
14 so I could just read it?

15 THE COURT: You may.

16 A. I'm better visually, but I believe that is correct.

17 Q. But please, pull it up. I'll get my hard copy while
18 you're doing it. I'm a dinosaur. I still use a chisel
19 and stone.

20 Q. Okay. So would you agree with me that the accused
21 not being present when the offense was committed is an
22 element of being an accessory before the fact in South
23 Carolina?

24 A. I would.

25 Q. Okay. Why didn't you argue as a basis for your

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1 directed verdict motion that the evidence introduced at
2 trial, and, in fact, your client's own statement that was
3 introduced by the State at trial, put her present at the
4 scene during a portion of what the State was wanting to
5 characterize as a common scheme or plan?

6 A. Well, and again, my -- I did do research on this and
7 as I understood it, she would have been a principal to,
8 at least, the burglary kidnaping, but they did not go
9 forward on those charges, which I anticipate is why they
10 didn't go forward on them. Maybe not to confuse the
11 matter. I really don't know why. But the two that they
12 did go forward on, she was not present at. And, again,
13 based on the research I felt that that was the
14 appropriate. I mean, otherwise, they would have charged
15 her as a principal. I'm assuming that. But, you know, I
16 guess it would be -- so I don't know if I've answered the
17 question or not.

18 Q. Well, let's look at that a little closer. I mean,
19 Kerry Hollins testified that one of his co-defendants
20 told him he got, I believe it was a watch -- I mean a
21 ring and a bracelet off the defendant [sic]?

22 A. Right.

23 Q. He didn't say when he took it, did he?

24 A. I don't remember. I don't remember what he said or
25 when he ---

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- 1 Q. So depending on when those items were taken from
2 Dexter, the victim, it's possible that your client was
3 present when the items that the State is arguing are the
4 thing that were taken from the victim is the foundation
5 for the armed robbery were, in fact, taken?
- 6 A. And I guess that could be -- you're right. I don't
7 know what -- when they were taken. I don't ...
- 8 Q. And, again, it was the State's position that this
9 was some sort of common scheme or plan, that there was a
10 plan to do all of this and that she was even the
11 mastermind, right?
- 12 A. Correct.
- 13 Q. And according to them, she called her old boyfriend
14 Kerry Hollins and told him when Dexter would be leaving
15 Tiwana's apartment and be out in the parking lot so they
16 could rob him?
- 17 A. Right. Well, and I believe that -- well, they got
18 in the apartment. So, yeah. That's what they're saying
19 is that she called and ---
- 20 Q. Now, let's be very careful with that testimony.
- 21 A. Okay.
- 22 Q. Isn't it a fact that according to the testimony as
23 it unfolded, she called and told them when he was
24 leaving?
- 25 A. I don't know.

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1 Q. Well, the record will speak for itself on the fact -

2 --

3 A. Yeah.

4 Q. --- that the testimony was that Dexter and Tiwana
5 and our client were outside when the men came rushing up.

6 A. And that could be. I have not re-read it.

7 Q. Okay.

8 A. So if that's what the record and the report
9 reflects, that's exactly right then.

10 Q. And if the transcript further reflects that Tiwana
11 and Dexter then ran back in the apartment and the
12 intruders came in and took Dexter out of the apartment.

13 A. Okay.

14 Q. Before that, Tiwana jumps off the balcony. And
15 there was a witness to the fact that our client was still
16 at the apartment complex, downstairs in the grass, after
17 all this happened and when the police got there, okay?

18 A. Okay. Yeah.

19 Q. So during a significant portion of this criminal
20 enterprise, our client, everybody says, was right there,
21 correct?

22 A. Correct.

23 Q. So my question is, why wouldn't you argue, as part
24 of your motion for directed verdict that, look, the State
25 could have charged her as a principal. They elected not

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1 to. Since they didn't, and they charged her with
2 accessory before the fact and the law is clear that an
3 accessory before the fact can't be present, why didn't
4 you argue that as a basis for the directed verdict?

5 A. I did research. But I found nothing that said once
6 they had left that scene and she was still there, I
7 didn't find any case law that said once -- if she was
8 part of any part of the plan, that then made her the
9 principal for every part of the plan. I didn't find any
10 case law to that effect. So, you know, I think she --
11 again, in my mind, she was the -- she could have been
12 charged as a principal for the burglary and the kidnaping
13 because she was there. But at that point when they took
14 her and went to a different location, she was no longer
15 present. And at that point in time, she then became the
16 accessory for the robbery. And, again, arguably if
17 they'd taken the stuff in the apartment, maybe it would
18 have made that -- but I didn't argue that point.

19 Q. Well, and I'm not -- truly, I'm not trying to beat
20 you up.

21 A. Sure.

22 Q. But -- so when you made the argument for the
23 directed verdict of acquittal, you're in the middle of
24 her trial, right?

25 A. Uh-huh (affirmative).

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1 Q. I mean, past the middle, really. The State's
2 finished with their case?

3 A. Right.

4 Q. She's not charged as a principal?

5 A. Correct.

6 Q. Now you've not like worried that they're going to be
7 able to up and ask for a jury charge making her guilty as
8 a principal because they couldn't do that on an
9 indictment for accessory before the fact, could they?

10 A. No.

11 Q. So there was no danger to your client in arguing
12 that she's present, Your Honor. And case law says she
13 can't be present. She's present for a significant part
14 of what they are characterizing as a common scheme and
15 plan. And, therefore, she can't be an accessory before
16 the fact.

17 A. Well, I mean, it certainly was argument that, you
18 know, I guess I could have made. I just didn't find any
19 case law that backed me up on that.

20 Q. Okay. Would you agree that the Judge, Judge
21 Jefferson, charged as part of her instruction, and the
22 record will speak for itself, that absence from the scene
23 was an element of accessory before the fact?

24 A. I'm pretty sure she did charge that.

25 Q. And since she charged absence from the scene as an

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1 element of accessory before the fact, what was your point
2 in telling the jury in closing arguments that she was
3 absent, she wasn't even there?

4 A. Well, my point was, I was trying to break that chain
5 of foreseeability. I mean, they had gone from -- to a
6 random location that nobody knew. I mean, it wasn't, you
7 know, it wasn't the victim's home. It wasn't -- it was
8 some random location where they had taken him. Again, I
9 assume he was trying to buy time, to get away. They
10 kicked in the door in some unknown residence. And, you
11 know, my argument was that, you know, I don't even think
12 it was foreseeable, you know, to the guys who were there
13 that they'd go to some random residence, kick in the
14 wrong door of some house and all that. So my argument
15 was that it certainly couldn't have been foreseeable by
16 Marquita, that they would have grabbed him, that they
17 would have taken him to another location, gone and done,
18 in essence, a home invasion and executed him in front of
19 a family. So that was what my thought was, was trying to
20 stretch the chain of events to show that, I mean, there's
21 no way that at nineteen, with no record or any experience
22 in this, that she could have been the mastermind of this
23 or that she could have foreseen this.

24 Q. All right. Let's -- thank you for that.

25 A. Oh, no. No problem.

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1 MS. SHURLING: I'm sorry, Your Honor, my mind's
2 jumping ahead.

3 Q. You made a motion for a severance ahead of time.
4 And one of your primary arguments was that it needed to
5 be severed so that you could deal with witnesses
6 differently on cross and bring up some evidence that you
7 wanted to bring up and so forth. But prior to trial, did
8 you ever consider what the necessary and appropriate jury
9 instructions would be for someone charged with accessory
10 before the fact to these crimes? Did you -- had you
11 researched it?

12 A. I had pulled the basic jury -- I mean, I had looked
13 at them, you know, through the bar website. We have them
14 on there, the basic instructions.

15 Q. Okay. Well, during the charge conference, at some
16 point you start alluding to the Judge that, you know, I
17 know Your Honor says you're going to charge something
18 about the hand of one, the hand of one -- the hand of one
19 being the hand of all. And foreseeability and all of
20 that. But I think maybe there should be something like
21 that for my client, too. Do you recall that colloquy
22 with the bench?

23 A. I remember we made that. You know, I don't remember
24 the specifics, I mean. But I do remember that we did
25 have -- you know, that was a discussion that we had.

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1 MS. SHURLING: A moments indulgence, Your
2 Honor.

3 THE COURT: Yes, ma'am.

4 Q. I'm on -- well, look specifically at page 597,
5 beginning at about line 15, where you start saying, I
6 think you're instructing and I think you might have
7 turned it, but the accomplice was the action and natural
8 probable -- natural probable consequence of an agreed
9 plan. Going on over to the -- about the middle of the
10 next page, specifically looking at lines 9 through 12,
11 you say, I think she'd be entitled to the charge of
12 strong armed robbery, no other evidence, blah, blah. You
13 see that?

14 A. I do.

15 Q. Okay. Why strong armed robbery? Wouldn't -- as
16 pertaining to your client, wouldn't the appropriate
17 charge be accessory before the fact to strong armed
18 robbery?

19 A. It would have. And listening to y'all's discussion
20 up here, I would have, you know, may have been -- and
21 hopefully, I would have logically moved to that at some
22 point had we gotten there, but I don't think -- I think
23 that -- the whole argument of strong arm got shot down
24 pretty quickly anyway, but you're correct. I should have
25 asked for accessory before the fact of strong armed

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1 robbery.

2 Q. Thank you. And ---

3 MS. SHURLING: One moment, Your Honor.

4 Q. Okay. Look at page 605. You're still talking in
5 the charge conference and you say, Your Honor, I don't
6 know if you -- if the only other thing I'm thinking about
7 outside -- I don't know -- I understand you made your
8 ruling on the strong arm. But I believe the liability of
9 accomplice act, one is not liable for accomplice unless
10 natural, probably consequences. And initially, Judge
11 Jefferson says, well, that's something you can argue to
12 the jury. Correct?

13 A. Yes. That's what the record ---

14 Q. And then you're talking about whether or not -- you
15 just didn't know whether she should charge it or not.
16 And the Judge at some point says, well, you got
17 something? You want me to take a look at something, I
18 mean? And my question is, if you thought accomplice
19 liability would -- the theory of accomplice liability was
20 going to attach to someone that was charged as an
21 accessory before the fact, why didn't you have prepared
22 an accomplice liability instruction for the Judge to
23 consider, if that's something that you wanted her to
24 charge?

25 A. I don't know. I really don't know. I mean, I guess

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1 I did not -- I don't know if -- because I did have -- you
2 know, I mean, I -- there's a standard one on there. I
3 guess -- I mean, if the record would show that I did not,
4 I did not.

5 Q. Okay. Now, later on I believe then Deputy
6 Solicitor, now Solicitor Wilson, picks up your mantra and
7 starts asking for an accomplice liability instruction in
8 connection with Marquita Smith herself, doesn't she?

9 A. It looks like that.

10 Q. Okay.

11 A. I did not get through this part of the transcript.

12 Q. And, again, eventually the Judge says, well, if
13 y'all are agreeing to it, you know, y'all are agreeing to
14 that being given, I'm not going to -- I'll do it if
15 you're going to agree to it. Remember that?

16 A. If that's what the transcript -- I don't. But if
17 the transcript says that, then that's what occurred.

18 Q. Okay. Now, when the charge was actually given at
19 the conclusion of the portion of the charge that
20 references Marquita Smith and the accessory charges,
21 Judge Jefferson actually says ---

22 MS. SHURLING: Your Honor, I'm sorry, but it
23 will take me just a second to locate this. Let's see.
24 I'm sorry, Your Honor, just one second. My flag fell off
25 again.

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1 Q. Okay. Page 718, lines 2 through 10. The lower
2 court instructed the jury -- and actually we can look at
3 lines 4 through 10. In order to prove these crimes, the
4 State must prove beyond a reasonable doubt that the
5 Defendant, Marquita Smith, either advised, agreed, urged,
6 counseled, hired, or in some way aided an abetted --
7 aided or abetted another person to commit a crime. See
8 that?

9 A. Right.

10 Q. And you subsequently objected to that instruction,
11 didn't you?

12 A. I guess. And I don't know. But if the record
13 reflects that.

14 Q. It does.

15 MS. SHURLING: And if the Court will indulge me
16 just one second, I can give you the page.

17 Q. 733, lines 16 through 19. And then going on to the
18 top of 734 and you argue on down all the way over to 735,
19 line 5. And the Judge overrules your objection, but
20 notes your exception for the record. Do you see that?

21 A. I do.

22 Q. Okay. Do you recall during the State's closing
23 argument the Solicitor making the argument that if
24 someone is killed during the commission of another
25 felony, that it is murder, period, end of statement?

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1 A. I don't. But if that's what the record reflects --
2 but I did not -- I don't think I got to read through the
3 closing.

4 Q. Did you notice that at the time that argument was
5 made?

6 A. If I didn't object, I probably did not. I'm
7 assuming that I didn't.

8 Q. Are you familiar with the South Carolina Supreme
9 Court's Ruling in the case of Lowry v. State**?

10 A. If you will refresh my memory, I probably have read
11 it, but it doesn't stand out right offhand.

12 Q. Lowry**, in fairness to you, is a case that was
13 decided in 2008 and this trial was in 2007. But in
14 Lowry**, our Supreme Court noted that South Carolina
15 doesn't, never has had, a true felony murder rule. Do
16 you recall that?

17 A. I think I remember looking at it through the, you
18 know, the little thing we get through the bar. I
19 remember briefly -- I mean -- but, yeah, I believe that I
20 know -- remember the case or I've heard of the case or
21 read the notes on it.

22 Q. Sure. You will agree with me that even if you're a
23 principal that the question is whether or not a crime was
24 either something you participated in knowingly or was
25 reasonably foreseeable to you based on what you agreed

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1 with the other people to do, correct?

2 A. Say that again?

3 Q. Okay. Under our standard accomplice liability law,
4 principals are held jointly responsible under what we
5 call the hand of one is the hand of all. If you either
6 knowingly participate with other people in a crime ---

7 A. Right.

8 Q. --- or some action of a confederate is one that was
9 reasonably foreseeable to you based on the acts that you
10 agreed to commit with these other people.

11 A. Correct.

12 Q. I'm paraphrasing because the actual terms are a
13 little awkward. But that's basically what our accomplice
14 liability law says, isn't it?

15 A. Right.

16 Q. Okay. Now, if you look at the closing argument made
17 by the Solicitor in this case, she says that if someone
18 is killed in the commission of an armed -- pardon me --
19 of a felony, a felony, without specificity, that it's
20 murder, period, end of statement. You recall that?

21 A. If the record reflects that -- I believe that was --
22 I'm sure it's accurate.

23 Q. Let me find it in my marked copy. Look at page 693,
24 lines 17 through 20. The law says, and Judge Jefferson
25 will charge you, if the victim was killed in the course

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1 of another felony, then his death is murder, end of
2 story.

3 A. I do. I see it.

4 Q. And my question to you, is that an accurate
5 statement of the law?

6 A. Not as it states on -- not as you just -- if Lowry**
7 and all of that, no.

8 Q. Well, and since Lowry** wasn't decided until 2008,
9 let's just use standard accomplice liability law in South
10 Carolina. In South Carolina you're responsible for the
11 acts of a confederate that you either knew were going to
12 happen or that were reasonably foreseeable to you,
13 correct?

14 A. Correct.

15 Q. So just because a homicide occurred during the
16 commission of a felony that you were taking part in, it
17 would not necessarily be murder as to you, unless it was
18 reasonably foreseeable, (a). Or (b), you knew in advance
19 that they were going to kill somebody?

20 A. I'd say correct. Correct.

21 Q. Okay. All right. Now, if you combine that argument
22 with the portion of the charge where Judge Jefferson said
23 that all they've got to prove is that she aided and
24 abetted or counseled, or whatever the lengthy definition
25 is, a crime, then that makes this portion of Scarlet

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1 Wilson's closing argument even more prejudicial, doesn't
2 it?

3 A. I would agree.

4 Q. And in retrospect, you think you should have
5 objected to this argument?

6 A. In retrospect, I would have objected to it.

7 Q. Okay. Now, are you aware of how many crimes -- I'm
8 not trying to beat you up again, but do you know how many
9 crimes are felonies in South Carolina?

10 A. I mean, no, I don't know the exact number, but I
11 know ---

12 Q. Well, I didn't count them either, but I copied them
13 and there are twenty pages in the Code of crimes that are
14 classed A, B, C, D, E or F felonies.

15 A. Right.

16 Q. So to say anytime a crime's committed in the course
17 of a felony, it's murder, would not be accurate, would
18 it?

19 A. No.

20 Q. And, in fact, I draw your attention to 16-03-325,
21 which states that the common law offense of robbery is a
22 felony. Familiar with that?

23 A. I'm familiar with it. I think so.

24 Q. So even if the jury had concluded that there was no
25 foundation for Marquita Smith reasonably foreseeing that

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1 this was going to be an armed robbery, but rather it was
2 what she admitted she knew about, just a robbery, robbery
3 is a felony?

4 A. Correct.

5 Q. Okay. All right. I'm going to move on because you
6 were gracious enough to say you should have objected and
7 made a motion for a mistrial too, I would assume. Do you
8 agree?

9 A. Probably so.

10 Q. Okay. At the end of your case -- well, actually,
11 the defense didn't present any, except for that fateful
12 photo lineup, but after everyone announced that they
13 weren't going to present anything, directed verdict
14 motions were renewed. Do you recall that?

15 A. I don't, but I'm sure ---

16 Q. If the record reflects that you only renewed your
17 motion for a directed verdict on the charge of accessory
18 before the fact to armed robbery, was that deliberate on
19 your part or did you just forget about the accessory
20 before the fact of murder?

21 A. I'm not sure. I don't recall. I mean, I don't
22 remember that, but I can't say whether it was part of any
23 strategy or not. I don't know what strategy it would be
24 a part of if it were.

25 MS. SHURLING: A moment's indulgence.

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- 1 Q. Look at 559, I believe, will get us there. And,
2 once again, your entire argument on 559, line 14 going
3 over to -- pardon me. I was wrong. I apologize. Look
4 at 560, line 7. You did say murder as well. My
5 apologies. Okay. Let's move on. We've covered a lot,
6 but there are a couple more things I need to ask you
7 about. And my documents have gotten mixed up. We've
8 covered it, I believe, but this is important so I want to
9 make sure. You were on fairly short notice of Kerry
10 Hollins testifying, but you did have an opportunity to
11 talk to his defense attorney before the trial, didn't
12 you? You, in fact, got documents from her?
- 13 A. I did. I think I spoke to her that Friday. I did.
- 14 Q. So you certainly could have asked her for ---
- 15 A. I could have.
- 16 Q. --- to ask her client whether she would talk to you?
- 17 A. I could have.
- 18 Q. All right. And in addition to that, although the
19 Court had shown that they were disinclined to grant an
20 actual continuance, you could have asked the Court for a
21 very brief delay, just long enough to allow you to
22 interview Kerry Hollins before the actual trial of
23 proceedings began, couldn't you?
- 24 A. I probably could have.
- 25 Q. You would have been a little more likely to get that

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1 than an actual continuance, wouldn't you?

2 A. I'm ---

3 Q. Usually?

4 A. Guessing, I would think so.

5 Q. Okay. And you didn't ask for that?

6 A. I did not.

7 Q. Prior to trial, did you have discussions with Ms.

8 Smith about how a trial works? About the State

9 presenting evidence and you presenting evidence and if

10 you don't present any evidence, you get the last argument

11 and why last argument is considered by some people to be

12 important. Did you have those kinds of conversations

13 with her?

14 A. I mean, we did have discussions over it, but I don't

15 remember if we had a specific discussion over the last

16 word. And mainly because with us trying it with

17 everybody else, I didn't know what everybody else was

18 going to do. So I don't know if I ever specifically --

19 it doesn't stand out that I specifically raised that

20 point.

21 Q. Well, were you surprised when you lost the final

22 argument because of the introduction of that photo lineup

23 by counsel for a co-defendant?

24 A. Both Mr. Volis and I were, yeah.

25 Q. So you did not believe that that would cost you the

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1 last argument?

2 A. We did not.

3 Q. So if you -- I'll rephrase that. Do you have any
4 independent recollection of whether or not you ever told
5 Marquita that if you didn't put up any evidence, you
6 would get the last argument?

7 A. I mean, I very well could have because I believed
8 that that -- both Mr. Volis and I thought that that
9 particular benefit would apply to us since we did not
10 produce any evidence. We knew it would not to Mr.

11 Barnwell. But both of us thought that it would -- we
12 would still have that. So I very well could have.

13 Q. And it became painfully obvious that the Court was
14 going to say that it was too late, that you already were
15 not going to get the last arguments fairly early in the
16 trial, didn't it?

17 A. I don't remember. I don't remember when we had that
18 discussion.

19 Q. Well, if you could look at page 499.

20 A. I see where there was a discussion.

21 Q. Going from the bottom of 499 -- well, actually it
22 starts at the top of 499, line 8, going over to page 500,
23 Judge Jefferson says it's driving her crazy because she
24 can't remember the name of the case, but she just read a
25 case recently that said if anybody submitted evidence, it

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1 was a done deal. Everybody lost the last argument. See
2 that?

3 A. I do.

4 Q. Okay. Your client did not announce to the Court,
5 and neither did her co-defendants, that they weren't
6 going to testify until later in the trial, correct?

7 A. I don't remember when, but that would typically be
8 the way I would do it. I would typically not, you know,
9 because things could change. So I would just say as a
10 general pattern of mine, I don't. So that would sound
11 accurate.

12 MS. SHURLING: May I have a moment, Your Honor?

13 Q. If you would go to page 556, the conclusion of the
14 State's witnesses is on page 555, line 17, okay? And
15 thereafter, there is discussion about different people's
16 clients not going to testify. So the announcement that
17 your client wasn't going to testify came after the Court
18 announcing that you've already lost the last argument.
19 Did you explain what the Judge was saying to your client?
20 Did you explain to her that, wow, I mean, I thought we'd
21 still get the last argument because we didn't put up any
22 evidence. And nobody got up and testified, but the
23 Court's saying that since this piece of paper came in,
24 you know, now I can put you up and not lose the last
25 argument. What do you want to do? Did you have that

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1 discussion with her?

2 A. I don't know if I had it with regard to because we
3 would lose the -- I didn't put her not because we
4 wouldn't get the last statement. I put her up because I
5 didn't want to have her subject to cross. So I probably
6 didn't have that discussion in relation of losing the
7 last argument. I don't think I did.

8 Q. Well, your client was nineteen years old, correct?

9 A. (Affirmative nod.)

10 Q. And had no prior criminal record at all, accurate?

11 A. Correct?

12 Q. I'm sorry. Madam court reporter can't write down
13 your head nod.

14 A. Sure. I'm sorry.

15 Q. I'm trying to get a record.

16 A. Yes. Correct.

17 Q. I'm an old appellate dog. I can't help it. I
18 always think about how records read. Okay. And she had
19 not only given a statement to the police, but didn't even
20 want to challenge it at trial because she said, I told
21 the truth. It's still the truth. I'm not challenging
22 that statement, right?

23 A. Correct.

24 Q. Marquita Smith is a fairly bright, articulate young
25 woman, isn't she?

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1 A. She is.

2 Q. Why were you so afraid of Scarlet Wilson getting a
3 hold of her?

4 A. Well, my concern was -- my concern is the co-
5 defendants and -- if they got into her knowledge. One of
6 them had, I think, two murders pending at that time. And
7 my concern was if there was knowledge that these guys
8 were going out to do something, we could create it where
9 it might be more foreseeable that somebody could get
10 killed or that they might have guns. I believe is the
11 one, Manning was a, you know, bad dude, and so my
12 concern was I didn't know what all they'd be able to
13 elicit from her as far as what she knew about them at
14 all.

15 Q. Well, the State had not introduced anything about
16 the records or -- well, except briefly the record on
17 Kerry Hollins, but the State had not gotten into any
18 pending charges with regard to any of the others; had
19 they?

20 A. I don't recall at that time. I don't know. If the
21 record says, no, they didn't, it would be no.

22 Q. And there was no foundation for believing that
23 Marquita Smith even knew anybody but Kerry Hollins, isn't
24 that correct?

25 A. I believe that part of the -- I believe that she had

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1 spoken to Manning. At one time, Kerry had given her the
2 phone -- given Manning the phone and she'd spoken with
3 Manning. So ---

4 Q. And pardon me, perhaps I worded the question poorly.
5 I recognize there's case law that at some point -- I
6 mean, pardon me -- there's testimony that at some point
7 Kerry Hollins handed the phone over to Marquita Smith and
8 she spoke to him. But there was no evidence introduced
9 at trial that Marquita Smith personally knew any of these
10 three other guys -- two other guys, excuse me?

11 A. I guess. I don't remember. I don't think there
12 was. I guess if the record doesn't reflect any, it would
13 be no.

14 Q. So you didn't have any foundation for believing that
15 she knew about any of this other stuff, did you?

16 A. (No verbal response.)

17 Q. You knew about it. I'm not asking whether you knew
18 about it. I'm asking, you didn't have any foundation for
19 her knowing about it at the time of these offenses?

20 A. And I'm -- I think that -- I don't remember what she
21 knew about them.

22 Q. Okay.

23 A. I just don't, I just don't recall offhand.

24 Q. And believe me, I understand. This is a pretty
25 common problem with us Defense attorneys. You would have

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1 found out in the course of discovery what the records of
2 these other people were, correct?

3 A. Correct.

4 Q. And a typical rap sheet would include arrests and
5 pending charges in addition to any old convictions and
6 sentences. So you knew about this stuff. But my
7 question was in reference to what you knew your client
8 knew. I don't have any further questions. If you would
9 please answer those put to you by the State, I appreciate
10 it.

11 A. Sure.

12 THE COURT: Okay. Mr. Friedman.

13 MR. FRIEDMAN: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. FRIEDMAN:

16 Q. Mr. Jones, how long have you been practicing law?

17 A. Since 2001.

18 Q. How much of your practice is in criminal law?

19 A. Probably seventy percent.

20 Q. Were you appointed or retained in this case?

21 A. I was retained.

22 Q. Do you recall about how many times you met with the
23 applicant?

24 A. I don't, but a pretty good bit over the course of
25 whatever that was, a year or so, or however long it was.

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1 Q. Do you think you had adequate time to meet with her
2 prior to trial?

3 A. I do. I mean, I think I do. I mean, I would have
4 liked to have had more time in light of the new witness,
5 Kerry Hollins, coming in to testify and kind of getting
6 his statement at the last minute and the last minute
7 notice. I think that time would have been beneficial.

8 Q. And I believe you testified you found about three or
9 four days prior to the trial about Kerry's statement?

10 A. I believe it was. And I'm refreshing this by going
11 back from the transcript and the argument that I made
12 there, but I believe it was -- I found out about that on
13 that -- it looks like that Friday beforehand.

14 Q. Was that part of the basis for your motion for
15 continuance and motion for severance?

16 A. I believe it was. I have not looked back at those,
17 but I'm sure for the continuance I believe that it was
18 part of it.

19 Q. During your meetings with Ms. Smith, did you discuss
20 the elements of the charges that the State was required
21 to prove?

22 A. We did.

23 Q. Did you discuss potential defenses with her?

24 A. We did.

25 Q. When Ms. Shurling asked you about the phrase lick,

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1 continually came up during the trial, I believe your
2 testimony was that you did not object because that was in
3 Mr. Hollins' statement. Is that correct?

4 A. Well, no, I didn't object because that was his --
5 they asked him, what did lick mean and that was -- I
6 didn't object because that was his definition of it and
7 then -- so I think that's -- I'm assuming that's why I
8 didn't at that time. Like I say, I don't recall at hat
9 time.

10 Q. In your opinion, did it matter whether lick mean
11 robbery or armed robbery?

12 A. At least at that time, I'm not sure that I thought
13 it did and maybe it did, but at least at that time -- I'm
14 not sure if I thought it mattered, if that answers your
15 question. I just don't remember exactly what I thought
16 at that time in reference to it.

17 Q. And you testified that you tried to break the chain
18 of foreseeability. Is that right?

19 A. I mean, that was what -- that was what our strategy
20 was. We was hoping to, you know, the acts were so much
21 beyond what Marquita had ever even thought would happen
22 or intended. I mean, they were just that -- what I hoped
23 was that we could convince the Judge that she would never
24 have done this had she foreseen that to happen.

25 Q. Do you remember if you argued in your closing

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1 statement that she did not know there would be guns
2 present?

3 A. No, I don't. I don't remember. I don't remember if
4 I ---

5 MS. SHURLING: I apologize. Could you repeat
6 that? I couldn't hear it.

7 MR. FRIEDMAN: I asked if he remembered in his
8 closing statement he argued that she did not know there
9 were going to be any guns present in the robbery.

10 MS. SHURLING: Thank you.

11 Q. How about in your closing, do you remember if you
12 argued that she was afraid of Mr. Hollins?

13 A. I don't remember.

14 Q. I refer you attention to page 653.

15 THE COURT: What page, counsel?

16 MR. FRIEDMAN: 653.

17 Q. Does that look like the beginning of your closing
18 argument, starting at line 18?

19 A. 653, 18. I see it, but I just don't see where I
20 said that. But I know that was in her statement, so I
21 probably would have.

22 MR. FRIEDMAN: I beg the Court's indulgence.

23 THE COURT: Yes, sir.

24 A. No, I don't, I don't see it, but I do remember it
25 was in her statement.

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1 Q. Do you remember if you brought up that she had been
2 manipulated by Kerry Hollins? If I can get you to page
3 664, line 12?

4 A. I do. I do. I see that in there and I think --
5 well, actually, line 12, I think I'm referencing actually
6 the State was manipulated by Kerry.

7 Q. Okay. Did you ever consider putting up any
8 testimony that she was afraid of Kerry Hollins?

9 A. We did talk about that.

10 Q. And what was your strategy behind not doing that?

11 A. Well, in trying to break the chain of
12 foreseeability, my concern was if we put up that some
13 abusive things that may have occurred in the
14 relationship, she may not be able to argue that she
15 couldn't have foreseen these events happening. So if I'm
16 not mistaken -- I'm going off my memory -- Kerry, I
17 think, had a very limited record at that time with
18 limited violence and so I think -- I decided that --
19 well, we thought the better tact may be to say that she
20 could not have believed that he could have -- that they
21 would have carried out the kind of acts that actually
22 occurred, which is what I believe. I don't believe she
23 thought that they would have done what ultimately
24 happened.

25 Q. Was there any indication that Kerry was threatening

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1 her to give him the name of someone to rob?

2 A. I don't -- I didn't see any indication he threatened
3 her to give up a name.

4 Q. Was there evidence that Ms. Smith tried to plan this
5 robbery over the course of several days?

6 A. There was evidence that the plan -- I believe there
7 was evidence that, over, I think, the three days it was
8 discussed. I don't know that I would say she was trying
9 to plan it over three days. I know that there was
10 evidence that -- there was talk about it. But I don't
11 know that she was trying to plan it over three days.

12 Q. Do you think she had an opportunity to call this
13 off?

14 A. There may have been opportunities to back out at
15 some point, but, I mean, there possibly could have been
16 opportunities to back out at some point.

17 Q. Did anyone other than Ms. Smith know where the
18 victim was located?

19 A. On that night, not ---

20 MS. SHURLING: Objection. I believe that calls
21 for conjecture.

22 THE COURT: Sustained.

23 Q. How did Mr. Hollins know where the victim was going
24 to be?

25 A. On that night it was by calls, if I remember right,

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1 by Marquita.

2 Q. Do you recall if Ms. Smith was related to the
3 victim?

4 A. Say that again?

5 Q. Do you recall if Ms. Smith was related to the
6 victim?

7 A. I believe she was a cousin, I think.

8 Q. Were there any plea offers in the case?

9 A. There was a plea offer. I believe of -- it is
10 reflected somewhere in the record. I remember reading
11 that. I believe the offer was to accessory before the
12 fact of armed robbery, two to thirty.

13 Q. Did you communicate that offer to her?

14 A. I did.

15 Q. Who's decision was it to reject it?

16 A. I think it was Marquita's.

17 Q. Ms. Shurling asked you why you didn't ask for a jury
18 charge on accessory before the fact on strong arm
19 robbery. Was anyone in this case charged with strong arm
20 robbery?

21 A. They were not.

22 Q. Did you think you had any basis to request that
23 charge?

24 A. I thought based on what Marquita knew about the
25 plan, I think that would -- I thought that that would

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1 have been the appropriate charge. I did argue for it and
2 I should have asked for exceptions for the fact to it,
3 but I thought strong arm robbery, I think based on what I
4 thought that she actually knew, I thought that I had a
5 good argument for them having that charge, giving that
6 charge.

7 Q. I believe you testified that you didn't exactly know
8 what Mr. Hollins would say on the stand. Is that
9 correct?

10 A. Correct.

11 Q. Is that why you didn't ask him if Ms. Smith knew
12 that there would be guns involved?

13 A. Yeah. That was why I was scared. If he say, yeah,
14 she did or something, we would be stuck with that.

15 Q. Let me turn your attention to page 559 and 560.
16 Does that look like your directed verdict motion?

17 A. It does.

18 Q. On page 560, line 10, does that look like you argued
19 that Ms. Smith was too far removed from the
20 circumstances?

21 A. It looks like I did.

22 Q. And above that, does it look like you argued that
23 there's no evidence that it was a probable and natural
24 consequence regarding with her?

25 A. It looks like I did.

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1 Q. And you testified earlier that you had researched
2 the law of accessory before the fact?

3 A. I did some and I don't recall the extent of it, but,
4 yes.

5 Q. Was there any evidence that the co-defendants took
6 the bracelet and the ring from the victim at Tiwana's
7 house?

8 A. I don't recall any evidence that that occurred
9 there.

10 Q. And was Tiwana's house the only time that Ms. Smith
11 was present?

12 A. I believe so, at the apartment complex.

13 Q. Well, is it correct that your testimony was that
14 your belief was that she could only be charged as a
15 principal in the burglary and the kidnaping?

16 A. If I'm -- and I'm going back off of my recollection,
17 I believe that that was my thought was that because she
18 was present there, she could have been charged as a
19 principal for those two.

20 Q. And was she charged as an accessory before the fact
21 for burglary or kidnaping?

22 A. You know, I don't remember. I don't remember. I
23 don't remember.

24 Q. Did you advise Ms. Smith of her right to testify?

25 A. I'm sure I did. I mean, I don't remember the exact

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1 time, but I'm sure I did.

2 Q. Whose decision would that have been for her to
3 testify?

4 A. I mean, probably it would have been mine. I mean, I
5 may have asked her, but I'm not sure that -- but, it was
6 probably my recommendation that she not. And I don't
7 remember the exact discussion but ...

8 Q. Did she ever indicate that she did want to testify?

9 A. I don't recall.

10 MR. FRIEDMAN: I beg the Court's indulgence.

11 THE COURT: Yes, sir.

12 Q. Do you remember if there was an offer, a plea offer
13 for ten years if she would agree to testify against Kerry
14 Hollins?

15 A. I know that morning we talked about a number of
16 things. I don't recall -- I mean, I saw from the record.
17 I know that there was an offer made and -- but for some
18 reason I think there was something, some indication --
19 but I don't have that in writing. It was not part of the
20 record because when I looked back through the record, it
21 looked like two to thirty was the offer, but I feel like
22 it was some discussion, but I just don't recall exactly.
23 I feel like there was some discussion about possibly ten
24 years if she did testify against him, but I don't have
25 any notes to that effect and so I -- but looking through

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1 the record, I see that there was, looks like two to
2 thirty offer.

3 Q. Do you recall if you discussed her statement with
4 her prior to trial?

5 A. I'm sure we discussed it probably numerous times.

6 MR. FRIEDMAN: I have nothing further.

7 MS. SHURLING: Briefly.

8 REDIRECT EXAMINATION

9 BY MS. SHURLING:

10 Q. Mr. Jones, if your request for a jury charge on
11 strong arm robbery had been granted, then the jury would
12 have heard a request on the strong arm that they could
13 have applied across the board, correct?

14 A. You mean to everybody? I'm sorry, I ---

15 Q. You requested a charge on strong arm robbery without
16 any specification that it be a charge relating only to
17 Marquita Smith?

18 A. I guess I did. I mean, I was clearly thinking in
19 terms of for Marquita and I think -- you mean it would
20 apply to everybody, the co-defendants also?

21 Q. Well, unless you specifically asked for a charge
22 that would include language that would say that that
23 verdict option was available only with reference to
24 Marquita Smith, if you ask just generally for a jury
25 charge on strong armed robbery, then it would be one the

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1 jury would hear and arguably could apply to the rest of
2 the co-defendants, couldn't they?

3 A. I guess it could and I don't know exactly how I
4 asked for it, but I think I would have -- I don't know
5 because there were actually guns involved with the
6 others. I don't know that it would have been applicable
7 to them so I may not -- I'm not sure how I expressed it,
8 but I would have intended it and maybe I didn't express
9 it that way, but I would have intended it to be
10 applicable only to Marquita.

11 Q. And I'm being a little bit unfair. Doesn't this
12 highlight the problem with having an accessory before the
13 fact tried with two co-defendants, the way this case was
14 tried?

15 A. It does.

16 Q. For example, whether or not Marquita Smith would be
17 entitled to a jury charge on accessory before the fact of
18 strong arm robbery, would be based on what, her
19 knowledge, correct?

20 A. Correct.

21 Q. Whether or not she had knowledge aforethought that
22 it was going to be an armed robbery or whether it being
23 an armed robbery was a readily foreseeable thing,
24 correct?

25 A. Correct.

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1 Q. Okay. And yet we see Judge Jefferson quite
2 appropriately observing on the record that there's plenty
3 of evidence guns were involved in this, and that there's
4 no evidence from which the jury could conclude that no
5 guns were involved and, therefore, that this was only a
6 strong arm robbery. Recall that?

7 A. I remember we had -- if the record reflects it, that
8 is accurate.

9 Q. I'm sure Judge Jefferson was a little more
10 articulate than me, but that's the gist of the charge
11 conference. So the attention at the time of the charge
12 conference was on what the evidence was concerning what
13 kind of crime this turned out to be, not whether or not
14 your client knew what kind of crime it was going to be.
15 Is that fair to say?

16 A. I would say that's probably the way it ended up.

17 Q. Okay. And isn't that, in fairness, kind of the
18 problem with this whole trial?

19 A. I agree. The severance I think -- I think the
20 severance would have been, hopefully, beneficial.

21 Q. Thank you.

22 MS. SHURLING: No further questions.

23 MR. FRIEDMAN: No other questions, Your Honor.

24 THE COURT: You may step down. Thank you.

25 MS. SHURLING: Your Honor, at this time, I

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1 would call Kerry Hollins.

2 THE COURT: Just for planning purposes, how
3 many more witnesses do you have?

4 MS. SHURLING: This gentleman and my client and
5 I would think that I could certainly be finished by five.

6 THE COURT: And do you have additional
7 witnesses?

8 MR. FRIEDMAN: I have no witnesses.

9 THE COURT: Mr. Mattson has waited patiently
10 and there's absolutely no way we're going to be able to
11 get to his case. Can we work it in tomorrow?

12 (WHEREUPON, off record discussions were held.)

13 THE COURT: We'll be at ease. Seven minutes.
14 Thank you.

15 THE CLERK: Do you swear the testimony you
16 shall give this court will be the truth, so help you God?

17 WITNESS: Yeah.

18 THE CLERK: State your full name for the
19 record, sir, and spell your last name.

20 WITNESS: Kerry Laniel Hollins, H-o-l-l-i-n-s.

21 KERRY HOLLINS,

22 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

23 THE COURT: Are you ready?

24 MS. SHURLING: Thank you.

25 DIRECT EXAMINATION

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1 BY MS. SHURLING:

2 Q. Mr. Hollins, sometime in the last few weeks, did I
3 come visit you at your correctional institution?

4 A. Yes, ma'am.

5 Q. Where are you being housed?

6 A. Lieber.

7 Q. Lieber?

8 A. Yes, ma'am.

9 Q. Down here near Charleston, up the road in
10 Ridgeville?

11 A. Yes, ma'am.

12 Q. Okay. Now, let's get some housekeeping matters out
13 of the way. When I came to see you, did I ask you
14 whether or not you were currently represented by an
15 attorney?

16 A. Yes, ma'am.

17 Q. And you advised me that you were not. Is that
18 correct?

19 A. Yes, ma'am.

20 Q. I also asked you if you had any pending appeals and
21 you indicate that you did not, correct?

22 A. Correct.

23 Q. Okay. Did I make it clear to you that I represented
24 Marquita Smith and that I was not your lawyer and it was
25 not my job to look after your best interests?

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1 A. Yes, ma'am.

2 Q. Okay. Did I also tell you that you were under
3 absolutely no legal obligation whatsoever to talk to me
4 if you didn't want to. That if you told me to go away,
5 I'd go away?

6 A. Yes, ma'am.

7 Q. Okay. And we subsequently had a brief conversation
8 about the case for which you're currently incarcerated
9 and the case that landed Marquita Smith in prison, as
10 well, correct?

11 A. Yes, ma'am.

12 Q. Did I get a chance earlier today to visit with you
13 again, briefly, in the attorney conference room here at
14 the Courthouse?

15 A. Yes, ma'am.

16 Q. All right. Prior to -- well, let's back up for a
17 second. At Marquita's trial you testified for the State.
18 They called you as a witness, correct?

19 A. Correct.

20 Q. Prior to that trial, if Marquita Smith's attorney
21 had asked to interview to you, to speak with you about
22 the upcoming trial and what your testimony was going to
23 be, would you have agreed to talk to him?

24 A. Yes, ma'am.

25 Q. If your lawyer had told you that Marquita's lawyer

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1 wanted to talk with you, and that he didn't necessarily
2 recommend that you do it, but it was your decision, what
3 would you have done?

4 A. I would have talked to him.

5 Q. Okay. At some point, and I'm not going to get into
6 whose idea was it first business. We're just going to
7 skip over that for the moment. But in all of the
8 discussion about robbing somebody, did Marquita ever know
9 that you and whoever you were going to be with, were
10 going to be using guns?

11 A. No, ma'am.

12 Q. Was she ever present when you had any conversations
13 with either of these other two co-defendants about being
14 armed or carrying guns?

15 A. No, ma'am.

16 Q. Did she tell you that she thought it'd be a good
17 idea for you to have a gun that day?

18 A. No, ma'am.

19 Q. Did she ever have a conversation with you about, you
20 better be armed because my cousin's known to carry a gun?

21 A. No, ma'am.

22 Q. Okay. Basically, did she tell you that this
23 individual dealt drugs a little bit?

24 A. Yes, ma'am.

25 Q. Did she tell you that he sometimes had either a

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1 little bit of reefer on him or some money from selling a

2 little bit of reefer?

3 A. Yes, ma'am.

4 Q. And there was never any discussion, was there, about

5 this person having thousands and thousands of dollars on

6 him at any point in time, was there?

7 A. No, ma'am.

8 Q. We're talking about a little bit of money?

9 A. Yes, ma'am.

10 Q. Would it be fair to say two thousand dollars or less

11 would be the ballpark of the kind of money that was being

12 talked about?

13 A. Ain't never been no amount established.

14 Q. Okay. But Marquita never told you that he carried

15 big amounts of money or large amounts of pot?

16 A. No. She ain't never say.

17 Q. Okay. Was there every any discussion with Marquita

18- concerning the fact that you were going to commit an

19 armed robbery of this person?

20 A. No, ma'am.

21 Q. So she didn't know guns were going to be involved

22 and you never discussed with her the fact that it would

23 be an armed robbery?

24 A. No, ma'am.

25 Q. Was there ever any discussion about the fact that if

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1 he didn't have the money or the pot on him that you'd
2 just grab him and take him for a ride to wherever the
3 money or the drugs were?

4 A. No, ma'am.

5 Q. So there was no discussion in advance about the fact
6 that if he didn't have the money or the drugs on him,
7 you'd just snatch him?

8 A. No, ma'am.

9 Q. Okay. And when she told you where Dexter was going
10 to be, she was telling you when he was going to be in an
11 open parking lot, wasn't she?

12 A. Not really.

13 Q. Pardon?

14 A. Not really.

15 Q. Well, I mean, she was telling you when he was going
16 to be at Tiwana's. I mean, she told you when he was
17 going to be leaving, when he was leaving. Isn't that
18 correct?

19 A. Correct.

20 Q. Okay. So she told you when he was going to be
21 leaving Tiwana's apartment?

22 A. Yes, ma'am.

23 Q. Okay. So was there ever any discussion with
24 Marquita or in Marquita's presence about the fact that
25 y'all might break in somewhere to get to this guy?

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1 A. No, ma'am.

2 Q. Okay. So let me get this real straight. Never any
3 discussion about using guns. Never any plan to commit an
4 armed robbery that she was a part of, no discussion about
5 breaking in an apartment or a trailer and no discussion,
6 most importantly, no discussion about killing him, was
7 there?

8 A. Correct.

9 Q. In Marquita's statement, she says that you assured
10 her that Dexter would not be hurt. Is that true?

11 A. Yes, ma'am.

12 Q. So you told Marquita not to worry, that nobody was
13 going to hurt Dexter?

14 A. Yes, ma'am.

15 Q. If Mr. Craig Jones had interviewed you before
16 Marquita's trial, and asked you the same questions I've
17 just asked you today, would you have answered him the
18 same way you've answered me?

19 A. Yes, ma'am.

20 Q. And if he had asked those questions of you under
21 oath when you were on the witness stand at her trial,
22 would you have answered them the same way you've answered
23 them here today?

24 A. Correct.

25 Q. Have I promised you anything in exchange for being

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1 here today?

2 A. No, ma'am.

3 Q. Have I hinted in any way that I would help you with
4 your case or try to get you transferred or anything ---

5 A. No, ma'am.

6 Q. --- to get you to be here today?

7 A. No, ma'am.

8 Q. Thank you.

9 MS. SHURLING: No further questions.

10 THE COURT: Mr. Friedman.

11 MR. FRIEDMAN: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. FRIEDMAN:

14 Q. Mr. Hollins, you testified that you're currently at
15 Lieber Correctional Institution. Is that correct?

16 A. Correct.

17 Q. Why are you there?

18 A. Why am I there?

19 Q. What are you there for?

20 A. I'm doing my time.

21 Q. What were you charged with? What were you convicted
22 of?

23 A. Manslaughter and armed robbery.

24 Q. Was that voluntary manslaughter?

25 A. Correct.

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1 Q. Was that in relation to the case that the applicant
2 was charged with?

3 A. Yes, sir.

4 Q. Did you go to trial or did you plead guilty?

5 A. Plea.

6 Q. How much time are you doing?

7 A. Eighteen years.

8 Q. And I believe you testified that -- you testified
9 for the State in her trial. Is that correct?

10 A. Yes, sir.

11 Q. Do you remember testifying that Marquita was the one
12 who planned this robbery?

13 A. Yes, sir.

14 Q. Do you remember testifying that Marquita told you
15 where Dexter would be?

16 A. Yes, sir.

17 Q. Do you remember testifying that you didn't want to
18 be an active participant, but Marquita influenced you?

19 A. No.

20 Q. You don't recall that? Do you recall testifying
21 that you stayed in the car at Tiwana's house because
22 Marquita asked you to?

23 A. We went there but that was part of the plan.

24 Q. Did you stay in the car?

25 A. Yes, sir.

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1 Q. Why did you stay in the car?

2 A. 'Cause I ain't never got out. Everybody else did
3 they part.

4 Q. Did Marquita ask you to stay in the car?

5 A. No, sir.

6 Q. Do you remember testifying that Marquita told you
7 not to go in the house because if Tiwana saw you, Tiwana
8 would know that Marquita was involved with this?

9 A. Yes, sir.

10 Q. Do you remember testifying that after the victim was
11 kidnaped Marquita called you and told you to leave?

12 A. Yes, sir.

13 Q. Do you remember testifying that Marquita told you to
14 leave, that they got my cousin?

15 A. Yes, sir.

16 Q. Have you and Ms. Smith ever dated?

17 A. Yes, sir.

18 Q. Were you dating at the time of the incident?

19 A. Yes, sir.

20 Q. Were you dating at the time of her trial?

21 A. No, sir.

22 MR. FRIEDMAN: I have nothing further, Your
23 Honor.

24 REDIRECT EXAMINATION

25 BY MS. SHURLING:

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1 Q. You and Marquita were still talking a little bit
2 about the time this incident happened, weren't you?

3 A. Yes, ma'am, a little bit.

4 Q. But you'd actually broken up and you had another
5 girlfriend, didn't you?

6 A. Yes, ma'am.

7 Q. Okay. And Marquita did not know in advance of any
8 plan to kidnap Dexter, did she?

9 A. No, ma'am.

10 Q. And when she called you and said, get out of there,
11 that they'd grabbed her cousin, she wasn't saying
12 everything went according to plan, they've got him, now
13 you should leave, was she?

14 A. No, ma'am.

15 Q. Was she upset?

16 A. She was scared.

17 Q. She was scared and she was upset because they'd
18 grabbed her cousin and run off with him, right?

19 A. Yes, ma'am.

20 Q. Did she sound surprised?

21 A. Yes, ma'am, because she didn't know that was going
22 to take place.

23 Q. Okay. You're doing an eighteen year sentence for
24 voluntary manslaughter and armed robbery?

25 A. Yes, ma'am.

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- 1 Q. Who was Manny?
- 2 A. One of my home boys.
- 3 Q. But was he on trial with Marquita?
- 4 A. Yes, ma'am.
- 5 Q. What's his street name? His government name, I
- 6 mean?
- 7 A. Germain Hartwell.
- 8 Q. Hartwell. How much time did Hartwell get?
- 9 A. Thirty.
- 10 Q. Thirty years?
- 11 A. Yes, ma'am.
- 12 Q. And Hartwell is the one that the deceased said,
- 13 before he died, was the one that shot him, right?
- 14 A. Yes, ma'am.
- 15 Q. So the dying declaration of the deceased was that
- 16 Manny Hartwell had shot him twice, correct?
- 17 A. Correct.
- 18 Q. And he got thirty years. Do you know how much time
- 19 Marquita got?
- 20 A. Thirty.
- 21 Q. Okay. So the shooter got thirty and Marquita got
- 22 thirty and you got eighteen?
- 23 A. Yes, ma'am.
- 24 Q. You testified at your trial that you did not have a
- 25 deal at the time of your trial testimony, right?

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1 A. Correct.

2 Q. So you wouldn't have been afraid to tell the truth
3 when -- if the Defense attorney had asked you the same
4 kind of questions that I asked you, you wouldn't have
5 been afraid to tell the truth, would you?

6 A. No, ma'am.

7 Q. Didn't have a reason to be. You didn't have a deal
8 to blow, did you?

9 A. No, ma'am.

10 Q. Thank you.

11 MS. SHURLING: No further questions.

12 THE COURT: Mr. Friedman?

13 MR. FRIEDMAN: Nothing further, Your Honor.

14 THE COURT: You may step down. Thank you.

15 MS. SHURLING: Your Honor, I think at this time
16 I would call the applicant to the stand.

17 THE COURT: Please come forward and be sworn.

18 MS. SHURLING: Your Honor, could I ask that one
19 hand be uncuffed so that she can reference?

20 THE COURT: If it appears to be a problem with
21 her reference, we'll deal with it at that time.

22 MS. SHURLING: Thank you, Your Honor.

23 THE COURT: Do the very best you can, Ms.
24 Smith.

25 MS. SHURLING: Your Honor, he's back.

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1 (WHEREUPON, the Court stood at recess for a short
2 break.)

3 THE COURT: I apologize, Ms. Smith. We had
4 some procedural matters to take care of.

5 MS. SMITH: That's fine.

6 THE CLERK: Do you swear the testimony you will
7 give this Court shall be the truth, so help you God?

8 WITNESS: I do.

9 MARQUITA SMITH,
10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 THE COURT: Spell your name, please.

12 MS. SMITH: Marquita Smith, M-A-R-Q-U-I-T-A,
13 Smith.

14 THE COURT: Spell Smith.

15 MS. SMITH: Oh, I'm sorry. S-M-I-T-H.

16 THE COURT: Thank you. Ms. Shurling.

17 MS. SHURLING: Thank you.

18 DIRECT EXAMINATION

19 BY MS. SHURLING:

20 Q. Marquita, I've been calling you Marguerite a lot,
21 haven't I? I apologize. Marquita, prior to your trial,
22 did you have any discussions with your attorney about
23 whether or not you would testify at your trial?

24 A. Yes, ma'am.

25 Q. What did your attorney tell you about the pros and

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1 cons of testifying or not testifying?

2 A. He told me that if I had testified that he would
3 lose the last argument and that he advised me not to
4 testify because he didn't want the prosecutors to eat me
5 alive because they would confuse me.

6 Q. Okay. So he told you he thought they would eat you
7 alive, huh?

8 A. Yes, ma'am.

9 Q. How far did you go in school, Marquita?

10 A. I graduated.

11 Q. You graduated from high school. And at the time of
12 your trial, did you have any prior criminal record?

13 A. No, ma'am.

14 Q. Were you working prior to your trial?

15 A. Yes, ma'am.

16 Q. What kind of job had you had?

17 A. I was working at -- for Sprint. I was working for
18 financial, and I was also working at Bi-Lo.

19 Q. Okay. So you had a good employment history, had no
20 prior criminal record, you were a high school graduate,
21 right?

22 A. Yes, ma'am.

23 Q. Now, you'd given a statement to the police about
24 this case when you were questioned about the death of
25 Dexter, right?

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- 1 A. Yes, ma'am.
- 2 Q. Did you tell them the truth?
- 3 A. Yes, ma'am.
- 4 Q. When you were preparing for trial, did your trial
- 5 attorney discuss with you whether or not you wanted to
- 6 try to challenge that statement?
- 7 A. No, ma'am.
- 8 Q. But you never told him that this statement was
- 9 untrue or coerced or that anybody made you say it, did
- 10 you?
- 11 A. No, ma'am.
- 12 Q. You were willing to stand by that statement because
- 13 it was the truth?
- 14 A. Correct.
- 15 Q. Okay. Now, everybody's referred to the deceased in
- 16 this case, Dexter, as your cousin.
- 17 A. Yes, ma'am.
- 18 Q. Was he actually your blood cousin?
- 19 A. We weren't blood cousins, but we grew up together so
- 20 we kind of just said we was cousins.
- 21 Q. Okay. So it was one of those real close familial
- 22 seeming relationships, but you weren't actually first
- 23 cousins?
- 24 A. No, ma'am.
- 25 Q. Were you second or third cousins to your knowledge?

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1 I mean, were you actually related in some way or just
2 very old family friends?

3 A. It's kind of confusing. We weren't really blood
4 cousins but we -- I mean, all our lives that's what we
5 knew each other as, was cousins.

6 Q. Okay. Now, did you know that your cousin was
7 dabbling and selling marijuana?

8 A. Yes, ma'am.

9 Q. And when your former boyfriend wanted to commit a
10 robbery, did you offer up his name as somebody that might
11 have some money or pot on him?

12 A. Yes, ma'am.

13 Q. You're not proud of that, are you?

14 A. No, ma'am.

15 Q. Okay. When you did that, did you have any idea that
16 Dexter, the man you considered a cousin, would be harmed
17 physically?

18 A. No, ma'am.

19 Q. Would you ever have done it if you'd thought he
20 would be?

21 A. No, ma'am.

22 Q. In your statement you gave to the police, you said
23 that you were assured by Kerry Hollins that no harm would
24 come to Dexter. Was that true?

25 A. That's correct.

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- 1 Q. Okay. Did you know anything about these other
2 fellows being involved in it at the time you initially
3 suggested Dexter as somebody to rob?
- 4 A. No, ma'am.
- 5 Q. You later found out that Kerry was going to have
6 some people with him?
- 7 A. That's correct.
- 8 Q. Okay. There's been mention of the fact that in the
9 transcript, at some point it says that you talked to
10 Manny on a cell phone directly one day.
- 11 A. Yes, ma'am.
- 12 Q. Okay. Did you know who Manny was at the time?
- 13 A. I didn't know him, but I knew of him.
- 14 Q. Okay. Did you know him to be a friend and/or
15 acquaintance of your former boyfriend, Kerry Hollins?
- 16 A. Yes, ma'am.
- 17 Q. Did you know him by face?
- 18 A. Yes, ma'am.
- 19 Q. Did you know him by name?
- 20 A. Yes, ma'am.
- 21 Q. Government name?
- 22 A. Not government name, but by his nickname.
- 23 Q. Manny?
- 24 A. Yes, ma'am.
- 25 Q. Okay. Did you have any knowledge of him having a

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1 violent history?

2 A. I just knew that he sold drugs, that's all.

3 Q. Okay. But -- okay.

4 A. Not violent.

5 Q. I'll move on. Was there every any discussion
6 between you and Kerry or discussion in your presence of
7 the fact that this would be an armed robbery?

8 A. No, ma'am.

9 Q. Was there every any discussion of grabbing your
10 cousin and taking him somewhere?

11 A. No, ma'am.

12 Q. Was there ever any discussion of if you couldn't
13 catch him outside, you'd just break in wherever he was
14 and get him?

15 A. No, ma'am.

16 Q. If you'd known that these people were going to do
17 anything like that, would you have ever suggested him as
18 someone they might could steal a little money from?

19 A. No, ma'am. I wouldn't have suggested anyone, if I
20 knew they were going to do all that.

21 Q. Okay. Now, if after you gave the name -- even after
22 you provided Dexter's name to Kerry Hollins, if you had
23 subsequently found out that the scope of the plan he was
24 making with these other people included using weapons and
25 possibly violence, would you have called it off or called

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1 the law?

2 A. Yes, ma'am, I would have.

3 Q. Okay. Did you have any intention at trial -- if you
4 had testified, did you have any intention of saying that
5 any part of your statement was a lie?

6 A. No, ma'am.

7 Q. Bearing that in mind, did your trial attorney tell
8 you what exactly he thought they could eat you alive
9 over?

10 A. He just said that they were two strong-headed
11 prosecutors that just would confuse me and they would
12 have just ate me alive.

13 Q. All right. Well, let's talk about the other reason
14 he gave you. You say he told you that if he didn't
15 present any evidence, you'd get the closing argument --
16 he'd get to argue to the jury last?

17 A. Yes, ma'am.

18 Q. At some point in this trial, it became clear that
19 the Trial Judge did not think that the -- you and one of
20 your other co-defendants were going to get to make a last
21 argument because the other co-defendant had introduced a
22 piece of paper. Do you remember paying any attention to
23 that discussion?

24 A. Yes, ma'am.

25 Q. At the time the Judge had that discussion with your

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1 lawyer, did you understand what they were talking about?

2 Did you know what that meant?

3 A. No, ma'am.

4 Q. Did your lawyer at any point before the Judge

5 questioned you about whether or not you wanted to take

6 the stand, did your lawyer ever tell you, okay, remember

7 how I told you that if you -- if we didn't present any

8 evidence, we'd get the last argument, that's off the

9 table. That the Judge is saying that because this other

10 defendant introduced evidence, we all lose the last

11 argument, so that's not a consideration any more. Did he

12 explain that to you?

13 A. No, ma'am.

14 Q. Were you really afraid of testifying?

15 A. No, ma'am.

16 Q. Were -- I realize you were in a pretty bad place and

17 this was a terrible experience, but you weren't planning

18 on challenging your statement?

19 A. No, ma'am.

20 Q. You didn't have a problem telling the truth?

21 A. No, ma'am.

22 Q. So were you afraid? Were you personally afraid that

23 the Solicitors trying this case were going to be able to

24 shake you up and, you know, scare you, eat you alive, to

25 use your defense attorney's terms?

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1 A. No, ma'am, I wasn't.

2 Q. So what was the major reason that you decided not to
3 testify?

4 A. Because my lawyer had recommended me not to because
5 he said that we wouldn't get the last argument.

6 Q. If you did?

7 A. If I did.

8 Q. And before you explained -- before you informed the
9 Court that you were going to waive your right to present
10 testimony in your own defense, your lawyer had not
11 explained to you why you'd already lost that right,
12 whether you testified or not. Is that fair to say?

13 A. Yes, ma'am.

14 Q. Did your appellate lawyers ever discuss with you
15 what issues they were going to raise on appeal?

16 A. Yes, ma'am.

17 Q. And you heard me ask about three issues that they
18 did not brief this morning.

19 A. Correct.

20 Q. If you had been able to, would you have wanted to
21 ask them or make them brief those issues in addition to
22 the ones they did present?

23 A. Yes, ma'am.

24 Q. Okay. Let's talk about this lick business for a
25 second. What does a lick mean to you?

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- 1 A. A way to get money.
- 2 Q. A way to get money. In the south there's an
- 3 expression. Have you ever heard somebody say, somebody's
- 4 so lazy they won't hit a lick at a stick? My daddy used
- 5 to say that. I never new what it meant. But have you
- 6 ever heard that expression?
- 7 A. Uh-uh (negative), I don't think so.
- 8 Q. Okay. But a lick to you is just an idea of a way to
- 9 get money?
- 10 A. Yes, ma'am.
- 11 Q. Have you ever considered the term lick to
- 12 necessarily mean a robbery or an armed robbery?
- 13 A. No, ma'am. I mean, it could have meant robbery, but
- 14 I never thought about -- thought of it as an armed
- 15 robbery. I always use it as a way to get money.
- 16 Q. Okay. Well, could it also mean a good place to
- 17 break in and steal stereos?
- 18 A. Yes, ma'am.
- 19 Q. Could it be a good store to go shoplift in because
- 20 they've got loose security?
- 21 A. Yes, ma'am.
- 22 Q. Could it be that you -- somebody's figured out where
- 23 a drug dealer's stash is and it's hidden outside
- 24 somewhere where it's easy to get?
- 25 A. Yes, ma'am.

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1 Q. So in other words, it could mean just about anything
2 that you could do as a way to make a quick buck?

3 A. That's correct.

4 Q. So even if you did use the word lick, you certainly
5 -- well, no, I don't want to put words in -- did you ever
6 in any way mean armed robbery if you used the word lick?

7 A. No, ma'am.

8 Q. And, again, you have no prior criminal record?

9 A. Correct.

10 Q. And you were nineteen years old?

11 A. Yes, ma'am.

12 Q. If you'd had the opportunity to testify, would you
13 have wanted to tell the jury that?

14 A. Yes, ma'am.

15 Q. Now, there was some back and forth about -- I'm
16 going to start back where I said I wasn't going to begin
17 with. There was some back and forth about whose idea
18 this was?

19 A. Yes, ma'am.

20 Q. Okay. You said that originally Kerry Hollins called
21 you and wanted somebody to rob. Is that right?

22 A. He asked me where he could get a lick from.

23 Q. Okay. And you didn't, you didn't just offer up
24 Dexter right away, did you?

25 A. No, ma'am.

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1 Q. Did you call him back and suggest that, well, if
2 you're going to do it, this is somebody that could -- you
3 could do it with?

4 A. Yes, ma'am.

5 Q. Okay. So in a way, you were both right?

6 A. Yes, ma'am.

7 Q. Isn't that fair to say?

8 A. Yes, ma'am.

9 Q. I mean, he asked you first but then you volunteered
10 -- you called back and volunteered that name?

11 A. Yes, ma'am.

12 Q. Okay. And I guess an important question, was there
13 ever any discussion of you getting part of the proceeds
14 from the robbery?

15 A. No, ma'am.

16 Q. Did you ever get anything from the robbery?

17 A. No, ma'am.

18 Q. There's a discussion about Dexter having a ring and
19 a bracelet stolen from him the night of the robbery,
20 remember that?

21 A. Yes, ma'am, I remember that.

22 Q. You'd been out to dinner with him and Tiwana
23 immediately before he was grabbed, hadn't you?

24 A. Yes, ma'am.

25 Q. Did he have on, to the best of your recollection, a

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1 ring and a bracelet?

2 A. Not that I know of. I think it was just a necklace.

3 Q. Okay. Do you ever recall him wearing, on a regular
4 basis, a bracelet and a ring?

5 A. I mean, he wore all different kinds of jewelry, but
6 I never -- not specifically.

7 Q. So you don't know anything -- you have no first-hand
8 knowledge of a ring or a bracelet being stolen in this
9 case?

10 A. No, ma'am, not at all.

11 Q. Nobody gave it to you, in any event, did they?

12 A. No, ma'am.

13 Q. And most of the issues, Marquita, in your case are
14 what I call legal issues that the Judge is going to have
15 to take a look at the transcript and the testimony here
16 today to decide. But barring some pretty unusual
17 circumstances that just frankly are not likely to take
18 place in your case, this is your one bite at the apple.
19 This is your one PCR action. You've listened carefully
20 today. Have I, through my questioning of the various
21 witnesses, have I presented all of the issues that you
22 wanted me to raise?

23 A. Yes, ma'am.

24 Q. Are there any other complaints. Let me put it
25 simply. In a post-conviction relief case, when you say

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1 that your Sixth Amendment right to effective assistance
2 of counsel was violated, we have to show errors and
3 omissions, and that simply means what did your lawyer do
4 that he did wrong and what didn't he do that he should
5 have done, that might have made a difference in the
6 outcome of your case. Do you understand that?

7 A. Yes, ma'am.

8 Q. Can you think of anything along those lines that I
9 have neglected to bring to Her Honor's attention here
10 today?

11 A. No, ma'am.

12 Q. Okay. Will you please listen very carefully to the
13 questions that are put to you by Mr. Friedman, the lawyer
14 for the respondent, and answer them truthfully?

15 A. Yes, ma'am.

16 THE COURT: Mr. Friedman.

17 MR. FRIEDMAN: Thank you.

18 CROSS-EXAMINATION

19 BY MR. FRIEDMAN:

20 Q. Ms. Smith, did you ever tell your attorney that you
21 wanted to testify at trial?

22 A. We never discussed it. We never discussed it from -
23 - coming from me but from him.

24 Q. Okay. And I believe you testified that your
25 statement was true. Is that correct?

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- 1 A. Yes, sir.
- 2 Q. Was there anything in Mr. Hollins trial testimony
- 3 that was not true?
- 4 A. When he described the -- well, that was his
- 5 definition, but when he -- some things that he said that
- 6 I had knew about before that I didn't.
- 7 Q. And you also testified that you didn't know the
- 8 victim would be harmed in this case. Is that right?
- 9 A. That's correct.
- 10 Q. What was your expectation of what would happen?
- 11 A. That they were just going to snatch and grab some
- 12 jewelry and maybe some weed or something and that was it.
- 13 Q. You also testified that you didn't know that others
- 14 would be involved. Is that right?
- 15 A. Yes, sir.
- 16 Q. Did you think it would just be Kerry?
- 17 A. In the beginning, yeah. Before everything
- 18 happened, yes, sir.
- 19 Q. And you also testified that your definition of a
- 20 lick is just a way to get money?
- 21 A. That's correct.
- 22 Q. How would one go about getting the money?
- 23 A. How would they what? I'm sorry?
- 24 Q. You say it's a way to get money. How do you go
- 25 about getting money?

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1 A. I mean, there's different ways you can go about
2 getting money. You could -- somebody can give you a
3 blank check and they tell you to write it out for this
4 amount and you write it out for more or, I mean, it's
5 several different ways.

6 Q. And in this case, when you gave the name, you gave
7 the name of Dexter, was the plan to rob his house or to
8 rob him personally?

9 A. It was a plan just to snatch and grab some jewelry.

10 MR. FRIEDMAN: I have nothing further, Your
11 Honor.

12 THE COURT: Ms. Shurling.

13 REDIRECT EXAMINATION

14 BY MS. SHURLING:

15 Q. Just for point of clarification. When you initially
16 talked about someone to rob with Kerry Hollins, you
17 thought it was just going to be Kerry. Is that correct?

18 A. Yes, ma'am.

19 Q. But before the actual event, at some point, you
20 became aware that he was going to have a friend with him.
21 Is that correct?

22 A. Yes, ma'am.

23 Q. And who was that friend?

24 A. Manny.

25 Q. Okay. Did you know anything about the other co-