

VOLUME III OF III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

HENRY L. GRAY,

RECEIVED

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S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001127

APPENDIX

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1 look at it?

2 A Yeah.

3 Q You can read, right?

4 A (Affirmative nod).

5 Q Is that the statement you gave police back

6 on February 13th of 2010?

7 A (Affirmative nod).

8 Q I need you to say yes or no.

9 A Yes.

10 Q Is that in your handwriting?

11 A Yes.

12 Q And I want to direct you to page -- you

13 gave them that information that's filled out at

14 the top about where you live and all that?

15 A Uh-huh.

16 Q On that second page, that part that's

17 highlighted, what does it say?

18 A Yeah, she was about in her late twenties.

19 Q And how much did you think she weighed?

20 A She was about a hundred fifty, my size.

21 Q Thank you. Didn't you tell them that she

22 was also assaulting the gentleman on the ground?

23 A Well, that's the thing. I don't know if

24 she was actually helping the guy or she was with

25 the group of guys, the group of people, but she

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1 had something in her hand.

2 Q She had something in her hands?

3 A Yes.

4 Q All right.

5 MS. SAMSOM: No further questions,

6 Your Honor.

7 THE COURT: Redirect?

8 DIRECT EXAMINATION

9 BY MR. CHAPLIN:

10 Q When you called 9-1-1, you called them
11 because you saw something? Correct?

12 A That's the only reason.

13 Q The only reason?

14 A Yeah.

15 Q You would have no reason to call 9-1-1 and
16 make up something that you didn't see?

17 A No.

18 Q Correct?

19 A Correct.

20 Q You're here telling the truth today under
21 oath, correct?

22 A Yes.

23 MR. CHAPLIN: Thank you very much.

24 MR. FARLEY: No questions.

25 THE COURT: Anything further?

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1 MS. SAMPSON: Nothing further.

2 THE COURT: All right. You may come
3 down, ma'am. Thank you very much. You're free
4 to go.

5 (WITNESS STEPS DOWN)

6 THE COURT: Without objection?

7 MR. FARLEY: Without objection.

8 MS. SAMPSON: Without objection.

9 THE COURT: You're free to go. Next
10 witness.

11 MR. CHAPLIN: Your Honor, at this time
12 the defense for Henry Gray rests.

13 THE COURT: All right.

14 THE COURT: Any reply or rebuttal?

15 MS. CAMPBELL: Yes, Your Honor.
16 Your Honor, may we approach for just a second.

17 THE COURT: Sure.

18 (OFF RECORD BENCH CONFERENCE)

19 MR. FARLEY: Your Honor, at this
20 time the defense for Ms. Robin Reese would like
21 to rest.

22 THE COURT: All right.

23 MR. FARLEY: We would like to make a
24 motion to renew ---

25 THE COURT: We'll do that in just a

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1 minute. All right. Ladies and gentlemen, that
2 concludes the defense of both defendants in this
3 case. Now, at this point in the trial, the
4 State has the opportunity if they so choose to
5 call a rebuttal witness, any witness where
6 something was presented to you they feel needs
7 rebuttal as far as the record is concerned.
8 They have that opportunity.

9 Counsel has indicated to me that they will
10 call a rebuttal witness or at least one and they
11 were not anticipating we would be this far along
12 at this moment, so they need a few minutes just
13 to get their witnesses in order and so rather
14 than have you just sit here, I'm going to let
15 you retire to the jury room for a few minutes
16 and just relax. when they're ready to continue
17 we will do so. We're going to finish this case
18 today now. Just there's a lot left to come, but
19 we'll get done today. So just relax for a few
20 minutes and we'll call you when we're ready.

21 (JURY OUT @ 9:34 A.M.)

22 THE COURT: Ms. Campbell, do you need a
23 break?

24 MS. CAMPBELL: Just five minutes.

25 THE COURT: This will be a good time

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1 when you're ready to view jury charges.

2 MS. CAMPBELL: We can do that now.

3 MS. SAMPSON: We can do that now.

4 THE COURT: I thought you had to step
5 out.

6 MS. CAMPBELL: I can get them to step
7 out to get out people.

8 THE COURT: All right. Well, let me
9 look over your proposed charges and I'll be
10 ready in just a few minutes.

11 MS. CAMPBELL: Okay, Judge. We'll
12 be back in ten minutes.

13 (BRIEF RECESS)

14 (DEFENDANTS PRESENT)

15 THE COURT: State ready?

16 MS. CAMPBELL: Yes, sir.

17 THE COURT: All right. Let's go
18 ahead and do that.

19 MS. CAMPBELL: Okay.

20 THE COURT: Bring the jury, please.

21 (JURY IN @ 10:16 a.m.)

22 BAILIFF: Jury is present, Your
23 Honor.

24 THE COURT: Solicitor.

25 MS. CAMPBELL: May it please the Court.

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1 The State calls Dr. Clay Nichols.

2 (WITNESS TAKES STAND)

3 CLAY NICHOLS, being duly sworn to tell
4 the truth, the whole truth and nothing but the
5 truth, testified, as follows:

6 DIRECT EXAMINATION

7 BY MS. CAMPBELL:

8 Q Dr. Nichols, where are you employed?

9 A I am the deputy chief medical examiner for
10 the State of North Carolina.

11 Q How long have you been employed in that
12 capacity.

13 A About one year.

14 Q Prior to that where did you work?

15 A I worked here in Richland County where I
16 was the chief medical examiner for Richland
17 County.

18 Q Back in February of 2010, what were your
19 duties?

20 A I was the chief medical examiner.

21 Q For Richland County?

22 A Yes.

23 Q At that point was Dr. Bradley Marcus one
24 of the people employed within your group?

25 A Yes.

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1 Q And he assisted in autopsies and things of
2 that nature?

3 A Yes.

4 Q Can you tell this jury a little about your
5 education and training in the field of forensic
6 pathologist?

7 A I received my B.S. from the University of
8 the Oklahoma in 1981, I received my M.D. degree
9 also from Oklahoma in 1985.

10 After that I entered a residency program in
11 both anatomic and forensic pathology at MUSC,
12 completing that in 1999.

13 For the next ten years, I was on the
14 faculty as assistant professor and associate
15 professor where I taught Pathology to residents,
16 medical student, Fellows, dental students,
17 pharmacy students.

18 After that I entered private practice here
19 in the Columbia area, where I was the chief
20 medical examiner for ten years.

21 Following that I'm the deputy chief medical
22 examiner for the State of North Carolina.

23 I'm board-certified in both anatomic and
24 forensics pathologist and hold unrestricted
25 licenses to practice medicine and surgery in

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1 both North Carolina and South Carolina.

2 Q Have you been qualified before as an expert
3 in the field of forensics pathologist.

4 A Yes.

5 Q Approximately how many times have you been
6 qualified?

7 A Hundreds.

8 MS: CAMPBELL: Your Honor, at this time
9 we'd offer him as an expert in forensics
10 pathologist.

11 THE COURT: Any *voir dire* or
12 objection?

13 MR. FARLEY: No objection, Your Honor.

14 MR. CHAPLIN: No objection, Your Honor.

15 DIRECT EXAMINATION CONTINUED

16 BY MS. CAMPBELL:

17 Q Doctor, I want to turn your attention back
18 to mid to late February 2010. Were you aware
19 that Dr. Marcus had performed an autopsy on a
20 young man named Kenneth Mack?

21 A Yes, ma'am, I was.

22 Q Were you asked, actually at the time, to
23 review his findings as far as cause of death and
24 things of that nature?

25 A Yes, I was.

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1 Q And specifically and I'll be brief since
2 this is reply testimony. Did you review his
3 work in that case?

4 A Yes, I did.

5 Q Was it done correctly?

6 A Yes.

7 Q As a result of that, was a cause of death
8 determined?

9 A Yes, it was.

10 Q Were you also given a history of what had
11 happened or what may have happened prior to the
12 young man being declared brain dead in the
13 hospital?

14 A Yes, I was.

15 Q Is that important as far as your field is
16 concerned?

17 A Sometimes it's very important. Sometimes
18 it's not. In this particular case it was, due
19 to the nature of two assaults within a short
20 period of time.

21 Q Were you aware that after the second
22 assault he was never conscious again and was
23 posturing by the time EMS got there?

24 A That's correct.

25 Q Based on your review of the autopsy --

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1 which was done correctly in this case; is that
2 right?

3 A Yes.

4 Q And your review of the history, were you
5 able to make any determinations as far as which
6 assault either contributed solely or was a
7 contributing factor to his death?

8 A The timeline and injuries indicate that it
9 would have been a second assault where the
10 deceased fell and hit the concrete, resulting in
11 closed head injury.

12 The first assault, the evidence isn't there
13 for a head injury.

14 The second assault, there is real good
15 evidence for a head injury.

16 Q And you discussed these with, I believe,
17 the coroner's office as well police officers in
18 this case?

19 A Yes.

20 Q And you've also had an opportunity prior to
21 testifying here today to review those findings
22 again?

23 A Yes.

24 Q And those are still your findings?

25 A Yes, they are.

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1 Q But for the second assault, he would not be
2 dead?

3 A That's correct.

4 MS. CAMPBELL: That's all that I have.

5 THE COURT: Cross-examination?

6 CROSS EXAMINATION

7 BY MR. FARLEY:

8 Q Dr. Nichols, again the 00 you're here to
9 testify to the blunt force trauma that was
10 suffered by Mr. Mack?

11 A I'm here to answer questions. The cause of
12 death in Mr. Mack is the blunt head trauma, yes.

13 Q But again, you're not here to propose how
14 that happened necessarily or who may have been
15 involved ---

16 A Not who was involved.

17 Q --- nor have any information in that
18 regard?

19 A Not as far as who was involved, how it
20 happened. Once again, the injury where he fell
21 and kinda struck his head on the concrete. I
22 think would itself have been a fatal injury.

23 MR. FARLEY: Please answer any
24 questions Mr. Chaplin has.

25 CROSS EXAMINATION

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1 BY MR. CHAPLIN:

2 Q So Dr. Nichols, your analysis is based on
3 the fact that he hit his head on the concrete;
4 correct?

5 A Yes.

6 Q Thank you very much. No further questions?

7 THE COURT: Redirect?

8 REDIRECT EXAMINATION

9 BY MS. CAMPBELL:

10 Q That would be concrete or a hard surface
11 commensurate with concrete?

12 A Yes.

13 MS. CAMPBELL: That's all I have.

14 MR. FARLEY: I don't have anything
15 further.

16 THE COURT: Anything further?

17 MR. CHAPLIN: I'm fine. Thank you.

18 THE COURT: All right. Thank you
19 very much, Doctor.

20 MS. CAMPBELL: Thank you. May he be
21 excused?

22 THE COURT: Yes, ma'am. Be excused.

23 MS. CAMPBELL: Thank you. Have a good
24 day.

25 THE COURT: Yes, sir.

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1 WITNESS: Thank you.

2 (WITNESS STEPS DOWN)

3 MS. SIMPSON: The State calls
4 Quintus Young.

5 (WITNESS TAKES STAND)

6 QUINTAS YOUNG, being duly sworn to tell
7 the truth, the whole truth and nothing but the
8 truth, testified, as follows:

9 DIRECT EXAMINATION

10 BY MS. SIMPSON:

11 Q Mr. Young, where do you work?

12 A I am employed with the State Law
13 Enforcement Division, commonly known as SLED.

14 Q How long have you been with SLED?

15 A Five years, this month.

16 Q What exactly do you do at SLED?

17 A As a toxicologist, we're responsible for
18 the analyses of biological specimens: blood,
19 urine, tissue -- to detect the absence or
20 presence of drugs, alcohol and poisons and to
21 interpret those findings for courts of law,
22 coroners and pathologists.

23 Q So you're a toxicologist?

24 A Yes.

25 Q Can you tell us a little bit about your

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1 educational background training and background?

2 A Yes, I received my bachelors from the
3 University of South Carolina in Chemistry.

4 Once I was hired on at SLED in 2007, I
5 completed the alcohol and drug portions of
6 training.

7 Q All right.

8 MS. SIMPSON: Your Honor, at this
9 time, I would seek to qualify Mr. Young as an
10 expert in toxicology.

11 THE COURT: Any voir dire or objection?

12 MR. FARLEY: No voir dire or objection,
13 Your Honor.

14 MR. CHAPLIN: Voir dire, Your Honor..

15 THE COURT: Yes, sir.

16 VOIR DIRE EXAMINATION

17 BY MR. CHAPLIN:

18 Q. Please -- I'm sorry, state your last name
19 again. Is it Young?

20 A. (Affirmative nod), Young.

21 Q. You said you majored in Chemistry?

22 A. Yes.

23 Q. And where did you go to school?

24 A. University of South Carolina.

25 Q. Did you take organic chemistry?

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1 A. I did.

2 Q. What is organic chemistry?

3 A. It's related to carbon molecules.

4 Q. Did you take inorganic?

5 A. I don't think I did.

6 Q. You have a Bachelor of Arts or a Bachelor
7 of Science in Chemistry?

8 A. Bachelor of Science.

9 Q. Did you take German?

10 A. No.

11 Q. Did you take quantitative analysis

12 A. I did.

13 Q. Now, after college, to prepare for this
14 job, did you take any additional training?

15 A. No, once I began, I had in-house training
16 at SLED.

17 Q. So in-house training?

18 A. Right.

19 Q. After a degree from Carolina?

20 A. Correct.

21 Q. How long have you been ---

22 A. Five years.

23 MR. CHAPLIN: Okay. No objection.

24 Thank you.

25 THE COURT: All right, sir. You may

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1 continue.

2 DIRECT EXAMINATION CONTINUED

3 BY MS. SIMPSON:

4 Q And Mr. Young, have you been qualified as
5 an expert before?

6 A Yes.

7 Q Did you receive some blood samples in this
8 case?

9 A I did.

10 Q And whose blood specimens did you receive?

11 A Kenneth Mack.

12 Q All right. Did it come to you through
13 SLED's evidence?

14 A Intake, (affirmative nod).

15 Q Okay. Which I guess utilizes the standard
16 procedures and protocols to protect the
17 integrity of the specimen?

18 A Correct.

19 Q What exactly do you test for?

20 A We test for volatiles, which would be
21 ethanols -- drinking alcohol -- and any drugs.

22 Q I see.

23 A Any prescriptions or ---

24 Q Can you describe for the jury kind of the
25 process that you used?

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1 A Okay. Once a sample is admitted, we first
2 test for volatiles. In this case it was
3 negative for alcohol. From there we go to a
4 drug screen which is a panel of your common
5 drugs: cocaine, marijuana, amphetamine,
6 methamphetamine, and from there if it screens
7 for anything positive it would go to a
8 confirmation second test just to make sure that
9 what is there is really there.

10 Q Okay. The second test you said is used to
11 confirm?

12 A Right.

13 Q Did you make any findings, in this case?

14 A I did.

15 Q Can you tell the jury about those?

16 A In this case like I stated, it was a
17 negative blood alcohol. On the drug screen it
18 screened positive for benzodiazepines and
19 tetrahydrocannabinols; which we found later to be
20 Lorazepam and a metabolite of marijuana/THC.

21 Q Okay. And just this probably a fairly
22 simple question, but "positive" means it was
23 present in the system.

24 A Right.

25 Q And I believe you said it was a THC

1 metabolyte. Can you tell the jury exactly what
2 that is?

3 A THC is the only active component of
4 marijuana. Once it's inquested it begins to --
5 that's the body's natural thing to do is break
6 it down to get rid of it. The carboxyl THC that
7 I found in this case was inactive but it clearly
8 shows a history of use.

9 Q What does it mean exactly to be inactive?

10 A Non-interfering.

11 Q So is there a timeframe that you can put
12 when the marijuana is ---

13 A Not so much. It really depends on
14 frequency of use. One dose could show up a week
15 later in a test.

16 Q And let's move on. You said Lorazepam?

17 A. Yes.

18 Q Can you tell the jury what that is?

19 A That's in the drug class of
20 benzodiazepines, which are commonly used for
21 anxiety but Lorazepam is normally administered
22 in hospitals for head injuries. What it does is
23 it shows the brain activity to prevent brain
24 swelling.

25 Q So -- and what would the effect of Ativan

1 potentially have on your system?

2 A It's a very simple central nervous system
3 depressant similar to that of alcohol.

4 Q Okay. You said potentially it's either
5 usually prescribed by a medical doctor or
6 administered through an EMT?

7 A Right.

8 Q So what would the combined effects of, say,
9 the inactive metabolite and Ativan have
10 together?

11 A Together the THC would not play a role in
12 impairment.

13 Q Why is that again?

14 A It's inactive.

15 Q Does that mean the person wasn't
16 necessarily under the influence?

17 A Right.

18 Q So Mr. Mack was not under the influence of
19 marijuana?

20 A Correct.

21 Q And in your report it's noted certain
22 levels: therapeutic, toxic. Can you tell us
23 about the levels that you found in this case?
24 Can you tell us about the levels that you found
25 in this case?

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1 A It was .12 micrographs per liter.

2 Q Was that with respect to the Ativan?

3 A Yes. Therapeutic level range from .01 to
4 .24, so that would fall in that range.

5 Q So mid range?

6 A Right.

7 Q It didn't rise really to the toxic levels
8 at all.

9 A No

10 Q Would that have contributed in any way to
11 the cause of death?

12 A No, not if administered by the hospital.

13 Q So for example if a person had been -- I
14 guess this was inactive so not under the
15 influence of marijuana.

16 A True.

17 Q And if the Ativan had been administered by
18 an emergency medical technician, there would be
19 no impairment?

20 A Correct.

21 MS. SIMPSON: Thank you.

22 THE COURT: Cross-examination.

23 CROSS EXAMINATION

24 BY MR. FARLEY:

25 Q Mr. Young, I just have a quick question.

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1 How did you term that the THC from the marijuana
2 is inactive?

3 A Say it again?

4 Q You said the THC was inactive.

5 A Correct.

6 Q I believe you said the THC is the active
7 (sic) ingredient in marijuana.

8 A Correct.

9 Q And I believe in this case you said you
10 determined that it was inactive?

11 A Correct. If you see on the report it's
12 Tetrahydrocannabinol, THC; that's the
13 metabolite. The drug screen we do on the front
14 end only shows class. The tests that we do to
15 confirm are more specific and let's you know
16 parent drug, metabolite. It tells the
17 difference.

18 Q So were you able to determine when he
19 ingested this drug?

20 A No, we can't do that. We can only say
21 what's in the blood at the time of draw.

22 Q So you don't know when he ingested the
23 marijuana?

24 A Correct.

25 Q You just know it was in his system?

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1 A Correct.

2 Q Well, how do you know he wasn't under the
3 influence?

4 A Because of the lack of parent THC.

5 Q Because of the lack of parent HTC?

6 A Yes.

7 Q I don't think I follow that exactly.

8 A Parent THC ---

9 Q You'll have to forgive me, I don't have a
10 degree in Chemistry.

11 A That's okay. Parent THC is the only active
12 component of marijuana.

13 A That's the objective competent of the
14 marijuana. As I stated before, once ingested in
15 the system the body begins to break it down to
16 get rid of it and this is one of the
17 metabolites.

18 Q So if you could determine that it was
19 already breaking it down, then how can you
20 determine ---

21 A We can't say when he ingested it.

22 Q Could he have ingested it that morning?

23 A It's possible. It's possible -- but I
24 can't say because parent THC shows -- parent THC
25 shows a fairly recent use, like within the past

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1 two to four hours or something. Because there
2 is a lack of it, I really can't say when he did
3 it.

4 Q But if you can't tell when he ingested the
5 drug, isn't it hard to say whether or not he's
6 under the influence or not?

7 A No, because it is not present.

8 MR. FARLEY: Please answer any
9 questions Mr. Chaplin has.

10 CROSS-EXAMINATION:

11 BY MR. CHAPLIN:

12 Q Mr. Young, I however did major in
13 chemistry.

14 A All right.

15 Q All right. Let me ask you a couple of
16 questions. I didn't hear you're speak a whole
17 lot about -- and I didn't ask you about this.
18 When you took your chemistry courses, did you
19 take a a lot Biology?

20 A I think I took one biology course.

21 Q Now, did you ever work on a cadaver while
22 you were at Carolina?

23 A No.

24 Q Okay. Did you ever take familial
25 physiology?

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1 A No.

2 Q Okay. So you never had any intention of
3 going back to med school or whatever?

4 A Right.

5 Q So you strictly worked in a lab with
6 chemicals, Bunson burners, and did hocus-pocus
7 stuff, like black magic?

8 A Not hocus-pocus.

9 Q I'm just using slang, but I'm saying you
10 basically worked in a lab?

11 A Right.

12 Q But you're here today testifying as to the
13 impact of drugs on a human body?

14 A Correct.

15 Q And what qualifies you to do that?

16 A My training.

17 Q Okay. I'm sorry. Tell me about that
18 training.

19 A At SLED when we're first hired on, you
20 begin volatile analysis training. That consists
21 of the verbal/oral exams, written exams and
22 different courses -- not courses but teachings
23 from people who have been there for years, years
24 and years.

25 Q Okay. So then it's your testimony that

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1 your training with regards to the impact of
2 drugs on the human system would be on-the-job?

3 A Right.

4 Q Okay. So no really formal training in that
5 area?

6 A Well, I did go to the work assigned school
7 of alcohol. That would be formal. It wasn't be
8 like University of South Carolina.

9 Q Right. So you take like seminars and stuff
10 like that?

11 A Right.

12 Q Of course, but you never took a formal
13 physiology class where you ---

14 A No.

15 Q All right. Let me move on. Now have, you
16 indicated that the victim was a frequent user of
17 marijuana?

18 A No. I said the level -- what's present
19 would be determined by how often he smoked or
20 did not smoke.

21 Q Okay. Can you tell how often he smoked?

22 A No.

23 Q You can't?

24 A (Negative gesture).

25 Q Okay. So he could have been a frequent

1 user?

2 A Right.

3 Q Okay. All right. Now, do you know when
4 this blood sample was taken?

5 A I cannot find in my notes right now.

6 Q All right. So you're not certain?

7 A I am not.

8 Q All right. I can accept that. Are you
9 aware that at some point the victim was given
10 several other medications?

11 A No.

12 Q Okay. Are you aware that he was given a
13 dose of Lidocaine?

14 A No, I'm not.

15 Q All right. What about a dose of Mecora?

16 A No.

17 Q Okay. Well, it's on the report. Would
18 those medications have any impact on the test
19 that you ran?

20 A No.

21 Q Tell me why.

22 A Well, these drug screens are specific for
23 drug classes. If those drugs don't fall within
24 those clarifications and we don't have a history
25 of it, we don't search for it. Protocol for

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- 1 homicides, drug screen, anything screens
2 positive, you confirm it and that's in the case.
- 3 Q Okay. So they didn't show up on the
4 screens that you did because you didn't test for
5 those particular ---
- 6 A Correct.
- 7 Q I don't mean to say opiates but those
8 particular drug classes?
- 9 A Correct.
- 10 Q But you can't say certain that it didn't
11 have an impact on the things that you did test
12 for?
- 13 A I can't say that it didn't have an impact?
- 14 Q Yes.
- 15 A No, I couldn't.
- 16 Q Okay.
- 17 Q So you're saying he couldn't have been a
18 frequent user of marijuana, you're not sure if
19 the other medications could have decreased the
20 level of THC that you found.
- 21 A Those things, that wouldn't have interfered
22 with any drugs that I found. You're saying
23 other drugs that would have affected this, on
24 the report?
- 25 Q Yes.

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1 A. No, sir.

2 Q Again, I need you to explain it to me --
3 tell me why?

4 A Each drug has -- breaks down to different,
5 uh, on the different instruments that we use. So
6 pretty much each drug has a fingerprint.

7 Q Right.

8 A So what is here is here. It wouldn't be
9 affected by any other drug.

10 Q Okay. And you're basing that on your
11 on-the-job training?

12 A Correct.

13 Q At SLED?

14 A Correct.

15 Q All right. No further questions.

16 MS. SIMPSON: Nothing further, Your
17 Honor.

18 THE COURT: All right. You may come
19 down.

20 (WITNESS STEPS DOWN)

21 THE COURT: May this witness be
22 excused?

23 MR. FARLEY: No objection, Your Honor.

24 THE COURT: Without objection.

25 MR. CHAPLIN: No objection.

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1 MS. SIMPSON: The State calls Kevin
2 Thomas.

3 (WITNESS TAKES STAND)

4 KEVIN THOMAS, being duly sworn to tell
5 the truth, the whole truth and nothing but the
6 truth, testified, as follows:

7 DIRECT EXAMINATION

8 BY MS. SIMPSON:

9 Q Good morning Mr. Thomas.

10 A Good morning.

11 Q You were actually here with us earlier in
12 the week, correct?

13 A I was, yes.

14 Q Can you remind the jury about what you do
15 and your role in this case?

16 A At the time of this case I was an emergency
17 medical technician based with Richland County
18 EMS, responsible for providing basic life support
19 care in a prehospital setting.

20 Q And you actually responded to a call in
21 this case regarding a Kenneth Mack, correct?

22 A Correct.

23 Q The victim?

24 A (No verbal response).

25 Q And when you responded, I believe you said

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1 you also responded with a partner?

2 A Correct, he was a paramedic.

3 Q What is your primary goal when responding
4 to any scene as a first responder?

5 A Primary goal is to initiate life saving
6 measures, if necessary, and transport them to
7 the hospital.

8 Q Is collection of evidence up there in your
9 goals?

10 A Negative. Correction, no.

11 Q And would you have collected blood in this
12 case?

13 A No, we don't collect blood.

14 Q No EMT collected blood in this case?

15 A No.

16 Q All right. And let me talk to you a little
17 bit about -- the victim in this case was
18 posturing at the time?

19 A Correct.

20 Q Would Ativan have been administered?

21 A If he was exhibiting signs of a seizure,
22 which our standing protocol is when we
23 administer Ativan, if he was seizing.

24 Q In this case he was actually was showing
25 seizure activity. Correct?

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1 A During my time with him he was posturing.
2 Now, between what happened once we got him in
3 the back of the truck, I got in the front of the
4 truck and drove. I don't know what happened
5 between the time we got him in the back and got
6 him to the hospital.

7 Q So your partner would have been the one
8 actually to administer the Ativan?

9 A Correct.

10 MS. SIMPSON: Thank you.

11 THE COURT: Cross-examination.

12 MR. FARLEY: Just a quick question.

13 CROSS EXAMINATION

14 BY MR. FARLEY:

15 Q So do you have any knowledge of whether
16 Ativan was administered?

17 A During the transport, I do not know whether
18 it was given or not. I was not in the back with
19 the patient.

20 Q Do you have any knowledge of whether your
21 partner did so?

22 A I don't know if he did or not.

23 Q Okay.

24 A I mean, I can read the report and whatever
25 the report says, I can verify, but as far as

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1 actually seeing him give it.

2 Q But actually as far as your testimony today
3 you can't really testify to anything regarding
4 Ativan?

5 A I was not present so, no, I can't.

6 MR. FARLEY: Thank you.

7 MR. CHAPLIN: No questions for
8 Mr. Thomas.

9 MS. SIMPSON: Beg the Court's
10 indulgence. No further questions?

11 THE COURT: All right. All right,
12 sir. You may come down. Thank you very much.

13 (WITNESS STEPS DOWN)

14 THE COURT: May this witness be
15 excused?

16 MR. FARLEY: No objection, Your Honor.

17 MR. CHAPLIN: No objection.

18 THE COURT: Yes, ma'am, next witness.

19 MS. CAMPBELL: One more witness.

20 That's all.

21 THE COURT: Go ahead.

22 MS. CAMPBELL: One more.

23 THE COURT: Go ahead.

24 MS. CAMPBELL: State would call
25 Sergeant Peagram.

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1 (WITNESS TAKES STAND)

2 WILLIAM PEGRAM, being duly sworn to
3 tell the truth, the whole truth and nothing but
4 the truth, testified, as follows:

5 DIRECT EXAMINATION

6 BY MS. CAMPBELL:

7 Q You're already under oath, Sergeant Pegram,
8 this is already prepared so we're limited to two
9 different areas we're going to talk about.

10 A Okay.

11 Q In this case did you attend the autopsy of
12 Kenneth Mack?

13 A I did.

14 Q Was clothing collected at the autopsy?

15 Q Which is -- did much of that clothing have
16 blood on it and therefore was a biohazard?

17 A Yes.

18 Q However you actually saw the clothing
19 yourself?

20 A I did.

21 Q Can you describe to the jury what clothing
22 was found on -- was taken from the victim at the
23 autopsy?

24 A He was wearing gray sweat pants.

25 Q Actually accompanied the autopsy. He

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1 wasn't wearing them at that time. I don't want
2 to mislead.

3 A Yes.

4 Q Okay.

5 A He was wearing gray sweat pants, a royal
6 blue shirt, a black jacket and I believe he was
7 wearing tennis shoes.

8 Q I want to show you a list from the autopsy
9 that actually illustrates, he had on a couple of
10 layers of clothing?

11 A He did.

12 Q Which it was actually snowing that day?

13 A It was snowing.

14 Q Is that a list of what was the collected at
15 the autopsy?

16 A It is what was collected and bagged. It
17 was a black jacket, a green shirt, two black
18 shirts, a barber's jacket, two pairs of sweat
19 pants, dark blue and dark gray, socks, black
20 shoes.

21 Q Does it mention any blue jean jacket or
22 blue jean clothing?

23 A No, it does not.

24 Q The only other area I want to ask you about
25 is, you participated in the interview of Robin

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1 Reese, I believe on February 14th.

2 A I did.

3 Q That was when she brought her daughter
4 down, as well?

5 A That's right.

6 Q At the that point, you mentioned earlier,
7 you didn't advise her of her rights?

8 A Right.

9 Q Why?

10 A She wasn't a suspect at that time.

11 Q At that point, what information or any
12 information do you have about anything with the
13 chair?

14 A The only thing as of the 14th was the
15 anonymous tip coming into the telephone resposne
16 unit, TRU. That information only provided the
17 name of Mr. Gray and that he used a chair. At
18 that point we had not located the chair or
19 Mr. Gray.

20 Q At any point in your interaction, I believe
21 you assisted Investigator Sumpter in
22 interviewing her that day?

23 A Correct.

24 Q Did she ever intention to you or tell you
25 about her being involved in an assault on this

1 victim with a chair?

2 A No, she did not.

3 Q At any point did you tell her you didn't
4 want to talk to her about her assault on the
5 victim?

6 A No, I did not.

7 Q In fact, would that have been crucial to
8 your investigation.

9 A Yes it would have been crucial.

10 Q Had she related that information, what
11 would you have done?

12 A Well, she would have been indicated on that
13 point. We would have stopped and treated her as
14 a suspectg.

15 Q That day was she ever treated as a suspect
16 in this case?

17 A No, she was not.

18 Q Was she free to go home?

19 A Yes.

20 Q And did she?

21 A Yes.

22 Q The victim in this case, approximately how
23 tall husband was he?

24 A He was 5'8", 165 pounds.

25 Q Thank you.

1 CROSS EXAMINATION

2 BY MR. FARLEY:

3 Q Investigator, you testified yesterday that
4 you're used to interviewing people in Gonzales
5 Gardens; is that correct.

6 A I'm accustomed to interviewing people in
7 general.

8 Q But you've had lot of dealings with
9 Gonzales Gardens?

10 A Yes.

11 Q Is that correct?

12 A Yes.

13 Q At the time Ms. Robin Reese came in for her
14 statement, you wanted to investigate more about
15 Marcellius Brooks?

16 A Yeah, what I wanted to investigated was the
17 truth about the incident to determine what
18 happened.

19 Q But you testified a moment ago that
20 Marcellius Brooks had come up as a person of
21 interest?

22 A Yes.

23 Q And you want to learn more about that
24 occurrence was, and that's what you asked about;
25 correct?

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1 A Yes, that was one of the things.

2 Q And you didn't ask about anything else?

3 A At that point, we had no knowledge about
4 the second assault.

5 Q But having no knowledge, you had no reason
6 to ask about anything else; correct?

7 A Well, generally we ask to tell us from
8 beginning to end what happened.

9 Q All right.

10 A And that's where we develop our
11 information.

12 Q In regards to Marcellius Brooks?

13 A No, in regards to the overall incident.
14 Marcellius Brooks was just one part of the
15 interview.

16 Q But wasn't that your main point of
17 interest?

18 A He was one point of interest.

19 Q That's what you asked Ms. Reese about?

20 A I asked Ms. Reese about the incident and
21 Marcellius Brooks.

22 Q I understand.

23 Q And in your dealings with Gonzales Gardens,
24 are you accustomed to many of the folks from
25 there just providing all kinds of information

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1 unrelated to the questions you're asking?

2 A In this case, we had people come forward.

3 I don't really understand your question.

4 Q Well, I guess what I'm asking you, if
5 you're asking people specific questions and they
6 don't know to go beyond the scope of those
7 questions, is that something you're accustomed
8 to, is having them go far beyond the scope and
9 tell you more information than you require?

10 A Well, that's hard to answer. I mean, it
11 depends on the person and what they tell us.

12 Q Right. And the other way, too. It's hard
13 for those people to know exactly what you
14 require?

15 A Well, I don't think it would be that
16 difficult. I mean, you come in and you're
17 requested to describe an event from beginning to
18 end. They describe the event from beginning to
19 be.

20 Q And as related to ---

21 A And some people are deceptive and they
22 fail to give the second part or all of the
23 information.

24 Q But if you're asking for information
25 related to Marcellius Brooks, Bloom, a person of

1 interest at the time, ---

2 A That is a specific question.

3 Q Right.

4 A And that was done in this case among other
5 things.

6 Q I'm just reviewing her statement. I'm sure
7 you remember it. That's pretty much what she is
8 speaking about, is his ---

9 A. That is all she is speaking about..

10 Q The incident with Marcellius Brooks?

11 A That's correct.

12 Q Thank you.

13 A Yes, sir.

14 CROSS EXAMINATION

15 BY MR. CHAPLIN:

16 Q Investigator Pegram, you're the lead
17 investigator for this entire case?

18 A Yes.

19 Q How long have you been in law enforcement?

20 A Twenty-nine years.

21 Q So how often have you testified in front of
22 of a jury?

23 A I have no idea.

24 A Sure, I mean, hundreds of times.

25 Q Hundreds of times, okay. So you're pretty

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1 experienced at doing that?

2 A I would say, (affirmative nod).

3 Q Okay. While most of the witnesses were
4 sequestered, you sat here through the entire
5 trial; did you not?

6 A I did.

7 Q Okay. And you testified last, correct?

8 A Yes.

9 Q Okay. No further questions?

10 THE COURT: Anything further?

11 MS. CAMPBELL: No, sir.

12 THE COURT: You may come down, sir.

13 WITNESS: Thank you.

14 (WITNESS STEPS DOWN)

15 THE COURT: Next witness.

16 MS. CAMPBELL: Your Honor, that's all.

17 THE COURT: All right. Ladies and
18 Gentlemen, that will conclude the evidence in
19 this case, the remaining portion of the trial
20 will consist of the final arguments of
21 counsel and my charge to you on the law of the
22 the State of South Carolina, after which the
23 case will be turned over to you for
24 deliberation.

25 I'm going to give the attorneys just a

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1 few minutes to prepare their closing arguments.
2 I'm sure they are already prepared but maybe
3 they need a short bathroom break or something,
4 so we'll take a morning break at this time and
5 we'll -- it's not going to be a long break, so -
6 - we need to keep moving. Please retire to the
7 jury room. Don't discuss the case among
8 yourselves while you're in the jury room.

9 (JURY OUT @ 10:54 a.m.)

10 THE COURT: All right. Counsel, the
11 only thing I think left to discuss is the --
12 whether or not to give an involuntary
13 manslaughter charge.

14 I told you in chambers I will give the
15 voluntary manslaughter charge.

16 So let me -- Mr. Farrell (sic) or Mr.
17 Chapman, tell me what is involuntary about this
18 death/killing when your client says she didn't
19 do anything to kill him. I guess I need to
20 address this to Mr. Farrell, since Mr. Chaplin's
21 client has not testified.

22 MR. FARLEY: Your Honor, with all due
23 respect, it is Farley.

24 THE COURT: What did I say?

25 MR. FARLEY: Farrell.

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1 THE COURT: Will you call Dave
2 Farrell, tell him I'm going to start calling him
3 Mr. Farley.

4 MR. FARLEY: I apologize, Your Honor.
5 Your Honor, I would just say that we believe
6 Ms. Reese does deserve a charge of involuntary
7 manslaughter given the facts that have been put
8 forth by the witnesses in this case. We believe
9 she has done nothing that could have led to the
10 intentional death of the victim in this case.

11 THE COURT: We are not talking about
12 the intentional.

13 MR. FARLEY: Yes, sir.

14 THE COURT: We're talking about -- I
15 hate to use the word "accident", but it's very
16 similar to an accident.

17 MR. FARLEY: Well, again, Your
18 Honor, I think that's exactly the case. As far
19 as the actions of Ms. Reese, ---

20 THE COURT: She doesn't even admit that
21 she did anything to kill him.

22 MR. FARLEY: That's correct. So if
23 death is the end result, I think that has to be
24 considered involuntary manslaughter. She did
25 nothing to facilitate the death given the facts

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1 that she was involved with.

2 THE COURT: But there has to be a
3 killing. For involuntary manslaughter, there
4 has to be a killing, first, and then there has
5 to be an unlawful act, not intending to cause
6 death or great bodily harm.

7 If I assume that the unlawful act that
8 she admits is throwing the chair, she says it
9 didn't hit him. She says it didn't kill him.

10 Now, if she had said on the stand 'I
11 threw a chair, but I didn't mean to hit him but
12 it hit him and killed him', then I've got the
13 link between the killing and her act. But she
14 says none of that happened. She says she got
15 age angry and threw a chair that did not hit
16 him, so there's no killing as a result of
17 actions, involuntary actions. There has to be
18 both. There has to be a killing and it has to
19 be done involuntarily.

20 It's the shooting of an unintended
21 victim a mile away that the bullet comes down
22 and kills somebody.

23 But she doesn't admit the killing. She
24 admits an unlawful act but there's no killing.
25 It's got to be both to warrant an involuntary

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1 manslaughter charge.

2 MR. FARLEY: I understand.

3 THE COURT: If I look at the
4 testimony in the light most favorable to her and
5 if the jury believes everything she said,
6 there's still not an involuntary killing because
7 she doesn't admit to killing.

8 She says she didn't meant to kill him.

9 She says that if something killed him, it was
10 not me. So it's not to be a not guilty or
11 involuntary or voluntary or murder. So ---

12 MR. FARLEY: I understand, Your Honor.

13 THE COURT: That's the way I read the
14 case law.

15 MR. FARLEY: I understand, Your Honor.
16 Thank you.

17 THE COURT: All right. I respectfully
18 deny your request to charge involuntary because
19 there's been no involuntary killing. There's
20 been a -- all right.

21 MR. CHAPLIN: Your Honor.

22 THE COURT: Yes.

23 MR. CHAPLIN: I, too, made some
24 additional charges, requests for charges, if you
25 would please deny those on the record, I would

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1 appreciate it.

2 THE COURT: Well, I don't deny your --
3 I have a stack of papers here. I'm don't deny --
4 - I grant your Motion for voluntary
5 manslaughter.

6 MR. CHAPLIN: Thank you.

7 THE COURT: I deny you Motion for
8 involuntary manslaughter for the same reason.
9 (A), you're client didn't even testify about
10 anything.

11 MR. CHAPLIN: Yes.

12 THE COURT: He can't -- I can't tell
13 the jury that he involuntarily killed somebody
14 when they have no evidence.

15 MR. CHAPLIN: I understand.

16 THE COURT: And secondly, I don't
17 think the defense of others applies in this
18 case. I'd certain give reasonable doubt and
19 proximate cause.

20 MR. CHAPLIN: Thank you very much.

21 THE COURT: From the State?

22 MS. CAMPBELL: Nothing, Your Honor.

23 Could I possibly get a copy of your hand of one
24 is the hand of all charge, just because I want
25 to make sure I don't miss anything. The one I

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1 handed up was erroneous. I didn't mean to hand
2 that one up.

3 THE COURT: It's printing right now.

4 MS. CAMPBELL: Thank you, sir.

5 THE COURT: Just for timing purposes,
6 do you plan to open on the law?

7 MS. CAMPBELL: Yes, sir.

8 THE COURT: I'd like to put some sort
9 of arbitrary time limits on this. How much time
10 do you need, Mr. Farley?

11 MR. FARLEY: I wouldn't take more than
12 twenty, twenty-five minutes.

13 THE COURT: Thirty minutes?

14 MR. FARLEY: Yes, sir.

15 THE COURT: Mr. Chaplin?

16 MR. CHAPLIN: Well, Your Honor, I would
17 say thirty to forty-five minutes.

18 THE COURT: I'm going to tweak you at
19 thirty minutes. I won't sit you down but I'll
20 remind you that you're -- and that would have to
21 apply to your closing, your final argument.

22 MS. CAMPBELL: Final argument, yes,
23 sir.

24 THE COURT: All right.

25 MR. CHAPLIN: So how long will she have

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1 to argue the two?

2 THE COURT: She's got to open on the
3 law, which shouldn't be more than ten or
4 fifteen; then thirty minutes, an hour.

5 MS. CAMPBELL: Yes, sir.

6 THE COURT: Got it. I won't be too
7 strict about it.

8 MR. CHAPLIN: Considering how the State
9 had four days, and we had one.

10 THE COURT: Well, if you have other
11 evidence you wish to produce, I mean, I'm not
12 restricting you from producing evidence.

13 MR. CHAPLIN: I understand, sir. I
14 would just like a little leeway on the closing,
15 that's all.

16 THE COURT: I'll give to it you.

17 MR. CHAPLIN: Thank you, sir.

18 THE COURT: But don't try me.

19 MR. CHAPLIN: I'm not and I feel you.
20 Okay.

21 (BRIEF RECESS)

22 (DEFENDANTS PRESENT)

23 THE COURT: Is the State ready to
24 proceed?

25 MS. CAMPBELL: Ready.

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1 THE COURT: Is the defense ready?

2 MR. CHAPLIN: Ready, Your Honor.

3 THE COURT: Bring in the jury.

4 (JURY IN @ 11:14 a.m.)

5 BAILIFF: Your Honor, the jury is
6 present.

7 THE COURT: Thank you very much.

8 Ms. Campbell, you may begin with your closing
9 remarks.

10 MS. CAMPBELL: May it please the Court.
11 Good morning. First thing I want to do on
12 behalf of the State of South Carolina, of the
13 citizens of Richland County and on behalf of the
14 family of the victim in this case is to thank
15 you for your service. I know when you showed up
16 on Monday morning, you may have tried to
17 anticipate what type of case. I'm sure you
18 didn't anticipate anything such as this case.

19 As the testimony has unraveled, it has
20 been graphic, it has been ugly. I apologize for
21 that, but we don't make the facts. Each of
22 you've paid attention carefully in this disputed
23 case about what happened back on February 13th.

24 Now, I am going to have an opportunity
25 to talk to you a little bit now about the law in

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1 the case. Then you're going to hear from the
2 two defense attorneys. Then Ms. Sampson, my
3 co-counsel, is going to get up here and talk to
4 you a little bit about the facts as we find the
5 facts, as we think the credible evidence shows
6 the facts and what they would be.

7 Remember, ladies and gentlemen, our
8 duty is to render justice. We bring forth all
9 the facts, the good, the bad and the ugly
10 because you must have the right to make your
11 decision based on credible evidence.

12 Now as I am talking about the law, if I
13 say anything different because ultimately the
14 judge is going to charge you on the law. If I
15 say anything different from what the judge
16 charges you, you take it right from what he
17 tells you. It is my intentional on my part.

18 I am going to discuss some of the
19 concepts, because there are multiple indictments
20 in this case and multiple charges all arising
21 out of a series of events that happened back on
22 February 13th. In that same vein, if either
23 side mischaracterize the facts when we are
24 talking to you, you remember them because that
25 is your role.

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1 The roles in this courtroom are very
2 specifically designed. They are definite. The
3 role of the prosecution to bring forth all the
4 relevant evidence to help you make a decision as
5 to the guilt or innocence of these defendants.
6 The defendants' role is very simple, to defend
7 the client to the best of their ability. The
8 judge's role is to determine what's admissible,
9 what's not admissible as the evidence that comes
10 before you and ultimately charge you on what the
11 law is that you must apply to the facts as you
12 find them.

13 Ladies and Gentlemen, nobody is going
14 to get up here and say that the most important
15 role in this courtroom is not yours. It is
16 yours. Each of individually and collectively
17 once you get back in that jury room. You
18 combine and weigh the credible, believability
19 evidence in this case and determine who is
20 responsible for the death of Kenneth Mack.

21 Now, you have heard all the evidence
22 from which you can base your verdict. What is
23 the evidence? The evidence is the sworn
24 testimony by witnesses and the exhibits that
25 will go with you, the ones that were admitted,

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1 back into that jury room. It's not innuendo,
2 conjecture, speculation or just plain wishful
3 thinking on anybody's part. It's the credible
4 or believable evidence.

5 I am to apologize if through the course
6 of this we have done anything to offend you in
7 any way. At times our questions has been
8 inartful, probably clumsy in ways. You heard
9 about testimony that wasn't admissible, was
10 admissible. It's been convoluted. You've been
11 very patient in dealing with all our clumsiness
12 -- videos that didn't play properly, we may have
13 put in supplements and things of that nature.
14 Please, please don't hold that against the State
15 or against the victim's family in this case.

16 Now, criminal cases are somewhat
17 unique. In a criminal case a defendant, as he
18 should, has an absolute right to confront each
19 and every witness against him. That is his
20 Constitutional right, as it should be. In this
21 case, you have heard references to many, many
22 statements, many, many reports, be it autopsy,
23 toxicology, whatever. You have heard about
24 other witnesses at the scene. As you have seen,
25 you don't have those reports. The only

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1 statement that was actually admissible was a
2 prior inconsistent statement by Ms. Chase.
3 Remember, she changed her testimony? It's only
4 admissible in certain ways. The reason the
5 statements aren't entered for your consideration
6 is there are no depositions read you or video
7 depositions that were read to you. The reason
8 for that is very simple. You as a jury in
9 criminal cases have a right to judge each and
10 every witness that comes before you, to judge
11 their credibility. We don't just admit an
12 autopsy report. You have a right to hear from
13 the pathologist, to judge his credibility, to
14 see what's brought up on cross-examination that
15 would make him more credible or less credible.
16 So that is the reason for that.

17 In that same manner, you've also heard
18 references to some witness that is haven't
19 appeared before you. There comes a point that's
20 called cumulative evidence. We can only put up
21 so many people to say the same thing over and
22 over and over. You heard from the witnesses as
23 to the assault that occurred in this case that
24 could identify the person and/or had something
25 to contribute. Were there were more people out

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1 there that we could find or couldn't find? You
2 also heard about witnesses that we couldn't
3 find. We have brought forth all the relevant
4 evidence sufficient and you have heard from
5 every eyewitness that came to the police and
6 observed anything that happened down there
7 between buildings F and G on that date. But the
8 reason you heard about other police officers
9 being at the scene and things like that is but
10 you may not have heard from them is because we
11 can't simply bring people in to say the same
12 thing over and over and over. At some point it
13 becomes cumulative and we can't do it.

14 Now, the burden of proof is on the
15 State of South Carolina to prove this
16 defendant's guilt beyond a reasonable doubt, and
17 I submit, ladies and gentlemen, in this case, in
18 this courtroom, perhaps more than any other that
19 is a burden the State welcomes based on this
20 evidence. Proof beyond a reasonable doubt.

21 Now, the judge will tell you'll and he will
22 instruct you what that means. It's a legal
23 term. What is proof beyond a reasonable doubt.
24 The law doesn't require that the State prove the
25 defendant's guilt beyond all doubt, just beyond

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1 a reasonable doubt.

2 The simplest way to define that, ladies
3 and gentlemen, what is reasonable doubt? It's
4 the kind of doubt that would make a reasonable
5 person hesitate to act. But in our state, we
6 have adopted some language that may help you and
7 the judge will charge you about this. As far as
8 defining what is reasonable doubt, very simply a
9 case in our state -- this is how our courts have
10 defined proof beyond a reasonable doubt. Proof
11 beyond a reasonable doubt is proof that leaves
12 you firmly convinced of the defendant's guilt.
13 There are very few things in this world that we
14 know beyond every possible doubt.

15 If based on your consideration of the
16 evidence you are firmly convinced that the
17 defendant is guilty of the crime charged, you
18 must find him Guilty.

19 If on the other hand you think there is
20 a real possibility that he is not guilty, you
21 must give him the benefit of the doubt and find
22 him Not Guilty.

23 Proof that leaves you firmly convinced
24 of the defendant's guilt. Even in criminal
25 cases, the law recognizes that we don't have to

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1 overcome every possible doubt but just that
2 proof which leaves you firmly convinced. That
3 may help you as you listen to the judge, in
4 guiding you to what is actual reasonable doubt.

5 Now, in this case both of these
6 defendants are before you and you are here today
7 to determine the elements of the crime,
8 determine whether or not these defendants are
9 responsible. That is the extent.

10 However, there will be many other areas
11 that the judge will explain to you: the hand of
12 one is the hand of all; proximate cause;
13 different things like that that play because of
14 the unique facts in this case. Obviously this
15 has come up before, because there are legal
16 standards which define and help you in
17 determining whether or not these two defendants
18 individually are guilty of, number one, murder
19 and, number two, lynching in the first degree.
20 Those are the two indictments.

21 Now, in certain cases if certain facts
22 apply, the judge will also charge -- in most
23 cases, actually -- as to lesser-included
24 offenses that is could or could not apply, for
25 you to consider.

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1 Lynching in the first degree, there is
2 no lesser offense you're going to have to
3 consider.

4 However, in murder a lesser-included
5 offense is voluntary manslaughter. The judge
6 will charge you that if you find that the State
7 has not met the elements of murder, which I
8 submit we have, however I'll get back to that,
9 then you can consider whether or not these two
10 defendants are guilty of voluntary manslaughter.

11 Let's consider them separately, but
12 those are the choice.

13 Very simply, ladies and gentlemen,
14 murder is probably the most heinous crime we
15 have and has probably the shortest definition in
16 our Code of Laws. Very simply, Murder is the
17 killing of any person with malice aforethought
18 either expressed or inferred.

19 Very simply what do those terms of art
20 mean? Malice aforethought, either expressed or
21 inferred? Very simply, ladies and gentlemen, I
22 want to talk to you about the term "malice" and
23 about the "aforethought", as far as those go.

24 Murder is the killing of another. Now
25 you will hear -- listen if you will, you hear

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1 the Judge tell you that at no point there had to
2 be premeditation. Although, I submit in this
3 case that we have that.

4 At no time as you listen to the Judge's
5 charge will he talk about how we have to prove a
6 motive, although I think that was fairly obvious
7 in this case as well.

8 Those are not elements of the crime
9 that we must prove. It doesn't mean that Robin
10 Reese or Henry Gray had to decide weeks
11 beforehand, days beforehand, even minutes
12 beforehand, to go and commit the assault that
13 ultimately led to the death. Basically we have
14 to prove that just before and at the time of the
15 act, and I will get back to that, that Henry
16 Gray and Robin Reese had malice in their heart.

17 What does the term "malice" mean? The
18 simple definition which I think of, and which is
19 always helpful to me, is the word "malicious."
20 Were their act malicious? Because malice is the
21 basis of that word. Very simple, Ladies and
22 Gentlemen, it doesn't get much more malicious
23 than this. As Ms. Simpson told you in her
24 opening, this case reeks of malice.

25 The judge will charge you that malice

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1 does not necessarily impart ill will towards the
2 individual injured. In this case, it does. But
3 it signifies, rather, a general malignant
4 recklessness of the lives and safety of others,
5 or a condition of mind that sounds a heart
6 regardless of social duty and fatally bent on
7 mischief.

8 Now, the defense may get up here -- and
9 you've got to understand that what was perceived
10 by Robin Reese as to what happened to her child,
11 -- whether or not this victim should have been
12 messing with her child is not a consideration.
13 Whether or not she acted upon that belief and
14 had a sufficient cooling down period, I'll get
15 back to, but basically when considering whether
16 or not malice was present -- it's not
17 necessarily ill will towards but a heart devoid
18 of social duty and fatally bent on mischief.
19 There is no doubt that on this date that Henry
20 Gray and Robin Reese, for whatever reason, were
21 going to make a point. They did. It cost this
22 victim his life.

23 Malice is a term of art that imparts
24 wickedness. Nobody is going to get up here and
25 say that they had the right to do what they did.

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1 I submit that they won't. No one will get up
2 here and say that no matter what information was
3 relayed to you, that anyone has a right to then
4 go and beat someone to death. It excludes just
5 cause for legal excuse. It is something that
6 brings wickedness with a depraved spirit, a
7 heart devoid of social duty and fatally bent on
8 mischief. It can denote hostility and ill will
9 towards another but not necessary towards the
10 specific injured. It is the intentional doing
11 of a wrongful act without just cause or excuse
12 and with the intent to inflict an injury under
13 the circumstances.

14 Listen carefully, too. This isn't a
15 self-defense case. The judge will not instruct
16 you on the elements of self-defense. Nobody is
17 going to say that.

18 And nobody was going to say that it was
19 an accident. Clearly the acts that day were
20 intentional. That excludes accident. The judge
21 will not instruct you on that law either.

22 What he will instruct you on is murder
23 and voluntary manslaughter. I submit, ladies
24 and gentlemen, that is the issue in this case.

25 Now, as I mentioned earlier, does

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1 malice have to be in the heart of the person --
2 premeditation is not an element. We don't even
3 have to prove motive, although I submit that we
4 did. Malice aforethought does not require that
5 malice exists for any particular time before the
6 act is committed, but malice must exist in the
7 defendant just before and at the time that the
8 act was committed. Therefore, there must be a
9 combination of the previous evil intent and the
10 act. It doesn't have to have be for a long
11 time, it can happen for merely a second. Malice
12 may exist for any appreciable period of time
13 before the act of killing occurs. Malice may be
14 conceived the very moment the fatal blow is
15 struck.

16 I submit, ladies and gentlemen, if this
17 case doesn't have malice, what case does?

18 Now, if you find that these -- that the
19 State has not met their burden and that these
20 two defendants, individually, were not acting
21 with malice, then you may consider the charge of
22 voluntary manslaughter. It is a lesser included
23 charge of murder. The Judge will explain these
24 terms to you.

25 Voluntary manslaughter is the unlawful

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1 killing of a human being in the sudden heat of
2 passion upon sufficient legal provocation.

3 Remember, the killing of another in the
4 sudden heat of passion with sufficient legal
5 provocation. There is nobody in this courtroom
6 who can get up here and say that Robin Reese
7 wasn't angry that day, and that she had a right
8 to be angry that day based on the information
9 that was relayed to her. We're the ones that
10 brought that information to you, because you
11 have a right -- and should always want to get
12 the accurate, total picture, the credible
13 picture about what happened that day. We wanted
14 to make sure that you knew about the first
15 assault. Nobody sugarcoated this victim and
16 what he did that day. Did he think she was
17 older? It doesn't matter. His acts were wrong,
18 but his acts do not justify murder.

19 There are laws in this country for a
20 reason. There are police out there for a
21 reason. Vigilantism, revenge are not okay.
22 Understandable to some degree, the want to do
23 it, but you don't go out and hunt down a man and
24 beat him like a wild dog.

25 Killing another in the sudden heat of

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1 passion upon sufficient legal provocation.
2 Listen carefully because it doesn't mean -- is
3 there sufficient legal provocation here? Was
4 Robin Reese legally provoked? Possibly. Did
5 she have enough time to compose herself? She
6 finished playing her video game. Was she that
7 provoked or was she just going to make things
8 right on her own terms because that's how they
9 do it.

10 The judge will tell you, be he will
11 define those terms, "sufficient legal
12 provocation" and "heat of passion."

13 By the way, one alone -- say just legal
14 provocation -- doesn't automatically reduce a
15 murder to manslaughter. There also has to be a
16 cooling down period. If there is a sufficient
17 cooling down period, no matter how provoked a
18 person is, then they are still guilty of murder
19 if a reasonable person would not have so acted.

20 The judge will tell you also that words
21 alone, however bold and insulting, are not
22 enough to be legal provocation. In other words,
23 just because someone walks up to another person
24 and starts yelling obscenities and insulting
25 their mother, that alone will not reduce murder

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1 to manslaughter.

2 The Judge will also instruct you that
3 if the heat of passion is cooled, or if there
4 was enough time between the provocation -- and
5 the provocation would be the time period when
6 she found out about what happened and then she
7 finishes her video game, then she chooses to
8 walk down the street and at that point starts
9 making phone calls, if any, then the killing,
10 the passion of a reasonable person to cool, the
11 killing would not be voluntary manslaughter. It
12 would be murder. So in other words, in order to
13 find that it's reduced from murder to voluntary
14 manslaughter, you must find that there was legal
15 provocation and that there was not a sufficient
16 time for murder.

17 An example of legal provocation, and
18 this is just one example and the Judge may give
19 you other examples, is if someone is in a pool
20 hall and someone walks up, picks up a pool stick
21 and hits a person over the head with -- even
22 though it doesn't rise to the level of self-
23 defense, because it can't kill them -- and then
24 the person reaches in their pocket and, before
25 they can think, they stab the person and it

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1 causes their death, that would reduce that
2 murder to manslaughter. It was not a sufficient
3 cooling off period and he was legally provoked.
4 That's just one example, and the Judge may give
5 you others.

6 So when you go back there and are
7 considering the two charges against these
8 defendants for murder, you'll have three choice:

9 Whether they are guilty of murder.

10 Or if you don't that the State has met
11 their burden, then whether they're guilty of
12 voluntary manslaughter.

13 I submit, Ladies and Gentlemen, that
14 the defense will get up here and argue that
15 their only -- that they are only guilty of
16 voluntary manslaughter, the lesser-included.

17 As we ask is that you look at the total
18 picture, the total timeframe, and if they have
19 sufficient time to cool off. Did they have an
20 alternative to their choice of how they chose to
21 handle their perception of what happened that
22 day? Murder or manslaughter?

23 Now, the second charge, which is
24 totally separate, even though it's based --
25 there are different elements and that's why we

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1 have two charges before you. The second charge
2 is lynching in the first degree.

3 Basically, Ladies and Gentlemen, any
4 act of violence inflicted upon the body of
5 another person shall which results in the death
6 of that person shall constitute the crime of
7 lynching in the first degree. It's antiquated
8 language but basically it is the intent of
9 inflicting violence upon another.

10 In this case, nobody is going to get up
11 here and dispute that violence caused the death
12 of someone. That is a crime in our state.
13 This is a totally separate indictment from what
14 you find on the murder charge.

15 The Judge will then define what is a
16 "mob" for purposes of your consideration. Under
17 our laws, a mob is defined as two or more
18 persons, without color or authority of law, with
19 premeditated intent of committing an act of
20 violence upon the person of another, whether it
21 be an act of violence that causes harm or an act
22 of violence that causes death, such as in this
23 case.

24 What is the premeditated purposes?
25 Ladies and gentlemen, I submit in this case it's

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1 somewhat simple. Either you believe Robin
2 Reese's version of events, which is not
3 supported by any of the eyewitnesses, by any of
4 the evidence, by the DNA, by the phone records
5 or the videotapes even, which would make her not
6 guilty or she went there for the premeditated
7 purpose -- even in her own testimony, she said
8 she went looking for him. She tried to say it
9 wasn't for revenge, that she just wanted to look
10 for him. Even in that part of her testimony she
11 admits premeditation.

12 To constitute a mob, the assemblage
13 need not have formed for the purpose to commit
14 an act of violence but rather the purpose and
15 intent may be formed after all the parties are
16 assembled. That's very important when I get to
17 another theory of law in just a second, that
18 kind of ties all of this together.

19 As you see in this case, the law is
20 very important. The reason that you were able
21 to consider this charge is because of something
22 called "the hand of one is the hand of all",
23 as well as the lynching charges in this state.

24 Finally, as I mentioned in the first
25 degree, without color of law, it is permissible

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1 to infer that all persons present when an act of
2 violence is committed have aided and abetted in
3 the crime and are guilty as principals.

4 Listen carefully to the Judge. We
5 don't have to prove, either to the murder or the
6 lynching charge, who actually inflicted the
7 fatal blow, at what moment. You can consider
8 all their acts. If they are together -- and I
9 will get back to that -- or if they are aiding
10 and abetting, even if they aren't together, in
11 the act that ultimately caused his death, then
12 all are guilty. It's under the adage of the
13 hand of one is the hand of all.

14 The judge is going to give you a fairly
15 lengthy definition of that. It's very
16 important. Listen carefully to that.

17 Mere presence at a scene is not enough
18 to constitute guilt. For it to be the hand of
19 one is the hand of all, you must be guilty as --
20 and we've heard these terms "principal", an
21 actual player or an actual instigator for it to
22 rise to the level of the hand of one is the hand
23 of all. I don't know how, and I could be wrong,
24 that anyone is going to get up here and say, or
25 maybe they will, that Henry Gray and Robin Reese

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1 weren't acting together that day. The hand of
2 one is the hand of all. If a crime is committed
3 by two or more experience who are acting
4 together in the commission of an offense, the
5 act of one is the act of both or all.

6 By way of illustration, two people can
7 be guilty of the killing of another, or murder,
8 when only one of two had a pistol and there was
9 only one bullet. If both are together, acting
10 together, assisting each other in the commission
11 of the offense, the law says that under those
12 circumstances the act of one is the act; and, as
13 it is sometimes said, the hand of one is the
14 hand of all.

15 A very simple version of it. Two
16 people band together, they walk up and commit a
17 robbery -- say a grocery store or convenience
18 store. One of them is going to be the lookout.
19 The other one has the gun. It's loaded. Even
20 if the person who is acting as the lookout --
21 and he's way out in the parking lot just making
22 sure the police don't come -- even if he tells
23 the other, "do not shoot anyone when you go in
24 there" because they are together and acting
25 together committing an offense, under the law

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1 they are both guilty. When the shooter goes in,
2 shoots the clerk dead. The lookout under our
3 law is just as guilty as the person who actually
4 gives the fatal blow.

5 In this case, you have heard there were
6 multiple blows struck by people that date. You
7 have heard from all of them and you have heard
8 from experts, and I'll get back to the known
9 cause of death. It doesn't matter. Even under
10 their theory of the case, both Henry Gray and
11 Robin Reese are guilty on both of these offenses
12 under the hand of one is the hand of all.

13 Now, whether or not being present at a
14 crime, in order for it to be the hand of one is
15 the hand of all there's got to be some showing
16 of some overt act: the phone call by Robin
17 Reese, the fact have she got down there has
18 quickly as possible. Remember, too, about how
19 Henry Gray came out, was fine with Kenneth Mack
20 who he seemed to know by all accounts, they all
21 agree, and then all the sudden he got that phone
22 call and things changed. "I'm going to take you
23 down to where my sister is."

24 Remember this victim's last words, "If
25 you're going to do anything to me, you're going

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1 to do it to me here. I'm not going back down
2 there." Those were the last words this victim
3 ever said.

4 Does that show hand of one is the hand
5 of all? To be present in order for the hand of
6 one is the hand of all at the commission it is
7 sufficient to aid, abet and assist in the
8 commission of the crime. Just because Robin
9 Reese didn't get there right at the very moment,
10 she was still present, aiding -- and set up the
11 whole thing. But for Robin Reese, Henry Gray
12 doesn't do this. I don't know under what theory
13 they're going to argue that, to say she is not
14 guilty as a principal.

15 The Judge will also charge you that in
16 order to show the crime of murder that we must
17 also show that there was a proximate cause.
18 It's called the "but for." You have heard from
19 experts. You believe which experts you believe,
20 which ones were credible because three experts
21 credible and one, (negative gesture).

22 Very simply it's kind of a "but for."
23 But for the second assault, Kenneth Mack does
24 not die. He was beaten. He was hurt, but he
25 does not die. We don't have to prove which

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1 actual blow, be it a beating with a chair, be it
2 when he fell on the ground or be it was swept
3 off his feet and -- or when he fell on his head.
4 We don't have to prove that, although I submit
5 we have, but we do have to prove that there was
6 a proximate cause between the second beating and
7 this two involved. I submit, ladies and
8 gentlemen, there should be no doubt as to common
9 sense.

10 The first one, he gets up, moves and he
11 walks away. He is coherent. He's able to talk.
12 Somebody puts him stumbling a little, some put
13 him not quiet steady. But he walked all the way
14 down on his own, that's undisputed, to get to
15 the other end, four buildings down. Then he's
16 able to have conversations.

17 Your common sense alone. He goes down.
18 He never has a voluntary movement again.
19 He's posturing, signs of an acute head injury.
20 That alone -- but you don't have to rely on that
21 alone because you have credible experts, the
22 ones from South Carolina, who were able to come
23 in here and who thoroughly examined and made
24 sure they came to the right conclusions and they
25 testified before you that because but for that

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1 second assault, Kenneth Mack does not die.

2 The fatal blow occurred during the second
3 assault.

4 What's reasonable? We can't say which
5 blow actually did it. Did the chair do it? Did
6 the fall to the ground caused by Henry Gray do
7 it? Does it matter? No, under the law, the
8 hand of one is the hand of all. Both were
9 there. Robin Reese was a couple seconds late
10 getting there but she got there and she got the
11 blows there. We have don't have to prove they
12 had a specific intent to kill. Listen carefully
13 to the Judge. All we have to prove is what they
14 did caused the death and that they were acting
15 maliciously. I submit, ladies and gentlemen, no
16 one is going to get up here and argue that
17 beating someone -- be it with your hands, fists,
18 anything is not malicious, especially when he
19 dies.

20 The acts of two or more persons may
21 combine or concur together as an efficient or
22 proximate cause of the death of a persons.
23 The defendants' actions may be regarded as
24 proximate cause if it is a contributing cause.
25 It doesn't have to be the sole cause. It

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1 doesn't have to be anything. Robin Reese's
2 telephone call alone, getting her riled brother
3 up, that was a cause; but for that phone call,
4 nobody dies. The defendant's act may not be the
5 sole cause of the death providing it's a
6 proximate cause actually contributing to the
7 death of the deceased. One who inflicts an
8 injury on another is deemed by law to be guilty
9 of homicide if the injury concerted immediately
10 causes or leads to the death of the deceased.
11 The fact that other causes also contribute to
12 the death of the deceased does not relieve a
13 defendant's responsibility.

14 This is some of the law the Judge is
15 going to charge you. As you probably
16 understand, the law in this case is very
17 important and understandable.

18 Again, on the two indictments for
19 murder, you'll have three choices:

20 Is he guilty of murder?

21 Is he guilty of voluntary manslaughter?

22 Or, is he not guilty?

23 I submit, ladies and gentlemen, they
24 will get up here and they will tell you that
25 wasn't really a murder. It's only voluntary

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1 manslaughter. All we ask that is that you look
2 at all the facts in this case as a whole
3 together. There was a sufficient cooling off
4 period if she was legally provoked. There were
5 other alternatives than beating him. Henry Gray
6 was going to grab him and take him up there so
7 she could beat him. That is malice.

8 Now, the Judge will also instruct you
9 there were two kinds of evidence you can
10 consider in this case, direct evidence and
11 circumstantial evidence.

12 Direct evidence is that kind of
13 eyewitnesses who corroborate each other. In
14 cases, as you probably understood, different
15 people have different angles. They saw
16 different things. That's what makes them
17 credible. They came up here and told you what
18 they observed. I submit to you, ladies and
19 gentlemen, when considering that -- consider
20 Mary Anderson. She is the one person in this
21 chase that had absolutely nothing to do with
22 this case. She was the only one who actually
23 didn't live out there that night. She was just
24 visiting her sister. She was so appalled by the
25 beating she saw -- and she didn't even see the

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1 initial takedown -- that she came forward
2 voluntarily to police, independent of the others
3 and everything else. I beg you to judge her.

4 Circumstantial evidence is not better
5 or worse than direct/eyewitness evidence, which
6 is typically considered the most reliable.
7 However it does help in this case but you have.
8 Circumstantial evidence is a series of facts or
9 events that take place which show or infer
10 another fact, such as the DNA evidence in this
11 case. It's "circumstantial" that this defendant
12 was hit with the chair, because DNA as we have
13 heard does not float through the air. It has to
14 be transferred it. It's down there on the
15 bottom, where it would have been hitting him.
16 They want to tell you that it is transferred
17 from handshake to handshake, whatever. That is
18 circumstantial evidence.

19 An example that some judges use, and I
20 don't know if this judge will, is basically
21 saying I go to bed tonight, I look out my window
22 and I only see dew on the ground, on the grass.
23 When I wake up in the morning and look outside,
24 I see that there that there's snow as far as you
25 can see. That is circumstantial evidence,

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1 reliable circumstantial evidence, that it snowed
2 during the night. The defense may get up here
3 and say, 'Oh no, somebody decided to play a joke
4 on you, went to North Carolina and brought in a
5 snow blower and blew snow all around you for
6 twelve hours to trick you.' That's not
7 reasonable.

8 Court reporter is evidence which points
9 to the existence of facts. Very simply,
10 however, it doesn't matter because the judge
11 will tell you that you don't weigh one more than
12 the other, direct more than verdict.

13 In this case, taken together they
14 totally corroborate each other. Circumstantial
15 evidence: telephone calls, which we have gone
16 back and forth about, whichever one you want to
17 believe. I think she finally admitted making
18 the phone call. That's circumstantial evidence
19 of the phone call that precipitated all of this.
20 The phone records give us that information.

21 In this case, circumstantial evidence
22 totally corroborated the directed verdict that's
23 been presented for you.

24 I'll trying to finish up.

25 Criminal intent. In every case the

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1 State must prove the defendants had criminal
2 intent. Nobody is going to argue that they
3 weren't having criminal intent that day. It's a
4 state of mind of the defendant. While we can't
5 take a person's brain and dissect to determine
6 what they were thinking at the time they did
7 this to a medical certainty, the law does
8 understand that you can look at that facts and
9 circumstances surrounding an event, as it's been
10 presented to you, in determining whether or not
11 there was criminal intent.

12 Ladies and Gentlemen, by her own
13 admission there was criminal intent.

14 Now, you also heard from a number of
15 witnesses which are, because of certain
16 training, can be qualified as expert witnesses.
17 Judge them the same way you do any other.

18 Expert witnesses are allowed to come
19 before you because they have certain training
20 and can testify to opinions. Normal witnesses
21 like me, I'm not an expert or anything but they
22 can come before you and testify as to an opinion
23 in their expertise and I submit, Ladies and
24 Gentlemen, that when you consider the credible
25 expert testimony in this case there is no issue

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1 as to cause of death.

2 Finally, credibility. This case boils
3 down to it, credibility, believability of the
4 witnesses, who had something to gain, who had
5 something to lose? Were they biased or
6 prejudiced? You can consider all of a witness's
7 testimony, none of a witness's testimony or part
8 of a witness's testimony. It is totally up to
9 you, because the most important role in this
10 courtroom is yours.

11 What was their demeanor like?

12 Was their testimony corroborate by the
13 other witnesses?

14 Was it corroborated by their own prior
15 statements?

16 You heard from Kara Chase. She has
17 become affiliated with the family. She got up
18 here and she tried to help out her friend. That
19 is perhaps understandable, but you have her
20 credibility testimony. That's the only
21 statement that's admitted, from when she gave a
22 prior statement that was inconsistent, when she
23 didn't have those prejudices involved. What's
24 more important was her testimony corroborated by
25 what the other eyewitnesses observed.

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1 Ladies and Gentlemen, in this case we
2 are lucky because certain witnesses did come
3 forward. They did the right thing.

4 Robin Reese even admits she went down
5 there. She may minimize her involvement, as
6 every defendant that would testify may do.

7 Marcellius Brooks, by gosh, just because
8 the State puts up Marcellius Brooks doesn't mean
9 that we believe every word he says. What he
10 does is he sets up the whole chain of events.
11 That's why you heard from him.

12 You heard from Sergeant Pegram. She
13 minimized his involvement since day one. He has
14 his own day in court.

15 Credibility, believability. You can
16 believe one against many, many against one. I
17 submit, Ladies and Gentlemen, that when you look
18 at all the evidence in this case the only
19 credible evidence shows you exactly what Robin
20 Reese and Henry Gray did back on February 13th
21 on 2010 when they the law into their own hands.
22 No matter what Mr. Mack did or didn't do, that
23 wasn't their right. That wasn't the right
24 choice. There were other avenues, other choices
25 that they could have had.

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1 All the State asks is that you consider
2 the facts as you determine them, apply the law
3 and that you come to a verdict that speaks the
4 truth for the citizens in this county.

5 Hold them responsible for their
6 choices. They had options. They made their
7 choices and Kenneth Mack doesn't get another
8 choice or another option. Thank you.

9 THE COURT: Mr. Farley.

10 MR. FARLEY: Thank you, Your Honor.

11 May it please the Court.

12 MS. CAMPBELL: Do you want me to move
13 that?

14 MR. FARLEY: If you don't mind. Can
15 you, please?

16 MS. CAMPBELL: (Complies).

17 MR. FARLEY: Thank you. Ladies and
18 Gentlemen of the jury, it's been a long week.
19 We've seen a lot of testimony, had a lot of
20 people come up to talk to us. I want to start
21 by thanking you also for your service. I'm sure
22 you didn't anticipate when you arrived on Monday
23 that you were going to be such a long haul nor
24 such a rollercoaster of emotion. We had a very
25 interesting trial and a very lengthy trial, so I

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1 want to thank you for coming here and doing your
2 civic duty.

3 I'd like to remind you, too, that my
4 name is Andrew Farley. I'm an attorney here in
5 Columbia and also Lexington. I'm here on behalf
6 of Ms. Robin Reese. I am here to represent her
7 today here in court. In my opening statement, I
8 told you to please listen to all the witnesses,
9 to please consider all the evidence that we're
10 going to have in this case that was brought
11 forward. I'm sure you did so.

12 I also asked you to look at any
13 discrepancy, any holes, any problems with their
14 chase may come forward. I submit to you I think
15 there's been many.

16 I don't believe that the prosecution
17 has been able to prove their case. They've been
18 unable to prove that Ms. Robin Reese is guilty
19 of lynching in the first degree or guilty of
20 murder beyond a reasonable doubt.

21 Now, what did the evidence show us?

22 I mean, what happened in this case?

23 I mean, we've heard from a lot of
24 witnesses who told us Melquanna S. [REDACTED],
25 Lucy, was going home. She was "harassed", to

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1 use the words of some witnesses, "assaulted" is
2 another word, "bothered", I think, by
3 Mr. Kenneth Mack.

4 Certainly I think that was inappropriate. I
5 don't think anyone would disagree with that.
6 Melquanna was thirteen (13), Mr. Mack at the
7 time was thirty-nine (39).

8 After that he -- she slapped him,
9 certainly. He tackled her to the ground, and
10 then we had Mr. Bloom who felt that he had to
11 intervene and knocked Mr. Mack off of her.
12 He took her to her mother. Her mother,
13 certainly, I think any mother would be agitated,
14 upset, angry that this happened. She took her
15 daughter back home and she told you, she
16 certainly wanted to go find Mr. Mack. She
17 didn't intend to kill Mr. Mack. She didn't
18 intend to lynch Mr. Mack, not to murder
19 Mr. Mack. She just wanted to tell Mr. Mack to
20 not ever bother her child again. I don't think
21 that's unusual. I don't think that's
22 unreasonable. I think that's what a lot of
23 mothers would do.

24 I'd also like to talk about and
25 highlight some of the witnesses that we did see

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1 in this case, and there were a lot of witnesses.
2 We had many, many people come up and testify. I
3 don't mean to go through all of them, but I
4 would like to highlight some, and I'm going to
5 do it out of order. Please forgive me.

6 Officer Gillian, he came up and
7 testified. He came up to testify about the
8 chair. He told you that just with the naked eye
9 you couldn't even see blood on the chair and it
10 took three different tests to find any blood.
11 The last test, this BlueStar test, some sort of
12 protein activation test, you heard from another
13 witness -- Ms. Unger, I believe, who worked for
14 SLED -- said that could come from common
15 surfaces. She is also the one that did the DNA
16 analysis.

17 I'd also like to remind you that
18 Investigator Pegram, he also testified. He
19 testified -- but in his testimony, he kind of
20 seems to wander. He wants it both ways. He
21 wants to have you understand that there's a lot
22 of problems in Gonzales Gardens. It's difficult
23 to get statements out of the Gonzales Gardens,
24 it's hard to believe anyone in Gonzales Gardens,
25 but that everyone in this case is believable and

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1 every statement in this case is credible. It's
2 just ordinarily they're not, but 'we have
3 everything in this case.' I think you can
4 certainly question that.

5 I would also point out that
6 Investigator Pegram also testified that Henry
7 Gray was in between F and G buildings, said
8 something to Mr. Mack and then received a phone
9 call and then became upset with Mr. Mack.

10 Later in the same testimony he wants
11 you to understand that Mr. Mack was at F and G,
12 said something to the victim, ran up to
13 Ms. Reese's apartment in the N building, took a
14 phone call from her phone line. I don't know
15 how he figured that the call coming in. That he
16 then ran back down here.

17 Then in another part of his testimony
18 he wanted you to understand he got a call on his
19 cell phone.

20 So that, in and of itself, is
21 contradictory.

22 I'd also like to bring up two of the
23 witnesses that did say they see the incident at
24 F and G building, Donetti Perry. You can
25 certainly judge the credibility of Miss Perry.

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1 She was here on the witness stand. came to say
2 what she was going to say, but once she had said
3 what she observed she couldn't elaborate. She
4 couldn't give you any more details. When
5 pressed, she was unsure of how far away, what
6 her angle of vision was, what exactly the
7 distance. I think that credibility in itself
8 could be called into question.

9 Mary Anderson, another witness. She
10 came to testify as to what she saw. Also could
11 not tell you how far away she was, and that at
12 one point she said she was twenty-five feet
13 away, at another point she said she was one foot
14 away. She also testified that the entire time
15 she was wearing reading glasses, which I think
16 would be very difficult to see something that's
17 happening twenty-five feet away. If she were
18 only one foot away, I think it would be even
19 more difficult.

20 We also heard from Little Ricky or
21 Angelo Boyd. He also testified to the fact that
22 Melquanna S. [REDACTED] was also assaulted. He was
23 there. He saw it. He corroborated the
24 testimony of Lucy and Marcellius Brooks. Just to
25 remind you, he said she was saying "please

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1 stop", screaming, upset and that Mr. Mack didn't
2 stop.

3 We heard from Lucy. Lucy testified to
4 the same thing. She asked him to quit, said
5 "leave me alone." He grabbed her by the jacket
6 and she slapped him. That's when he took her to
7 the ground.

8 You heard from Marcellius Brooks.
9 Marcellius Brooks came here today to tell you
10 that in his observation he felt he needed to
11 intervene in what was going on. It was that
12 serious and that when he did so, his kindness
13 got repaid with the charge of murder.

14 Then finally we heard from Ms. Reese.
15 Ms. Reese wanted to tell you what her story was,
16 and I'd like to address a few things.

17 She told you not that she kept making
18 her video games. She was done with her games.
19 She was ready to take her child back to her
20 hours where she would be safe.

21 It's not as if she just calmly had a
22 cooling off period, she wanted to get her child
23 to where she would be safe.

24 You also heard her testify she called
25 several people. I submit to you, I don't think

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1 about. This case is not really about lynching
2 or murder. This case is really about a mother
3 and a mother's concern for her daughter. That's
4 what we really have to consider today. That's
5 what really is the motivation behind this case.

6 And, Ladies and Gentlemen, you can use
7 common sense and apply that common sense with
8 facts of this case. I believe in applying that
9 common sense to this case, you will arrive at
10 the correct conclusion. The case against
11 Ms. Reese has been elevated to a point where it
12 just doesn't deserve. This case does not
13 warrant the charges that have been brought
14 against Ms. Reese.

15 I mean, you heard her testify that she
16 wanted to find Mr. Mack, but common sense should
17 tell you she didn't want to go find him for
18 revenge. She wasn't going to find him to kill
19 him. She just went to tell him "leave my child
20 alone." You heard her try to tell the truth to
21 you. She tried to kick him. She missed. She
22 fell. She slapped him. In her anger when she
23 pulled away, she grabbed a chair and flung it in
24 the general direction. That's a far cry from
25 trying to kill someone. That's just anger

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1 expended.

2 This case has got these incredible
3 charges heaped upon it when it does not deserve
4 it. I would submit to you that these charges
5 simply are not appropriate. And as the
6 solicitor pointed out to you, they require
7 malice aforethought. They require planning. It
8 really requires intent to get together, to want
9 to do this. My point to you is no one in this
10 wanted to kill. Robin Reese did not want to
11 kill or lynch or murder anyone. She just wanted
12 to go tell someone "leave my baby along."

13 You know, maybe the right thing to do
14 would have been to call the police. Maybe
15 that's what should have been done, in hindsight.
16 But as Investigator Pegram pointed out, Gonzales
17 Gardens is a pretty rough place and we don't
18 have -- or we have the luxury of not living in
19 Gonzales Gardens, Ms. Reese does not. This is
20 reasonable doubt.

21 Just one final thing I would tell you,
22 that I think it's a natural reaction to want to
23 protect your children. It's a natural reaction
24 when you find out or when you think your child
25 is hurt or upset or assaulted to want to try to

1 protect them further, to try to warn away the
2 danger, to try to prevent it from ever occurring
3 again and that's what Ms. Reese tried to do.
4 She just tried to warn away the danger and tell
5 this man "don't ever come around my child
6 again."

7 I'd like to remind you, too, that all
8 the witnesses, the ones that you may think are
9 credible or not, all of them said she was there
10 less than five minutes. She came in and was
11 gone almost immediately.

12 Now have, Judge Cooper is going to
13 instruct you on the law and you should listen
14 very closely to what he's going to say, because
15 he is going to tell you about something the
16 solicitor has already brought up -- it's very,
17 very important. That's why we all cover it.
18 That's the burden of proof in this case.
19 Beyond a reasonable doubt.

20 Beyond a reasonable doubt means that a
21 reasonable person might hesitate, a reasonable
22 person might say, 'I'm not certain. I don't
23 know.' It's okay not to know, it's okay to have
24 reasonable doubt. What we have in this case is
25 reasonable doubt because the State simply cannot

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1 prove in this case that Ms. Reese wanted to
2 lynch and murder Kenneth Mack.

3 When you deliberate back in the jury
4 panel, I want you to remember that this case is
5 really about a mother and daughter, and that's
6 the essential part of this case. That's what
7 started this whole thing and I would want you to
8 think about the reasonable doubt and I want you
9 to think about what the prosecution has been
10 able to bring to the table. What I want you to
11 do, what we're asking you to do is to return
12 Ms. Reese to her home, return Ms. Reese to her
13 family and her friends. Importantly, return
14 Ms. Reese to Lucy. And I want you to return the
15 verdict that justice requires.

16 The only verdict that you can reach
17 when you look at all the evidence and all the
18 witnesses in this case and that's a verdict of
19 not guilty. The charge of the murder of Kenneth
20 Mack and the charge of lynching in the first
21 degree of Kenneth Mack, Not Guilty, because
22 Robin Reese is not guilty of these charges.
23 Thank you.

24 THE COURT: Mr. Chaplin.

25 MR. CHAPLIN: Thank you very much, Your

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1 Honor. Good afternoon ladies and gentlemen of
2 the jury.

3 Ladies and gentlemen, we've been here
4 for five days and for five days this chair has
5 sat in front of you. I'm going to bring it a
6 little closer (moving chair) -- because you see
7 what's been sitting in this chair for the past
8 five days has been reasonable doubt.

9 Reasonable doubt, there can be no doubt
10 that would affect a reasonable person's belief.
11 There must be no doubt that Henry Gray is
12 guilty. There must be no dispute that any
13 reasonable alternative is possible. The State
14 must prove every element of the charged offense
15 beyond a reasonable doubt. There must be no
16 doubt that would cause a reasonable person to
17 hesitate and the State must leave you firmly
18 convinced that Henry Gray is guilty.

19 I suggest to you ladies and gentlemen
20 that that is not the case here.

21 I'm going to leave this right here.
22 I'm sorry it's a little small.

23 So -- to you reasonable people, let's
24 talk about the evidence in this case, and let's
25 just review the reasonable doubt. First and

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1 foremost, let's talk about the issues with the
2 marijuana and the Ativan. If that was such a
3 nonissue for the State, why didn't they bring it
4 up to you? Why did we bring that to your
5 attention?

6 The State would have you believe that
7 there's basically no problems with that and
8 everything is fine. When I asked the gentlemen
9 could there be any effect on Mr. Mack with
10 regards to mixing those two ingredients, clearly
11 it was stated no. Yet when I asked him about
12 his knowledge base on that particular issue, he
13 said he didn't really have any knowledge on that
14 so he couldn't really form an opinion, very
15 confusing. But when we got up there, we
16 explained it to you in much greater detail.

17 Now, labels on the autopsy photos.
18 You're going to see those photos when you go
19 back in the room. What you're going to find is
20 that there are no labels, so you're just going
21 to have to take their word for it that it is
22 what they've told you that it is.

23 They have told you over and over that
24 the victim was beaten with this chair but yet
25 none of them have been able to find blood, and I

1 mean, they are saying 'well, maybe there was a
2 trace amount or something like'; but, come on,
3 you take a chair and you beat somebody with it,
4 why isn't there blood all over this chair? Why
5 isn't this chair bent? Why is this chair still
6 usable? Now, you heard somebody say that they
7 found some DNA on the chair. Well, why did they
8 have to go to and resort to DNA? Why couldn't
9 they just bring you a blood match? Because there
10 is none. So they had to go to the next best
11 thing, which was DNA.

12 But then I suggest to you that you also
13 heard testimony that the victim was in this area
14 leaning on something or whatever the case might
15 be. I don't know. I wasn't there, but his DNA
16 allegedly is on the bottom of this chair. That
17 doesn't make any sense to me, but at the same
18 rate, if I took that at what they're saying and
19 I have no reason to think they would fabricate
20 that, it still doesn't pass the sniff test. I
21 expect that chair would be covered in blood,
22 skin, tissue whatever that case may be and it's
23 just not there.

24 The doctor talked to you about a lucid
25 interval. Now, the reports say that when the

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1 gentleman -- when the victim got up, he was
2 lucid. The State argues, 'Well, that's not a
3 lucid interval. That just means that he was
4 lucid.' Well, you interpret it however you like
5 but what the State would like you to believe is
6 when the victim got up from the first attack, he
7 was lucid.

8 Then you heard a very credible
9 forensics pathologist tell you that it is
10 possible to sustain a horrific beating in one
11 location and then things go on in your head,
12 swelling, bleeding, whatever the case may be
13 that would cause you to pass out and collapse in
14 a different location. You heard medical
15 testimony on that issue, but yet what the State
16 wants you to believe is that whatever occurred
17 in that the first attack did not occur. It did
18 not have any impact on the victim and that it
19 definitely had to be the second attack that
20 killed him. They have brought in people
21 after -- numerous witnesses try to bolster that
22 particular testimony. Again, it does not
23 necessarily make sense. Why? Because Amber
24 Hardy, Isaac Weathers, Kiki Burns, all of them
25 testified contrary to that and they told that

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1 man did not just pop up and walk away, that he
2 definitely was impaired as a result of that
3 horrific -- and what did Amber call it, brutal
4 attack at the top.

5 I'm going to say like Attorney Farley
6 said, it's common sense here. What about all of
7 the different people that the State can't find
8 that have not been arrested in this case? Come
9 on. It's been two years since this family has
10 lost their loved one, and yet the State has
11 brought this case to trial, and there's still
12 Juve, Trigger, Genesis and whoever else, all
13 those little hooded people that were beating the
14 brakes off of this man at the top and they don't
15 know where they are. Yet they want you to
16 believe and have confidence in the fact that
17 they have sufficiently investigated this case
18 and that you can trust their evidence and that
19 it's beyond a reasonable doubt. I tell you,
20 that dog don't hunt.

21 Now, proximate cause, that's a kind of
22 fancy term but I'm just going to break it down
23 to this: in order for you to believe that the
24 victim's injuries and what he sustained at the
25 top of the hill did not cause his death, and,

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1 you know, I think the State is going to get up
2 here and argue a "but more" type of argument,
3 but let's just stick with what I'm saying. In
4 order for you to say that, you would have to
5 believe what Marcellius Brooks told you, and I
6 suggest that's a very dangerous thing to do;
7 because even the lead investigator, Pegram, and
8 even the lead prosecutor in this case has told
9 you that Marcellius Brooks is a liar, that he is
10 deceptive, but yet the majority of their
11 investigation is based on what he has said.

12 They weren't there. They don't know if the
13 man popped up or if he stumbled or whatever.
14 All they can go by is the evidence. Clearly
15 they don't believe Amber Hardy, Isaac Weathers
16 or Kiki Burns. They believe Marcellius Brooks.
17 Marcellius said all he did was do a slap and a
18 kick. You've heard numerous people come in here
19 and say that's clearly not true, but in order
20 for all of their analysts to be that "but for"
21 the second attack, you would have to believe the
22 slap and the kick theory. I suggest to you
23 again that does not pass the sniff test either.

24 You heard numerous people talk to you
25 about kicks, stomps to this man's head. And

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1 where did it occur? They told you about the
2 top, where Marcellius Brooks and his band of
3 thugs, his mob attacked this man.

4 Now, you also heard people tell you
5 that, 'well, I think there's been some testimony
6 that Mr. Gray swept his feet from under him and
7 he fell back.' I know that you all were paying
8 attention when you heard all the doctors say all
9 the injuries to the victim's head were on the
10 side. I think you also paid attention when
11 Donetti Perry said it occurred in the middle and
12 she said the middle is grass. I know you heard
13 the rebuttal witness that came in here this
14 morning, I can't remember his name right now,
15 and he clearly said 'yes, ma'am it had to happen
16 on concrete.' Then when I asked him, 'Are you
17 telling me that your testimony is that it had to
18 happen on concrete? Yes.' Then the state
19 popped up and said, 'Well could it be concrete
20 or a hard surface?' Because you see, they
21 realized there was something wrong with that
22 testimony. Donneti Perry said the man did not
23 fall on concrete.

24 Now, it would be nice if you knew more
25 about that crime scene, but guess what, all

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1 these pictures with the snow on the ground and
2 all the rulers on the ground and things like
3 that, that's not even of the area between F and
4 G. You can throw those in the garbage. That's
5 not even the crime scene in this particular
6 case. It's not even relevant, but I tell you
7 what is, they did find blood up there and they
8 did find missing earrings and buttons and all
9 this other good stuff so something definitely
10 happened up top that was definitely more than a
11 kick and a slap. And they're going to send
12 those pictures back with you in the jury room.
13 I suggest that you don't throw them in the
14 garbage but you look at them because what that
15 cause is it tells you is really what happened up
16 there when Marcellius and his boys beat the
17 brakes off the victim in this particular case.

18 Now, Brooks testified, and he said
19 these were his witnesses. You know, I'm sitting
20 here and I've been looking at this file for like
21 the last four months. I'm convinced at this
22 point the only person that really investigated
23 this case is Marcellius Brooks. Marcellius
24 Brooks is the one that came to the police and
25 said, 'Oh, no, no, no. There was another

1 *attack.'*

2 *Oh, really? Well, we're looking kind of*
3 *foolish right now. Tell me about that.*

4 *See, it happened that the bottom.*

5 *Tell me about that.*

6 *Well, do you got any witnesses?*

7 Then he sends his witnesses in to tell
8 the police about the attack that he told them
9 about. Who are his witnesses? Mary Anderson
10 Donetti Perry, Kara Chase. Now, when they came
11 in, and all of them came in on the 16th of
12 February, 2010. None of them were under oath.
13 Now, I don't know why they all showed up
14 together, and I'm not trying to say anything bad
15 about these ladies. All I'm telling you is they
16 all got in the car or whatever the case may be.
17 They all ended up in the police department at
18 the same time. They all gave statements.

19 But let me tell you, when Donetti Perry
20 and Kara Chase got here to the courtroom this
21 week, their stories were different. And you
22 know why, because they had to look that the man
23 and raise their hand and they had to go under
24 oath. They said, *'no way I'm going to get hit*
25 *with a zero-to-five perjury charge for trying to*

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1 *help somebody like Marcellius Brooks, who in all*
2 *counts is going to walk. I am not going to do*
3 *that.*

4 They got on that stand and what did
5 they do? They told the truth. That's the only
6 time that these people were under oath. The
7 other times I'm not sure why they did what they
8 did or how they did it or if they were
9 influenced or whatever. I'm not going to stand
10 up here and tell you things that aren't in
11 evidence. All I'm telling you is that something
12 happened. I do know that when they got in here,
13 they had a great deal to say and it was
14 inconsistent and they were under oath.

15 Now, it's up to you to determine how
16 reliable those statements are, and that's your
17 job. You're going to take in the back with you,
18 you're going to take a statement from Kara Chase
19 a couple of them. I just want you to keep in
20 mind that in none of those statements was Kara
21 Chase under oath. The only time that Kara Chase
22 swore on the Bible -- and you heard what
23 Marcellius Brooks said, he said, 'Yeah, I was
24 *lying but not on the Bible.*' The only time
25 Kara Chase was under oath was when she sat on

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1 that stand and she told you all what she
2 remembered occurring occurred on the 13th of
3 February on that day.

4 You're going to also notice that there
5 was snow and ice on the ground when you look at
6 these pictures. I don't think the fact they got
7 the wrong location matters because I think there
8 was snow everywhere. I tried to draw you a
9 diagram of the different attacks. They keep
10 tell you that there were one attack -- rather
11 two attacks. I don't know that. I heard that
12 at one point there was a man on top of a girl.
13 I heard at one point there was a man that pushed
14 him off the girl. I heard at one point somebody
15 kicked the man in the head. Then I heard this
16 morning that the man tried to run and then he
17 fell. Then I heard again a group of guys, four
18 or six guys, chased the man. So a whole lot of
19 stuff happened up there. It's even not sure
20 what all occurred, but I tell you one thing, it
21 had an impact on this case.

22 As much as the State needs to rely on
23 therapy theory that whatever happened up there
24 was just minimal, I'm just telling you that is
25 not true. See, this case is getting old and the

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1 State needs to convict somebody for this crime.
2 There's a death and there's a family here, which
3 I have a great deal of respect for and I feel
4 sorry for them -- I'm sorry that they have to go
5 through this. But I am here to defend Henry
6 Gray. The State needs to close this case and
7 people are becoming impatient.

8 Now, I'm telling you I think you
9 deserve a little better. If you're going to be
10 asked to come in here and spend your week and
11 review evidence, to make a determination about
12 two people's lives, I think you also have an
13 expectation to expect that the evidence that
14 they bring to you would not be riddled with
15 errors and have gapping holes in it and require
16 that the State bring in investigators to impeach
17 their own witnesses that are supposed to be
18 telling you what occurred and not have to, after
19 the end of the case, bring in three or four
20 other people as rebuttal witness to say clean up
21 stuff that was not done appropriately and that's
22 what you've seen here in this particular case.
23 The State is not sure who to charge in this
24 case, so they just -- basically they charged
25 everyone. I take that back, not everyone, the

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1 ones that they say they could find.

2 Now, you also heard in testimony that
3 somebody saw Brooks go into a building down
4 there at the bottom when the cops came around.
5 That an officer went to the door and that by the
6 time he went to the door, Brooks disappeared.
7 Things that make you go, *'Humm, why was that?*
8 *What was he doing down there?*

9 You heard a lot about phone numbers,
10 and they want you to convict somebody based on a
11 phone number. You don't have any audio. You
12 don't know what was said. They're trying to
13 connect some lines and times. If he said this
14 is what occurred or whatever the case might be,
15 all mere speculation, it's mere speculation.

16 You need evidence. You're not going to
17 go back in there and say, *'Well I have a*
18 *suspicion.'* No. You're going to go back there
19 and say, *'I think they have proven beyond a*
20 *reasonable doubt that certain things occurred.'*

21 I told you earlier the names that the
22 police got to support the theory that my client
23 swept somebody's feet from under them and that
24 the other lady beat him with a chair, those
25 names came from the man sitting in jail charged

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1 with murder trying to get off that charge;
2 thinking that maybe if he provided a
3 distraction, maybe he could get a simple
4 assault. So basically, if the State believed
5 his witnesses, then maybe he would get a walk.

6 Beg the Court's indulgence.

7 Now, during this trial, the witnesses
8 were sequestered. That's another reason why I
9 think when they came in here, they had to tell
10 the truth. You see, they didn't get a chance
11 to, like they did when they went down to the
12 police department, sit around in the lobby or
13 whatever they did and talk about this thing..
14 They were sequestered. They don't know what the
15 other person said, they couldn't track it, so
16 they came in here and told the truth.

17 Well, stop and talk a minute about Mary
18 Anderson, who they say corroborated all of the
19 evidence of the other people. Mary Anderson
20 said that she didn't even write the report.
21 Mary Anderson said that when she came out that
22 the man was on the ground.

23 Now, I asked the officer that took the
24 report, and I said, 'Can Mary Anderson read?'
25 He said, *I don't know.* Well, I would have

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1 expected that he would have said, 'Yes, she can
2 because I gave her the report, I told her to
3 review it and after she reviews it, to sign it.'
4 What did he tell me? 'I have no clue.' so
5 basically, I don't know who wrote that. I don't
6 know who wrote it.

7 Donetti Perry said when she went there,
8 the man was lying on the ground.

9 The EMS report that came in here said
10 there were three men and one woman involved in
11 the matter. I don't know what case that is.

12 Now, my client is charged with murder
13 and he's charged with lynching. Well, first of
14 all, to charge him with murder you have to
15 believe beyond a reasonable doubt that Henry
16 Gray killed Mr. Mack. Then you also have to
17 believe that it was done with malice and that
18 the State has proven that beyond a reasonable
19 doubt. I suggest that's not the case.

20 Then he's also charged with lynching
21 and that's generally done by an angry mob.
22 Well, I suggest to you, Ladies and Gentlemen,
23 the only angry mob I heard about in this
24 particular case has been the people up there at
25 the top with Marcellius Brooks and all the guys

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1 in hoods.

2 So again look for the solid evidence in
3 this case and, please, please do not rely on
4 mere suspicious.

5 The hand of one is the hand of all.
6 You heard the prosecutor say just a second ago,
7 she said that the case is based on that theory.
8 But then she also turned around and said
9 Marcellius Brooks' acts do not meet the level of
10 murder. I'm going to ask you this, why is he
11 charged with murder if that's the case? That's
12 how confusing this whole case is.

13 I'm about to wrap this up. And I'll
14 say this, it took the State eighteen months in
15 this particular case to charge my client with
16 this murder.

17 The State doesn't know. The State is
18 confused on this whole thing. They basically
19 have charged everyone and what they've done is
20 they've brought you this evidence that's full of
21 reasonable doubt. That is reasonable doubt.
22 They've said, *'You figure it out. It's in your*
23 *hands. We don't know.'*

24 If they're so convinced that Marcellius
25 Brooks didn't committed murder, then why haven't

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1 they dismissed his charges?

2 Why did it take them eighteen months to
3 charge my client?

4 Why are there so many problems with the
5 investigation?

6 I'm not trying to say that we've got a
7 bad police department or anything like that, and
8 I hope you don't get that impression, but what I
9 am saying is that we're here talking about
10 somebody's life, and I'm telling you that the
11 level of this evidence does not meet the
12 standard that I believe it should be in order to
13 make those kind of decisions.

14 So the State has had a problem on their
15 hands with regard to this case. They're hoping
16 that you can buy into their theory that it
17 occurred on the second attack and these are the
18 people that did it. They want you to find them
19 guilty of those charges.

20 I have suggest to you in closing that's
21 not the case here, that my client, Henry Gray
22 has pled Not Guilty. He is innocent and I'm
23 asking that you come back with a verdict of Not
24 Guilty as it pertains to murder and as it
25 pertains to lynching in this particular case.

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1 I thank you so very much for your time
2 and your attention.

3 THE COURT: Ms. Sampson.

4 MS. SAMPSON: May it please the Court.

5 "An eye for an eye leaves the whole
6 world blind."

7 Robin Reese and Henry Gray wanted to
8 take out revenge on Kenneth Mack for what he did
9 to Lucy, Melquanna S. [REDACTED].

10 Because they were told that he had
11 touched Lucy S. [REDACTED] in a way they didn't
12 think he should, they wanted revenge and they
13 got it. They went after Kenneth Mack like you
14 would go after a dog who has done something
15 wrong.

16 They didn't stop when they heard he had
17 been assaulted by three, four, five individuals,
18 wasn't good enough. He had to be taken care of.
19 They had to make sure he would never touch her
20 again, in Robin Reese's own words. They killed
21 him. He'll never touch anybody again.

22 That is the definition of murder.

23 You have heard evidence from several
24 different people and I'm going to go over that
25 and unfortunately, you're going to have to hear

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1 it again. You heard from several people about
2 two incidents, not three, not four, but two.
3 One took place by L building now. As you can
4 see on this diagram here, and what everybody has
5 told you, has been consistent, L Building is
6 right here. Here is Forest Drive, here in the
7 B.P. station, here is where the market starts.
8 The first assault takes place here. It is a
9 series of events, not a series of assaults as
10 Mr. Chaplin would have you believe.

11 Lucy S. [REDACTED] begins to have a
12 conversation with Kenneth Mack. That turns into
13 an assault. He grabs her arm, for whatever
14 reason. She slaps him. In response, they end
15 up on the ground.

16 Now have, you've heard several
17 different versions of how that happens. That's
18 natural. If you see a car wreck, everybody is
19 going to say a different version of what
20 happened. They're not lying. They just were
21 focused on different things. That's what
22 happens.

23 But they both end up on the ground, and
24 what are Marcellius Brooks, Angelo Boyd and even
25 Lucy S. [REDACTED] telling you? They tell you that

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1 Marcellius Brooks pulls him off, that he holds
2 him on the ground so that Lucy can get her licks
3 in, and that she does. Angelo Boyd takes a
4 couple of kicks, as he told you. But that did
5 not kill Kenneth Mack. And that wasn't enough
6 for Robin Reese and Henry Gray.

7 At the beginning of this case, my
8 co-counsel, Ms. Simpson, told you this was about
9 choice, bad choices made and continually made
10 over and over again. That is exactly what we
11 have shown you.

12 Kenneth Mack unfortunately made the
13 choice to touch Miss S. [REDACTED] -- right, wrong
14 or otherwise, he did that.

15 Marcellius Brooks made the choice to
16 intervene into an altercation that had nothing
17 to do with him, another bad choice. Marcellius
18 Brooks then takes Lucy to her mother who
19 everybody knows is hanging out in the Mini Mart
20 playing video games, because that's what she
21 does. He tells her what happens. But let's
22 remember, he also tells her, *'I took care of*
23 *it.'* He made the choice to tell her and then he
24 made the choice not to stop her when she goes to
25 get Kenneth Mack.

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1 Because what does everybody tell
2 you'll? She is mad. She looked like she was
3 going to yell and she did. They told you she
4 left -- first she had to finish her video game.
5 Let's not forget she had to cash out. Then she
6 makes some phone calls. She chose to now
7 involve her brother, Henry Gray.

8 She calls him as she takes Lucy home
9 and tells him, *'Guess what that guy Ken did?'*
10 They would have you believe that she didn't know
11 Ken. That she didn't know Brooks either. How
12 did she call them? She told you she didn't know
13 Brooks. How did she have his number? She said
14 she got it from somebody else. Did she mention
15 calling that person? Look at the call logs.
16 She didn't have the time.

17 She called Brooks because she wanted to
18 make sure, *'It was Ken? Right? Ken is the one*
19 *who did it?'* *'Yep, it was Ken.'*

20 She called her brother: *'You'll never*
21 *guess what that Ken did?*

22 *Ken? Ken, the barber?*

23 *Yeah, Ken the barber.'*

24 Unfortunately for all of us, Ken chose
25 after he assaulted that first time to walk down

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1 the sidewalk, which you can see here, down
2 Forest Drive to G Building, where he hoped he
3 could get some help. Let's remember, he could
4 walk, he could talk and what Sanovia Thompson
5 told you is that the talked to a friend, who
6 went to get him something for his head. They
7 were friends. He'd just gotten beat up.

8 He could get help until Henry Gray
9 Robin Reese stopped him cold, couldn't call for
10 help, couldn't ask for help. Couldn't get up
11 and get help after they were through with him.

12 Now, everything was good, fine, going
13 well. Henry Gray comes out, *'What happened to*
14 *you? Then he got that call from his sister.*
15 *The whole thing changed. His demeanor changed.*
16 *He started cussing, wanted to know, 'What the*
17 *fuck did you do to my niece? Grabbed him. 'I am*
18 *taking you to my sister.'* Another bad choice --
19 and where the lynching began.

20 She called, said *'get Kenneth Mack'* and
21 Henry Gray did. He said, *'You're going to get*
22 *with my sister.'* They all heard that. That's
23 where they were going.

24 Kenneth Mack being the man that he was,
25 the man that he was said, *'I am not going*

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1 anywhere. Whatever you gotta do, do it to me
2 here.' Henry Gray said all right, swept his
3 feet out, knocked him town. He's done.

4 Still not enough. Robin Reese arrives,
5 "That's him." How did she know that was him if
6 she didn't know it was Kenneth Mack. If she
7 didn't know Kenneth Mack was the man touching
8 her daughter, how did she know when she got
9 there that's the right guy? Because she knew
10 him. She goes up, she kicks him. She stomps
11 him, and yes, she takes this chair -- that's
12 been covered up for five days for whatever
13 reason, I don't know -- and hits him with it.
14 Not once but twice.

15 Yeah, that's a chair. I'm not that
16 big, but it's not that heavy. Did it break?
17 No. It's iron, it's not going to break.

18 Did it cut his skin? No, he had on
19 clothes. What did we just tell you he had on,
20 two pairs of sweats, a shirt, a barber jacket
21 and a regular jacket. Of course he's not cut,
22 but he is hurt. They kicked, stomped and hit a
23 man when he was down. Talk about malice.

24 Then instead of getting him help,
25 instead of waiting around to see if he was going

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1 to get up, walked away as if nothing had
2 happened. They didn't even have the decency to
3 stay and tell people what happened. They didn't
4 have the decency to get the man some help. That
5 is malice.

6 Now, how do we know all of this, Ladies
7 and Gentlemen? The defense would have you
8 believe that you should just believe Robin
9 Reese. She told you -- she got up there and told
10 you what happened. But there is a huge problem
11 with that, Ladies and Gentlemen. If you believe
12 Robin Reese, you have to first disbelieve
13 Donetti Perry -- and I'll remind you she is the
14 one first to testify. Pink shirt on. She came
15 up here and she testified. Didn't want to be
16 here, but was under subpoena. Told you the
17 exact same thing she said back two years ago,
18 two years ago.

19 Now, honestly, you asked me what I was
20 doing two years ago, heaven help me, I have no
21 idea but she remembered because this was
22 traumatic. She had never seen a man beaten to
23 death. I hope that none of us ever have to see
24 a man beaten to death, but she did. She told
25 you she saw Robin Reese. She knows her, they

1 can't get around that. She know her because her
2 father lives in G building. She knows Henry
3 Gray, known as Six, because that's his father.
4 She knew Lucy, because that's her grandfather.
5 They ignored that. You heard -- did you even
6 hear them talking about that?

7 I used to do what they do, did it for
8 twelve years. Part of what you do is you put up
9 smoke-and-mirrors, try to misdirect the jury,
10 have them look somewhere else other than the
11 evidence.

12 I want you to look directly at the
13 evidence. Donetti Perry told that she saw Robin
14 Reese and Henry Gray do this. Gray got the
15 call, swept him off his feet, knocking him down,
16 and beat him up.

17 Robin Reese comes around, kick him,
18 says, "*That's him.*" The takes this chair, hits
19 him with it. Walks off. So for her to be
20 telling the truth, Donetti Perry would have to
21 be a liar.

22 MR. FARLEY: Objection, Your Honor.

23 THE COURT: I think it's a fair
24 interpretation of the facts. Overruled.

25 MS. SAMPSON: Then we move to Kara

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1 Chase. She came up here, had the red hair. She
2 told you, *'Well, yeah, back in February 2010,*
3 *when everybody was best in my mind, I saw Robin*
4 *do this. I saw Henry do this. I was out there*
5 *and they did it.'* Now, two years later, when
6 her child is the best friend with Robin Reese's
7 child, she wants nothing to do with getting her
8 in trouble. That is her best friend's child and
9 her best friend's mother. Of course, her story
10 is different now.

11 Mr. Chaplin said to look for some
12 reason why things are different. That's the
13 reason.

14 But could she still not get around?
15 That Robin Reese was there, that Henry Gray was
16 there, and that they did it. And when we asked
17 her, *well, was your story back then true, what*
18 *did she tell you? 'Yes, yes it was.'* She never
19 denied that what she said back in February of
20 2010 was the truth. What she said this week
21 was, *'Well, I've had all of these things and I*
22 *just can't remember.'* But we asked again and
23 again, *'Did you tell the truth back then?'*

24 Yes, I did.

25 Is your statement true?

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1 Yes, it is.

2 And in her statement she told them that
3 they did it, because they did it.

4 Again for Robin Reese to be telling the
5 truth Sanvoia Thompson would have to be lying.
6 She is friends with Robin Reese. She told you
7 she has known her since she was fifteen, because
8 she had dated her brother. She had absolutely
9 no reason to try to get this woman in trouble.
10 She told you that she did it. For Robin Reese
11 to be telling the truth, her friend is lying.

12 Then we get to Mary Anderson. Mary
13 Anderson -- little Mary Anderson -- had
14 absolutely no dog in this fight. She doesn't
15 live there. She doesn't know Robin Reese, she
16 doesn't know Henry Gray, she doesn't know
17 Marcellius Brooks. Mr. Chaplin would like you
18 to believe that they all came to the Police
19 Department together and just made this stuff up.

20

21 But what did she tell you? 'I went by
22 myself.' They just happened to go on the same
23 day. As Investigator Pegram told you, people
24 won't talk at the Gardens. At the Gardens. Not
25 at all, but inside the Gardens where all the

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1 people are that they don't want to know that
2 they've talked to the police. Even Kara Chase
3 told you that. What did she say, *'You don't*
4 *talk in the 'hood. It'll get you killed.'*
5 So they go to the police station and they talk.
6 Mary Anderson told you about that.

7 What did she say? I loved her words, I
8 wrote it down: *"I seen what I seen."* And she
9 told Mr. Farley, when he tried to put words in
10 her mouth, *'Don't you put words in my mouth.'*
11 She saw Mr. Mack laying on the ground, she saw
12 Henry Gray and Robin Reese kick him, hit him,
13 take that chair and hit him with it.

14 For Robin Reese's story yesterday to be
15 true, Mary Anderson is a liar.

16 We also heard from Antonio Boyd. He
17 told you -- he didn't want to be here either --
18 about the first fight. Right? And he told you
19 how he and Marcellius Brooks went in and told
20 Ms. Reese that they took care of it. But she
21 denied that, *'didn't happen.'* Remember how she
22 told you that Brooks came in with some other
23 guy? Antonio Boyd is known as Little Ricky,
24 because of his size. He's not 6'2". For her to
25 be telling the truth, Antonio Boyd is lying.

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1 Marcellius Brooks would also have to be
2 lying. Now, again, Mr. Chaplin wants you to
3 believe that he has a reason to lie. He came in
4 here and told you what happened. He still is
5 facing charges. He is facing the same charges
6 that they are, for a very good reason. Without
7 his choices, none of us would be here. He chose
8 to tell Robin Reese. He chose to tell her who
9 did it and he chose to tell her where he went.
10 He chose not to stop her where she went to go
11 get him. That is why he was charged with
12 murder, under the hand of one is the hand of
13 all. He started it. Whatever happened
14 afterwards, he's just as liable for it. That's
15 why he's charged the murder.

16 We're not confused. We know exactly
17 what happened. We're not making this stuff up.
18 I couldn't make this stuff up if I didn't want
19 to, I'm just not that creative. People came in
20 here and told you all about it.

21 But again he told you what he did -- he
22 told Robin Reese, what he said to her. In order
23 for her to be telling the truth, he's lying.

24 And lastly for her to be telling the
25 truth, Lucy S. [REDACTED], her daughter, also has

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1 to be lying. What did Lucy tell you? They said
2 'Me and mom -- I told her what happened, she
3 took me home. I stayed at the house. She never
4 came back.'

5 What did Robin Reese tell you? Oh, I
6 went back. After I tried to kick him and
7 missed. After I slapped him. Went back home
8 and talked to her about what had happened. She
9 also told you that Henry Gray came back with her
10 and talked to her. If that's true, then when
11 Lucy S. [REDACTED] was up here talking to you, why
12 didn't you hear that? Because it was simply not
13 true.

14 Ms. Campbell told you that you need to
15 decide the credibility of the witnesses based on
16 their reasons to lie. Ms. Reese stands here
17 accused of murder and lynching in the first
18 degree. If she doesn't have a reason to lie,
19 who does? She doesn't want to get in trouble
20 for this. She doesn't want a conviction. Of
21 course she has a reason to lie. For her to be
22 telling the truth, all of these people have to
23 be lying.

24 I just realized that I left off one
25 really important person -- and I'll apologize to

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1 him right now. Investigator Pegram, I left off
2 you and I am sorry. Because Robin Reese told
3 you that he just didn't let her talk. Does that
4 make any sense? He has twenty-something years
5 of experience, and doesn't want her to talk
6 about the one thing he's asked them to talk
7 about? He said *tell me what happened*. She left
8 out the I part where she tried to hit the
9 victim, left out the part where she and her
10 brother were there, left out that altercation
11 altogether because he said *'I don't want to talk*
12 *about that'*?

13 Look at that. You have the statement,
14 she wrote it in her own handwriting. She could
15 have written whatever she wanted. She didn't.
16 She didn't want to put herself out there, and
17 she said that. I didn't make that up. That's
18 not the State's position, that's her position.
19 She didn't want to put herself out there.

20 Ladies and Gentlemen, she did that
21 because she is the one that has a reason to lie.

22 Now, they would have you believe this
23 was a terrible investigation because we didn't
24 know what happened. Of course we didn't know
25 what happened, nobody was telling us. Officer

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1 Buck and Office Delage get a call that there's
2 been an assault. We all agree that happened.
3 That's when Kenneth Mack first gets involved.
4 But when they get there, nobody is there.

5 Now, if she is so upset about her
6 daughter being hurt, about her daughter being
7 touched, after they find Kenneth Mack, the
8 Gardens are loaded with police officers. They
9 are over there by the market taking photos. They
10 are over by Kenneth Mack, trying to get him
11 help. Tell them! All she had to do was walk
12 out of the Mini Mart -- I guess that's where she
13 went back, get off her dern video game -- and
14 tell them 'my daughter was assaulted.' They are
15 standing around, trying to figure out what
16 happened, taking photos. She said nothing,
17 because she knew what she did was wrong.

18 She told them nothing, so the police
19 don't know what to ask. They do think that
20 first assault is what killed him, until people
21 finally start talking. So, yes, on some reports
22 it says that he died from that first assault.
23 On the EMT report, it talks about the first
24 assault, because that's all that they knew about
25 when they wrote that report.

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1 But when they got it straight, they
2 charged the right people. Yes, it took eighteen
3 months. We don't want to get it wrong. Do you
4 really want a solicitor's office that runs
5 around just charging people because we feel like
6 it or do you want us to do our jobs? Do you
7 want Investigator Pegram and the other
8 investigators to do their jobs to, do them
9 right, do what you pay us to do -- and we did?
10 We charged the right people with the right crime
11 because that's who did it.

12 I'll talk a little bit more about Robin
13 Reese and her versions of the truth. For Robin
14 Reese to not be guilty, you would have to
15 believe her list of lies:

16 She doesn't know Marcellius Brooks that
17 well. We already went over that. She had to
18 know him. She had his phone number.

19 Had to ask a friend for a cell phone?
20 When?

21 She also told you that Henry Gray was
22 at Lizard's Thicket. Yet one, two, three, four
23 people -- with no dog in this fight -- told you
24 that he was there at E building. Then she
25 suddenly remembered, 'Oh, yeah, he was there.

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1 *He pulled me off of him.* Which is it?

2 She didn't know the man who got into
3 the altercation with Lucy. So how did she know
4 -- she says that she runs up to G and just sees
5 a man and starts kicking him, but falls. Well,
6 how do you know that's him? Are you just going
7 to run up and start assaulting anybody in
8 Gonzales Gardens? I don't think so. He knew
9 exactly who he was.

10 She said she was looking for a man with
11 jeans and a jean jacket. We just told you that
12 he didn't have on jeans or a jean jacket. So
13 why was she assaulting him?

14 Again, had no idea that the man was at
15 G building. She just miraculously shows up
16 where the one man who assaulted her child is at?
17 She knew. Her brother told her.

18 She called her brother. He's standing
19 there looking at him. You don't think he went,
20 *'He's here, come get him.'* He's standing right
21 there with him.

22 She said she was so angry that she
23 tried to kick him but missed and fell and she
24 slapped him once. If you're that angry, how is
25 your brother going to stop the assault? She is

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1 so angry at what he did -- and you saw her -
2 that she just stopped? No. She beat him with
3 this chair and her feet. She didn't stop.

4 For these to be true, again all of
5 those people would have to be lying. Not one but
6 four.

7 Henry pulled her away from the men and
8 held her. Again, four against one. Nobody saw
9 that. Nobody even heard that until yesterday.

10 She then said that she threw a chair at
11 the man but it never came into contact with him.
12 Let's talk about that a little bit. They said
13 that you couldn't see blood on the chair. The
14 chair is black. There is not going to be much
15 that you're going to see on a black chair.
16 Lucky for us, we have forensics. They do their
17 job, they do it well. They took one, two, three
18 tests -- because that is how many that it took -
19 - and they find blood. If they hadn't, don't
20 you think that they would have hired an expert
21 to say that there was no blood? They find
22 blood.

23 Unfortunately the test that they used
24 for blood does interfere with another test for
25 blood, not for DNA. Those are two separate

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1 things. Our experts got up there and explained
2 it to you. They talked to you -- forget that,
3 they put smoke-and-mirrors, don't look at that.
4 She explained to you that you could still find
5 DNA. Nothing was wrong with her results.

6 Where did they find it? Under the
7 chair, where you would expect it if you took it
8 and hit someone with it and their blood sloshed
9 up on it -- their DNA, their sweat, tears. It
10 got on that chair. DNA can't be controverted.
11 It was on the bottom of that chair. The one
12 thing that they didn't do was explain how that
13 happened. Because they have no explanation for
14 how that happened, except for it happened during
15 the lynching and murder of Kenneth Mack.

16 Again, we went over this. We returned
17 home and talked to Lucy, with Henry. It
18 happened. She said that she spoke with Brooks
19 outside of her apartment. Remember, she told
20 you that -- that Gray did, that he thanked him
21 for what he had done. Why didn't you hear that
22 from Marcellius Brooks? Didn't happen.

23 Didn't tell police what happened
24 because Pegram didn't want to hear about it.
25 We've been over there.

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1 This last. Pegram told her that he
2 knew that she threw the chair. He didn't know
3 about the chair. What did he tell you? They
4 got an anonymous tip that a man threw a chair.
5 A man. Now, Robin Reese isn't a man. They
6 didn't know that the chair was even involved for
7 two days. When they're talking to her, they
8 don't know about the chair being involved in the
9 incident. So how could he have told her, 'we
10 already know about the chair.' He didn't tell
11 her that, because it didn't happen.

12 You have to disbelieve everybody in
13 order to believe Robin Reese. It just didn't
14 happen.

15 Cause of death in this case, as Ms.
16 Campbell sais, that seems to be the new defense
17 of the time, that you question the cause of
18 death. But their own experts agrees on the
19 cause of death.

20 Dr. Conradi, who has been doing this
21 longer than I have even been alive, told you
22 that he died during the second attack, during
23 the second. She, Dr. Marcus and even whatever
24 we could get out of Dr. Shaker agree that it
25 took blunt force trauma and that it would take

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1 significant force. Kicks from two, three people
2 that were all over his body, not just on his
3 head, is not enough force to kill him. He had
4 cerebral edema, his brain was swelling. He had
5 cerebral contusions. He had a skull fracture.
6 Your skull is one of the hardest materials out
7 there. It protects your brain. A kick just
8 ain't gonna do it.

9 Dr. Marcus showed you this diagram and
10 what Mr. Chaplin would love for you to believe
11 is that the injury is up on the top of the head.
12 Look at this picture, it's right here -- where
13 if you fell to the ground, you'd hit your head.
14 The reason that he fell to the ground was that
15 Henry Gray swept him, killing him.

16 There's no problem with cause of death.
17 They did it. He's dead. They should be held
18 accountable for it.

19 Now, the hand of one is the hand of
20 all. So if Robin Reese started this, and she
21 did start it, she is just as guilty as Henry
22 Gray. Without that choice make that call,
23 Kenneth Mack would be here today. Because they
24 don't want you to remember is that he could
25 walk, he could talk, he could ask and that he

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1 did ask for help after that first assault.
2 Instead of help, he got kicked, kicked and
3 chaired -- beat up on, by those two people.
4 When they left, they left him dead. The hand of
5 one is the hand of all.

6 Now, I'm almost done. I want to talk to
7 you a little bit about being a juror. We all
8 get instructions on how to be lawyers. We go to
9 law schools. Y'all are professionals, you have
10 instructions on how to do your jobs. Nobody
11 gives instructions on how to be jurors. We put
12 you twelve strangers in here and say *go figure*
13 *it out*. So I do want to give you instructions,
14 look at the evidence, listen to what you heard,
15 remember what you heard. Go back there and
16 discuss it because at the end of the day, there
17 is absolutely no evidence that supports Robin
18 Reese and Henry Gray of being innocent.

19 At the beginning of this case,
20 Mr. Chaplin talked to you about what it
21 would sound -- what the end of the world would
22 sound like. To his client, the end of the world
23 sounded like being wrongfully accused.

24 Kenneth Mack doesn't have to imagine
25 what the end of the world sounds like. Robin

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1 Reese and Henry Gray ended his world on February
2 13, 2010. Kenneth Mack's family and his mother,
3 they don't have to imagine. They had to bury
4 their loved one, and a part of Kenneth Mack's
5 mother's world died that day too. They don't
6 have to imagine the end of the world.

7 Mr. Chaplin told you just a few minutes
8 ago that Robin Reese was only there for a
9 minute, two minutes, couldn't have done this;
10 that Henry Gray was only there a couple of
11 minutes, couldn't have done this.

12 It takes hours to give life and seconds
13 to take it. They took Henry Gray's life with
14 total disregard for human life. That is the
15 definition of murder. Their actions -- while
16 only two people are needed to make a mob, not a
17 group, not a ton, two were lynching, there are
18 two of them. That is a mob that got together.
19 They don't have to plan on murder. They don't
20 have to intend on murder. They have to intend
21 to act together and they did when they stomped
22 him, when they kicked him, when they hit him and
23 when they left him bleeding literally to death.
24 Definition of lynching. They don't have to even
25 plan for him to die for murder. They have to

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1 disregard human life. Kicking the feet out from
2 under someone, kicking him while he's down,
3 beating him with a chair and leaving him in the
4 snow alone, unable to speak is disregard for
5 human life and the definition of murder.

6 As a solicitor, the State of South
7 Carolina and Kenneth Mack's family has given me
8 and put in me the faith to get justice, to make
9 justice happen. I now give that to you.

10 You all now have the choice, the choice
11 whether to let them go free for what they did or
12 to convict them for killing Kenneth Mack. I ask
13 that you hold them responsible. That you come
14 back with a verdict that speaks the truth, a
15 verdict that makes justice happen, a verdict of
16 Guilty of murder by Henry Gray and Robin Reese,
17 a verdict of Guilty of lynching in the first
18 degree because Robin Reese and Henry Gray took
19 the life of Kenneth Mack. Find them guilty
20 because they are guilty. Thank you.

21 THE COURT: Madam Forelady, Ladies
22 and Gentlemen of the jury, you've heard all the
23 testimony in this case. You've heard all the
24 arguments of counsel, both for the State and the
25 defendants. You'll take to the jury room all

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1 the evidence in this case these been introduced.

2 Now, from time to time, jurors ask me
3 to send me a copy of what I'm about to tell you
4 or go over with you. Well, generally speaking
5 I'm not able to do that. In some states it is
6 done. It's not done generally in South Carolina
7 so I ask you to pay close attention to what I
8 now tell you.

9 I'll remind you of a few things that I
10 mentioned in the opening remarks. Under our
11 Constitution and Code of Laws, only the jury can
12 make findings of fact. I'm not permitted to
13 indicate to you how I might feel about the
14 facts. If I have done or said anything in this
15 case which would indicate to you that I have an
16 opinion concerning the facts of this case, then
17 you should disregard that. You must
18 independently weigh the evidence presented in
19 this trial and render a verdict based solely on
20 that evidence.

21 The same Constitution and laws that
22 designate and make you the finders of fact also
23 make me the instructor of the law. If you have
24 some idea as to what the law is or what the law
25 ought to be and it does not agree with what I

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1 now tell you the law is, you're obligated under
2 the oath that you have taken to abandon this
3 preconception of the law and accept it and apply
4 the law precisely as I now state it to you.

5 As you know, the indictments in this
6 case allege several different offenses against
7 the defendants. Both defendants are charged
8 with lynching in the first degree and murder.

9 Each indictment charges a separate and
10 distinct offense. You must decide each
11 indictment for each defendant separately on the
12 evidence and the law applicable to it
13 uninfluenced by your decision as to the other
14 indictment.

15 The defendants may have be separately
16 convicted or acquitted on any or all of the
17 offenses charged.

18 You'll be asked to write a separate
19 verdict of Guilty or Not Guilty for each
20 indictment and for each defendant.

21 Now, I reminded you again the fact that
22 the defendants were arrested, charged and
23 indicted in this case, cannot be considered as
24 evidence of guilt in this case, not does it
25 create any presumption of inference of guilt.

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1 The indictment, again, is only the formal legal
2 document by which the charges are brought into
3 court and made against a defendant.

4 Now, each defendant has pled not guilty
5 to each of these indictments. That plea puts
6 the burden on the State to prove the defendant
7 is guilty. A person charged with committing a
8 criminal offense in South Carolina is never
9 required to prove himself or herself innocent.
10 I charge you this is an important rule of law.
11 The defendants in a criminal case no matter what
12 the seriousness of the charge may be will always
13 be presumed to be innocent of the crime for
14 which this indictment was issued unless guilt
15 has been proven to you beyond a reasonable
16 doubt.

17 This presumption of innocence does not
18 end when you begin your deliberations. In other
19 words, it accompanies the defendant throughout
20 the trial and until you reach a verdict of guilt
21 based on evidence satisfying you of that guilt
22 beyond a reasonable doubt.

23 The presumption of innocence again is
24 not a mere legal theory. It's not just a legal
25 phrase. It is a substantial right to which

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1 every defendant is entitled until and unless you
2 the jury are satisfied from the evidence of the
3 defendant's guilt beyond a reasonable doubt.

4 Well, what is a reasonable doubt in the
5 law? The attorneys have attempted to explain to
6 it you. A reasonable doubt is the kind of doubt
7 which would cause the reasonable person to
8 hesitate. I'll say that again. A reasonable
9 doubt is the kind of doubt that would cause a
10 reasonable person to hesitate to do something,
11 and in this case, to convict.

12 The State has the burden of proving the
13 defendant's guilt beyond a reasonable doubt.
14 Some of you may have served as jurors in civil
15 cases where you were told that it's only
16 necessary to prove a fact is more likely true
17 than not true, such as by the greater weight or
18 the preponderance of the evidence. In criminal
19 cases, however, the State's proof must be more
20 powerful than that. It must be beyond a
21 reasonable doubt.

22 To think that a defendant is probably
23 guilty or the circumstances are suspicious is
24 not enough. Proof beyond a reasonable doubt is
25 proof that leaves you firmly convinced of the

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1 defendant's guilt. Now, there are very few
2 things in this world that we know with absolute
3 certainty. In criminal cases the law does not
4 require proof that overcomes every possible
5 doubt.

6 If based on your consideration of the
7 evidence you are firmly convinced the defendant
8 is guilty of the crime(s) -- or either defendant
9 is guilty of the crime -- charged, you must find
10 that defendant Guilty.

11 On the other hand, if you think there
12 is a real possibility that the defendants
13 separately are not guilty, you must give each of
14 those defendants the benefit of the doubt and
15 find him or her Not Guilty.

16 Now, there are two types of evidence
17 which are generally presented during a trial.
18 They are called direct evidence and
19 circumstantial evidence. Direct evidence is
20 merely the testimony of a person who claims to
21 have actual knowledge of a fact, such as an
22 eyewitness. It's evidence which immediately
23 establishes the main fact to be proved.

24 On the other hand, circumstantial
25 evidence is proof of a chain or series of facts

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1 indicating the existence of some fact. It's
2 evidence which immediately establishes
3 collateral facts from which the main fact may be
4 inferred. Circumstantial evidence is based on
5 inference, not on personal knowledge or
6 observation.

7 The law makes absolutely no distinction
8 between the weight or value to be given to
9 either direct or circumstantial evidence, nor is
10 a greater degree of certainty required of
11 circumstantial evidence than of direct evidence.
12 You must weigh all the evidence in the case and
13 after weighing all the evidence, if you're not
14 convinced of the guilt of the defendants beyond
15 a reasonable doubt, you must find the defendants
16 guilty -- not guilty.

17 Now, necessarily you must determine the
18 credibility of witness who is have testified in
19 this case. There were a lot of witnesses in
20 this case. Credibility simply means
21 believability. It becomes your duty as jurors
22 to analyze and evaluate the evidence and
23 determine which evidence convinces you of its
24 truth.

25 In determining the believability of

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1 witnessed who have testified, you may believe
2 one witness over several witnesses or several
3 witnesses over one. You may believe a part of
4 the testimony of a witness and reject the
5 remaining part of the testimony of that same
6 witness. You may believe the testimony of a
7 witness in its entirety or reject the testimony
8 of a witness in its entirety. You may consider
9 whether any witness has exhibited to you any
10 interest, bias, prejudice or other motive in
11 this case. You may also consider the appearance
12 and the manner of the witness while on the
13 witness stand.

14 Now speaking of witnesses, a person who
15 has a criminal record, and there were some in ,
16 this case, is competent to testify during the
17 trial. Past record does not affect the ability
18 of that witness to testify. Past record of a
19 witness may only be considered by you, if at
20 all, in determining the witness's believability.
21 Remember, you are the sole judges of the facts
22 in this case and of the believability of any and
23 all witnesses.

24 Also, we've had expert witnesses in
25 this case. Now, the Rules of Evidence, those

1 are the rules that guide our trial principles,
2 do not normally allow for witnesses to offer
3 opinions or conclusions. Normally witnesses
4 testify to facts, but an exception to this rule
5 exist for witnesses that we call an expert, and
6 we had some in this case; a witness, who by
7 education and/or experience has become expert in
8 some art or science or profession may state on
9 opinion to you as to relevant and material
10 matter in which the witness claims to be an
11 expert and may also state the reasons for that
12 opinion.

13 You should consider any expert opinion
14 received in evidence in this case like any other
15 evidence and give it the weight you think it
16 deserves. If you decide that the opinion of an
17 expert witness is not based upon sufficient
18 education and experience or if you conclude that
19 the reasons given in support of the opinion are
20 not sound or that the opinion is out weighed by
21 other evidence, you may disregard that opinion
22 in its entirety.

23 In other words, an expert witness's
24 testimony is to be given no greater weight than
25 that of any other witness simply because the

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1 witness is an expert. Further you're not
2 required to accept an expert's opinion even
3 though it might not be contradicted.

4 Now, in order to establish criminal
5 liability, criminal intent is required.
6 Criminal intent must be proven by the State
7 beyond a reasonable doubt. Criminal intent is
8 always a matter that must be determined by the
9 jury from the circumstances surrounding the
10 situation. There's no way to prove intent to a
11 mathematical certainty. There is no way to
12 prove that medical science can dissect a
13 person's brain and determine actually person had
14 in mind, so the law says that criminal intent
15 may be inferred from the circumstances shown to
16 have existed at the time and place. This is how
17 you make a determination of whether or not the
18 element requiring intent was present. It's not
19 necessary to establish intent by direct or
20 positive evidence but intent may be established
21 by inference, in the same way as any other fact
22 by taking into consideration the acts of the
23 party and all the facts and circumstances of the
24 case.

25 In other words, criminal intent is a

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1 mental state of conscious wrongdoing. It's up
2 the you to determine what the defendants
3 intended to do based on the circumstances shown
4 to have existed.

5 Now, the attorneys have talked to you
6 about the hand of one or the hand of all -- the
7 hand of all. If a crime is committed by two or
8 more people who are acting together in
9 committing a crime, the act of one is the act of
10 all. A person who joins with another to commit
11 an unlawful act is criminally responsible for
12 everything done by the other person which
13 happens as a probable or natural consequence of
14 the acts done in carrying out the common plan
15 and purpose..

16 For example, two people can be guilty
17 of the killing another person when only one of
18 the two had a gun. There's only one bullet,
19 only one shot fired that caused the death.
20 If two or more people are acting together
21 assisting each other in committing the offense'
22 the act of one is the act of all; or sometimes
23 referred to as the hand of one is the hand of
24 all.

25 Prior knowledge that a crime is going

1 to be committed without more is not sufficient
2 to make a person guilty of that crime. Mere
3 knowledge that another person is going to commit
4 crime, even if the defendant is present when the
5 crime is committed, is also not sufficient to
6 convict a defendant as a principal. Guilt as
7 the principal is shown by actual or constructive
8 presence at the scene as a result of prior
9 arrangement. The State must dispute beyond a
10 reasonable doubt by competent evidence the
11 theory of the hand of one is the hand of all.

12 A principal in a crime is one who
13 either actually commits the crime or who is
14 present aiding, abetting or assisting in
15 committing the crime.

16 When a person does an act in the
17 presence of and with the assistance of another,
18 the act is done by both. Where two or more
19 acting under common plan or intent are present
20 at the commission of a crime, it does not matter
21 who actually commits the crime. All are guilty.
22 Presence at the commission of a crime means to
23 be sufficiently near the crime as aid, abet and
24 assist in the crime. However, mere presence at
25 the scene of the crime obviously is not

1 sufficient to convict one as a principal on the
2 theory of aiding and abetting.

3 Intent is also a necessary element, for
4 there must have a common design or intent to
5 commit the crime and the crime must have been
6 committed with the person aiding and abetting by
7 some overt act. Intent meaning intending the
8 result which actually occurs. It's not
9 accidentally, involuntarily. The State must prove
10 these elements beyond a reasonable doubt.

11 Well, let me defined murder for you.
12 Each defendant is charged separately with
13 murder. The State must prove beyond a
14 reasonable doubt that the defendant(s) killed
15 another person with malice aforethought.

16 Malice is hatred, ill will or hostility
17 towards another person. It is the intentional
18 doing of a wrongful act without just cause or
19 excuse and with an intent to inflict an injury
20 under circumstances that the law will infer an
21 evil intent.

22 Malice aforethought does not require
23 that malice exist for any particular time before
24 the act is committed but malice must exist in
25 the mind of the defendant(s) just before and at

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1 the time the act is committed. Therefore there
2 must have a combination of the evil intent --
3 the previous evil intent -- and the act.

4 Malice does not necessarily impart ill
5 will towards an individual but signifies,
6 rather, in general a malignant recklessness of
7 the lives and safety of others, or a condition
8 of mind which shows a heart, regardless of
9 social duty, fatally bent on mischief.

10 Malice need not exist for any
11 appreciable time before the commission of the
12 act or killing occurs. Malice may be conceived
13 at the very moment that the fatal blow is
14 stricken.

15 Malice aforethought may be express or
16 inferred. These terms, "express" or "inferred"
17 do not mean different kinds of malice but merely
18 mean the manner in which the malice may be shown
19 to exist. That's either by direct evidence or
20 by inference from the facts and circumstances
21 which are proved.

22 Express malice is shown when a person
23 speaks words or expresses hatred or ill will for
24 another, or when a person prepared beforehand to
25 do an act which was later accomplished; for

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1 example, lying in wait for a person. Or other
2 acts of preparation that go to show that the
3 deed was within the defendant's mind would be
4 express malice. Malice may be inferred by
5 conduct showing a total disregard of human life.

6 Now, just as in some states you may
7 have -- either on television or otherwise read
8 that there are lesser-included offenses of
9 murder. For example, in some states there is
10 murder in the first degree, murder in the second
11 degree, murder in the third degree. You may
12 have heard those terms. In South Carolina we
13 call the lesser-included offense of murder
14 voluntary manslaughter. That's not murder in
15 the second degree, it's not murder in the third
16 degree, it's called voluntary manslaughter. This
17 is included within our law as a lesser-included
18 offense of murder.

19 So if find that the State has failed to
20 prove beyond a reasonable doubt that the
21 defendant(s) has committed murder, you may
22 consider whether the State has proved beyond a
23 reasonable doubt that the defendant(s) committed
24 voluntary manslaughter. To prove voluntary
25 manslaughter, the State must prove beyond a

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1 reasonable doubt that the defendant took the
2 life of another in the sudden heat of passion
3 based upon sufficient legal provocation, both
4 heat of the passion and sufficient legal
5 provocation must be present at the time of the
6 killing to constitute voluntary manslaughter.

7 Sudden heat of passion may for a time
8 affect a person's self-control and temporarily
9 disturb a person's reason. The sudden heat of
10 passion must be the type that would make an
11 ordinary person unable to coolly reflect on his
12 action and would produce an uncontrollable
13 impulse to do violence.

14 Sufficient legal provocation must be
15 the type that could cause a person of ordinary
16 reason and caution to become enraged and to lose
17 control temporarily. The provocation need for
18 voluntary manslaughter must come from some act
19 or related to the victim. However, words alone,
20 however vulgar or insulting, are not enough to
21 be legal provocation. The exercise of a legal
22 right, no matter how offense it is to another,
23 is never sufficient legal provocation for
24 voluntary manslaughter.

25 If the heat of passion had cooled or if

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1 there was enough time between the provocation,
2 if any, and the killing for the passion of a
3 reasonable person to cool, the killing would not
4 be voluntary manslaughter. In deciding whether
5 a reasonable person would have had enough time
6 to cool off, you should consider all the
7 circumstances surrounding the killing. You may
8 consider the nature of the provocation, if any,
9 the defendant's mental and physical state, and
10 the circumstances and relationships between the
11 parties.

12 Now, where a person inflicts a fatal
13 injury on another person and that person dies at
14 a later time, you must be convinced beyond a
15 reasonable doubt that the infliction of the
16 injury was the proximate cause of the victim's
17 death.

18 Proximate cause is the direct cause.
19 It is the immediate cause. It is the efficient
20 cause. It is cause without which the death of
21 the victim would not have resulted. There must
22 be a change of causation from the time of the
23 injury until the time of the victim's death.
24 Proximate cause does not necessarily mean that
25 it occurred immediately prior to the death.

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1 There may be more than one proximate
2 cause. The acts of two of more persons may
3 combine together to be a proximate cause of the
4 death of a person. A defendant's act may be
5 regarded as a proximate cause if it is a
6 contributing cause to the death of a victim.

7 The fact that other causes also
8 contributed to the death of the victim does not
9 relieve the defendants from responsibility. The
10 defendant's act need not be the sole cause
11 of death but it must be the proximate cause
12 creating -- I'm sorry -- contributing to the
13 death of the victim.

14 The second charge is lynching in the
15 first degree. Any act of violence inflicted by
16 a mob upon the body of another person which
17 results in the death of the person shall
18 constitute the crime of lynching.

19 A "mob" is defined as the assemblage of
20 two or more persons, without the authority of
21 law, for the premeditated purpose and with the
22 premeditated intent of committing an act of
23 violence upon the person of another. To
24 constitute a mob under the statute, the
25 assemblage need not have formed with the

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1 premeditated person -- formed with the
2 premeditated purpose and intent of committing an
3 act of violence on the person of another. But
4 the requisite purpose and intent may be formed
5 after the participants are assembled.

6 It is permissible to infer that all
7 persons present when an act of violence is
8 committed aid and abetted the crime and are
9 guilty as principals.

10 Now, Ladies and Gentlemen, I want to
11 emphasize this next point. I instruct you and
12 emphasize the fact that the defendant Henry Gray
13 did not testify I this case is not a factor to
14 be considered by you in any way in your
15 deliberations and your consideration on the
16 question of the guilt or innocence of Henry
17 Gray. It must not be considered by you in any
18 manner whatsoever.

19 A defendant has the Constitutional
20 right to remain silent and the assertion of this
21 right must not be considered by you in your
22 deliberations. I repeat, under your oath, you
23 are to draw no conclusion whatsoever from the
24 fact that the defendant Henry Gray in this case
25 did not testify. The fact that this defendant

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1 did not testify should not even be discussed in
2 the jury room.

3 Burden of proof, as I have stated to
4 you, it is on the State to prove his
5 innocence -- is on -- as stated to you, it is on
6 the State to prove his guilt. The defendant is
7 not required to prove his innocence. The burden
8 of proof remains on the State to prove guilt
9 beyond a reasonable doubt.

10 Now, Ladies and Gentlemen, you've also
11 the heard testimony in this chase concerning the
12 penalty a person can receive or serve for crimes
13 alleged in these indictments. In determining
14 the guilt or innocence of the defendants, you
15 cannot consider any possible penalty for a
16 particular crime. Punishment for the crimes is
17 a matter for me to determine and should never be
18 considered by you in any way whatsoever in
19 arriving at a fair and impartial verdict as to
20 the guilt or innocence of the defendant(s).

21 Now, in just a minute, you will begin
22 your deliberations. I'll remind you that during
23 your deliberations you must not and cannot
24 communicate with anyone outside the jury room.
25 We cannot provide any information to you, other

1 information to you about the case other than
2 you've already received. You may not use any
3 reference materials, dictionaries, encyclopedias
4 or a Bible or any internet resource. If you
5 learn that any juror has violated this
6 instruction, you're to report that directly to
7 the court immediately.

8 Now, as I said, Ladies and Gentlemen,
9 nothing I may have said during the course of
10 this trial has been in any way intended to
11 express or suggest a view of the cases or an
12 opinion of mine as to the facts in the case.
13 If any of my actions or words have so seemed to
14 indicate, you will disregard and form your own
15 opinion as to these matters. I'm required to
16 declare the law, as I've done in these
17 instruction, to help guide you to a just and
18 lawful verdict. Whether some of these
19 instruction will apply will depend on what you
20 find to be the facts. The fact that I've
21 instructed on various subjects in this case must
22 not when it taken by you has indicating an
23 opinion of this court as to what you should find
24 to be the facts or what your verdict should be.

25 Now, there are two potential verdicts

1 to each charge which you may find in this case:
2 guilty and not guilty. There is no significance
3 whatsoever in the order in which I state these
4 possible verdicts. It's simply one must be
5 stated first.

6 All twelve of you must agree on the
7 verdict in each case. Your verdict cannot be
8 based on sympathy, passion, prejudice, emotion
9 or any other consideration not in evidence in
10 this case.

11 Madame Forelady, I have prepared two
12 verdict forms, one for each defendant. They
13 are, I hope, fairly straightforward.

14 First as to both defendants on the
15 charge of lynching in the first degree, once you
16 have reached the unanimous verdict, please
17 indicate guilty or not guilty as to each
18 defendant.

19 As to the charge of murder, once the
20 jury has concluded a unanimous verdict, please
21 indicate whether you find the defendant -- each
22 of the defendants -- guilty or not guilty of
23 murder.

24 If you do not find the defendants
25 guilty of murder, you may consider the charge of

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1 voluntary manslaughter, in which case you also
2 would find by unanimous consent the defendants
3 guilty or not guilty of voluntary manslaughter.

4 Once that is concluded, if you will
5 sign and date the verdict form, knock on the
6 jury room door and we will receive your verdict.

7 Now, Ladies and Gentlemen, I'm going to
8 ask you to retire to the jury room. Your
9 lunches are here. It's up to you whether you
10 want to begin deliberations before you eat or
11 after you eat or during -- while you eat.
12 I ask you not to begin your deliberations until
13 you have received the evidence and the verdict
14 forms. Once you have the verdict forms and the
15 evidence, the bailiffs are going to bring them
16 to you, you may begin your deliberations. Good
17 luck to all of you. Thank you very much.

18 (JURY OUT @ 1:43 p.m.)

19 THE COURT: Any exceptions or
20 objections from the State?

21 MS. CAMPBELL: No, sir.

22 THE COURT: From the defense.

23 MR. FARLEY: No.

24 MR. CHAPLIN: No.

25 THE COURT: All right. Counsel, if

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1 you would please review the evidence with the
2 court reporter. We will stand at-ease until we
3 hear from the jury.

4 (REVIEW OF EVIDENCE)

5 (JURY IN DELIBERATION @ 1:54 p.m.)

6 THE COURT: I need to dismiss the
7 alternate. Any objection?

8 MS. CAMPBELL: You know my position --
9 without objection.

10 THE COURT: I can't find defense
11 counsel, but I'm going to go ahead and do it.

12 MS. CAMPBELL: Thank you judge.

13 MS. SIMPSON: Thank you.

14 THE COURT: No, hold on, I want one of
15 you to stay and witness. Is it -- yes, juror --
16 you're Juror Number 53 and Number 207, and I
17 still am not going to call you by your name.

18 Obviously the jury has begun
19 deliberating and you were chosen as alternates
20 to fill in if somebody were unable to continue
21 the trial. I will tell you many times we have a
22 problem with a juror -- I mean, we have a
23 problem with a juror. Jurors have problems,
24 cars break down, jurors get sick, any number of
25 reasons why we need alternates to sit and be

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1 ready to fill in during these cases would have
2 been prepared to sit to move in to the jury had
3 we needed your services but we didn't. Perhaps
4 that's a good thing. I do want to thank you for
5 your service. I'm going to dismiss you now.
6 Somebody in the check's office can -- either of
7 you need work excuses?

8 BAILIFF: I told them to drop by the
9 jury panel assembly room.

10 THE COURT: Is that the way they do it?
11 Okay. You are welcome to stay as I indicated.
12 The jury may be out an hour. They may be out
13 until midnight. It's not unusual, especially
14 when we have two defendants and three possible
15 verdicts for each defendant for jurors to take a
16 lot of time because jurors in my experience are
17 very conscious about going through the evidence
18 and going through the elements of the crimes
19 trying to decide which is the proper thing to
20 do.

21 You are released. You are free to talk
22 to anybody about this case if you wish to do so,
23 but you also are free not to talk to anybody.
24 If anybody wanted to -- if the defense lawyers
25 or these lawyers for the State want to talk to

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1 you and you felt you did not want to talk to
2 them, you don't have to. They know that, they
3 won't bother you.

4 I guess the only other thing I can say
5 is thank you for your service.

6 (ALTERNATES EXCUSED)

7 (JURY IN DELIBERATIONS

8 (DEFENDANTS PRESENT)

9 THE COURT: All right. Counsel, the
10 bailiff informs the court the jury has reached a
11 verdict. Are you ready to receive the verdict?

12 MS. CAMPBELL: Yes, sir.

13 THE COURT: Defense?

14 MR. FARLEY: Yes, sir.

15 MR. CHAPLIN: Yes, Your Honor.

16 THE COURT: Bring the jury. Now,
17 Ladies and Gentlemen, before the jury comes in,
18 let me say something. Whatever the verdict is
19 in this case, I don't expect any outbursts.
20 These things are pretty emotional. I realize
21 that, but that is court of law and a place of
22 where the business of this court is conducted
23 and I don't expect any show of emotion.
24 If you have to show -- if you have to show your
25 emotion, please step outside.

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1 (JURY IN @ 3:30 p.m.)

2 BAILIFF: Your Honor, the jury
3 is present.

4 THE COURT: Thank you very much.
5 Madam Forelady, has the jury reached a verdict?

6 THE FOREMAN: We have, Your Honor.

7 THE COURT: Would you please hand it
8 to the bailiff.

9 THE FOREMAN: (Tenders)

10 THE COURT: (Upon review), all right.
11 Madam clerk, publish the verdicts, please.

12 THE CLERK: Indictment numbers
13 2010-GS-40-39 and 40, indictment numbers
14 2011-GS-40-4915, and 4916, the State of South
15 Carolina versus Henry Gray and Robin Reese,
16 (reading):

17 "We, the jury, by unanimous verdict
18 find, as follows:

19 As to Defendant Henry Gray, as to the
20 charge of lynching in the first degree,
21 Indictment 10-40-0039, we find the Defendant,
22 Henry L. Gray, guilty.

23 As to the charge of murder, Indictment
24 11-40-4915, we find the Defendant, Henry L.
25 Gray, guilty."

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1 This is signed by the foreperson, Juror
2 11, March 2nd, 2012.

3 As to the Defendant Robin Gray Reese,
4 (reading):

5 "We, the jury, by unanimous verdict
6 find, as follows:

7 As to Indictment 10-40-0040, lynching
8 in the first degree, we find the Defendant,
9 Robin Gray Reese, guilty.

10 As to the charge of murder, Indictment
11 11-40-4916, we find the Defendant, Robin Reese,
12 guilty."

13 This is signed by the foreperson, Juror
14 11, March 2nd, 2012.

15 Madam Foreperson, are these your
16 verdicts and the verdict of the entire jury?

17 FOREMAN: Yes, they are.

18 THE COURT: Is there a desire to
19 poll the jury?

20 MR. CHAPLIN: Please poll the jury.

21 MR. FARLEY: Please, Your Honor.

22 THE COURT: Madam clerk, please poll
23 the jury.

24 CLERK: Ladies and gentlemen of the
25 jury, I'm going to ask you two questions

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1 regarding the verdict. If you'll just answer
2 yes or no to both questions.

3 Juror Number 11, were these your
4 verdicts?

5 JUROR: Yes.

6 CLERK: Are these still your
7 verdicts?

8 JUROR: Yes.

9 CLERK: Juror Number 294, were these
10 your verdicts?

11 JUROR: Yes.

12 CLERK: Are these still your
13 verdicts?

14 JUROR: Yes.

15 CLERK: Juror Number 164, were these
16 your verdicts?

17 JUROR: Yes.

18 CLERK: Are these still your
19 verdicts?

20 JUROR: Yes.

21 CLERK: Juror Number 293, were these
22 your verdicts?

23 JUROR: Yes.

24 CLERK: Are these still your
25 verdicts?

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1 JUROR: Yes.

2 CLERK: Juror Number 162, were these
3 your verdicts?

4 JUROR: Yes.

5 CLERK: Are these still your
6 verdicts?

7 JUROR: Yes.

8 CLERK: Juror Number 94, were these
9 your verdicts?

10 JUROR: Yes.

11 CLERK: Are these still your
12 verdicts?

13 JUROR: Yes.

14 CLERK: Juror Number 19, were these
15 your verdicts?

16 JUROR: Yes.

17 CLERK: Are these still your
18 verdicts?

19 JUROR: Yes.

20 CLERK: Juror Number 16, were these
21 your verdicts?

22 JUROR: Yes.

23 CLERK: Are these still your
24 verdicts?

25 JUROR: Yes.

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1 CLERK: Juror Number 114, were these
2 your verdicts?
3 JUROR: Yes.
4 CLERK: Are these still your
5 verdicts?
6 JUROR: Yes.
7 CLERK: Juror Number 309, were these
8 your verdicts?
9 JUROR: Yes.
10 CLERK: Are these still your
11 verdicts?
12 JUROR: Yes.
13 CLERK: Juror Number 6, were these
14 your verdicts?
15 JUROR: Yes.
16 CLERK: Are these still your
17 verdicts?
18 JUROR: Yes.
19 CLERK: Juror 155, were these your
20 verdicts?
21 JUROR: Yes.
22 CLERK: Are these still your
23 verdicts?
24 JUROR: Yes.
25 CLERK: The jurors have been polled,

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1 Your Honor.

2 THE COURT: All right. All right.

3 Ladies and gentlemen of the jury, just because
4 of our sort of backed up trial schedule here in
5 Richland County, it's a very busy county, we
6 don't have the luxury as they do on television
7 in Law & Order for telling you that the
8 defendants will be sentenced later. They're
9 going to be sentenced today. That process will
10 take about another fifteen, twenty, thirty
11 minutes. I need for a few minutes to get the
12 paperwork done before sentencing occurs.
13 Sentencing will be done today.

14 I will tell you that based on your
15 verdict of murder, the minimum mandatory
16 sentence in the state of South Carolina is a
17 thirty year sentence. Of course it runs
18 anywhere from thirty years to life.

19 The sentence range -- you probably
20 heard that during the trial, of the lynching
21 charge is five to forty years.

22 The fact that the murder verdict
23 carries a mandatory minimum of thirty years
24 doesn't allow this court much leeway in terms of
25 sentencing, particularly on the lynching charge.

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1
2 Now, you are welcome to stay for that
3 process if you wish to do so. You need not
4 stay. You're going to be released at this time.
5 Again, I will have law enforcement to walk you
6 to your cars. But you're welcome to stay if you
7 wish to stay. The bailiffs will show you where
8 you can have a seat in the audience and witness
9 the process. It's a little -- a little more
10 that you will see, the process that we go
11 through every week here. So if you're
12 interested, please stay.

13 Some jurors feel it adds closure to the
14 process that they've been through this week, but
15 if you choose not to stay, at this time, I'm
16 going to tell you again that I appreciate your
17 services, as do all the court personnel here.

18 You've been a very attentive jury, you
19 haven't demanded more than we could accommodate.
20 We've tried to hopefully make it as pleasant as
21 we could for you. I can tell you that this
22 whole system can do without me, it can do
23 without these attorneys, but it can't do you.
24 You are an important part of the judicial system
25 of this county of this state and this nation.

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1 You probably heard me tell the jury venire
2 before they left that your role is written into
3 the Constitution of the United States. It's a
4 very vital roll to this whole system. We can't
5 operate without you. We can't operate without
6 citizens who are willing to come and resolve
7 these matters in this community. It's tough
8 work, but I'm happy that you were with us. I'm
9 happy that you were able to get together and
10 reach a decision. So many times it's very
11 difficult for twelve people to reach a consent
12 decision, but obviously the evidence convinced
13 you as to the way this case should have resulted
14 and the outcome should have been as you have now
15 indicated.

16 So with that, again let me wish you
17 well. I was kind of surprised to see the sun
18 shining today. Maybe you can get out and enjoy
19 a little bit of it before the evening if you
20 wish to do so. So you're dismissed at this
21 time.

22 I will tell that in probably fifteen to
23 twenty minutes that the sentencing process will
24 take place. You're welcome to stay. Good luck
25 to all of you. Thank you very much.

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1 (JURY DISMISSED @ 3:38 p.m.)

2 THE COURT: All right. Let's be at-
3 ease for a few -- let me -- hold on a minute.
4 Any Motions at this time, counsel?

5 MR. FARLEY: Yes, Your Honor. At this
6 time, Ms. Robin Reese would like to preserve and
7 renew all motions and objections previously made
8 and we'd also like to ask or make a motion for a
9 new trial under South Carolina Code 17-23-110.
10 The basis of that new trial is based on all of
11 our prior objections to the evidence.

12 THE COURT: All right. Anything from
13 the Defendant ---

14 MR. CHAPLIN: Yes.

15 THE COURT: --- Gray?

16 MR. CHAPLIN: For defendant Henry Gray,
17 Your Honor, we, too, would like to renew all
18 prior objections and motions and ask that a new
19 trial be granted based on all prior objections.

20 THE COURT: All right. What's the
21 State's position?

22 MS. CAMPBELL: Your Honor, we maintain
23 the position we had before and are in agreement
24 with your rulings.

25 THE COURT: All right. Well, I think

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1 the jury was within -- based on the evidence
2 presented, I think the jury was well within
3 their responsibilities to return the verdicts
4 they did based on the facts of this case.

5 I feel the rulings made prior to this
6 time, I feel comfortable that they were made
7 according to the law and I respectfully deny
8 both of your motions.

9 All right. Let's stand at-ease for
10 about ten minutes while the preparation for the
11 sentencing takes place.

12 (BRIEF RECESS)

13 (DEFENDANTS PRESENT - IN CUSTODY)

14 MS. CAMPBELL: May it please the Court,
15 Your Honor.

16 THE COURT: Who is first?

17 MS. CAMPBELL: Whoever you want.

18 THE COURT: Mr. Farrow (sic) can bring
19 his client. Yes, ma'am?

20 MS. CAMPBELL: May it please the Court,
21 Your Honor. We did run a rap sheet on
22 Ms. Reese. She is showing up with some assault
23 arrest. I am not showing any convictions on
24 those over the years.

25 Your Honor, I would just like to point

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1 out -- and they would be speaking as to both
2 defendants, whatever you think is proper. There
3 are family members here. That whole section of
4 people that you see right here on this end, on
5 the upper level, are all family members of the
6 victim in this case and have been here, I think,
7 almost all week. I know that the victim's
8 mother would like to speak. I do not know, but
9 I'll check and see if anyone else would like to
10 speak as well.

11 Your Honor, one thing that they wanted
12 me to hand up, which I did already share with
13 defense attorneys, both of them, is -- as you
14 heard during the trial, they decided to make the
15 victim in this case an organ donor. He did
16 donate organs to different people. I believe --
17 at this point, I would like to approach. This
18 is a letter from the recipient of the heart that
19 they wanted me to share with you.

20 If you would hear from them as to how
21 this has affected them.

22 THE COURT: You can designate one or
23 two family members.

24 MS. CAMPBELL: Yes, sir, I would be
25 glad to. Beg the Court's indulgence.

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1 Her daughter can join.

2 THE COURT: Do you want to come down,
3 ma'am?

4 MS. CAMPBELL: Your Honor, this is
5 the victim's mother. I think she would like to
6 address the court. Can you hear or do you want
7 me to put her closer?

8 THE COURT: Why don't you put her on
9 the stand there at that time podium.

10 MS. CAMPBELL: Be careful.

11 THE COURT: Yes, ma'am?

12 MS. CAMPBELL: State your name for
13 the record.

14 MS. WRIGHT: My name is Carrie Mack
15 Wright. Thank you, Your Honor, and I'd like to
16 thank all of the court solicitors office, the
17 investigators, all the officers and the victim
18 advocates. Everyone here today in your
19 representable place, I just want to say "Thank
20 you."

21 Even though this has been very, very
22 hard for me, but -- we came a long ways and,
23 Your Honor, I ask that you just kind of bear
24 with me because it's a little hard right now.
25 But I just want to share with you briefly how on

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1 February 14th of 2010 when the doctors told me
2 that my son was brain dead, not only that I lost
3 him, but a big part of me went with him.

4 It wasn't the fact that he died so,
5 because I understand that we all must leave
6 here; but the way that he left, it's very hard
7 for me. At the present time I am still in
8 counseling and in a support group, and I'm still
9 trying to overcome, to understand why.

10 But today I thank God for justice, but
11 I yet would rather have my son.

12 As I said, a part of my son's life has
13 died. My son died and part of my life has gone
14 with him. I would never be the same. The death
15 of my son had a devastating impact on my life.
16 The death was something that neither my son nor
17 I deserved.

18 My son's death has affected me mentally
19 and physically. The thought of thinking about
20 the assault is breathtaking. My son had a
21 horrible number of beatings and thinking about
22 lying there lifeless and defenseless. I've
23 asked myself the question over and over, 'Will I
24 ever overcome my child's death?' A part of my
25 life has been taken from me and nothing in the

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1 world can bring it back.

2 He was a very quiet, respectable young
3 man. He would give you his very last if you
4 were in need. My son was reared by his father
5 and his mother. He was taught to treat everyone
6 the way he wanted to be treated. He was reared
7 in a Christian home. He believed in the Bible
8 and praying day and night. If anyone spoke with
9 my son, they would say he would constantly
10 acknowledge God. My son didn't carry guns,
11 knives. He didn't walk around with his pants
12 down, his shirt out of his pants, his cap on
13 backwards. That sent a message alone. My son
14 was a very young man of integrity, a minister of
15 the Gospel of New Covenant Revival Ministry
16 church, a barber instructor. He was also once a
17 business owner and operator of results of a
18 blessed barber shop in Columbia and Gastonia,
19 North Carolina. My son was a poem writer,
20 motivated speaker.

21 My son wanted to live and let live.
22 There are four people living today because my
23 son's organs were given to help save other's
24 lives. My son valued life and didn't try to
25 take life.

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1 The heart that God put in man to love
2 one another turning to evil, the hand that God
3 gave to care for each other turning to violence.
4 My belief is that "thy shall not kill."

5 My son's death left me with a bleeding
6 heart. I often feel anxiety, nervous. I have
7 alread been diagnosed with post trauma stress.
8 No one knows how I struggle and suffer the
9 emotion, the impact on my son's death. Murder
10 is a deduction from my life and a responsibility
11 to society. My son is no longer here to help me
12 with my financial obligations. My son isn't
13 here to take me to doctors appointments, nor is
14 he here to just sit and talk and pray with me or
15 drive me to church.

16 I would not want any parent to lose a
17 child, especially to murder.

18 Once we were a family. Now, we are no
19 longer a family without my son. We no longer
20 celebrate holidays, birthdays, Thanksgiving,
21 Christmas. It is very hard to move on not
22 having my son who was also a father, uncle,
23 brother and so much more.

24 I am grateful for the parents of
25 murdered children's support group, the post

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1 trauma resources. I feel like my life has been
2 cut short, but I realize that only God can help
3 me.

4 Those that took my child's life, the
5 only hope I have is to believe in God to keep me
6 alive. There is nothing any more can I do to
7 give or to help with my child. My heart is
8 broken. My son always tried to help me to teach
9 other young men and women to be successful in
10 life. Even the day he was murdered, he was
11 working at the barber college. He called me
12 that morning and said he had four students that
13 came into school, and he wanted to reward them
14 by treating them with a pizza. It was snowing
15 that morning, and I said 'that is very nice.'

16 My son only weighed 130 or 135 and just
17 thinking about the number and attacks and
18 actually beating to death is insane. Seven
19 years ago my son attended Queen Bible College.
20 He left a legacy behind. He was blessed to have
21 many accomplishments but none of that will bring
22 him back. I hope that he has met our heavenly
23 Father and may he rest in peace.

24 For the ones that took his life, I hope
25 they will never had an opportunity to take

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1 another life. I pray that God be with them and
2 justice has been served.

3 I hope and pray that no one here today
4 will ever lose their child, because a part of
5 your life will be gone with that child. Nothing
6 in the world can bring my son back. We all love
7 and miss him, his church family, students from
8 the barber college. Today I stand before you as
9 a mother. I am living off of one kidney today
10 and a thirty percent of -- but nevertheless, I
11 know that we all serve a real and a living God,
12 so God bless you all. Thank you, Your Honor.
13 Thank everyone here and for the opportunity that
14 you gave me just to share this with you.

15 THE COURT: Thank you very much
16 Ms. Mack.

17 MS. CAMPBELL: State your name.

18 KAREN MACK: I am Karen Mack Barber, -
19 - (emotional).

20 THE COURT: It's all right. Take your
21 time.

22 KAREN MACK: (Emotional), -- help me.
23 I thought I would feel different after hearing
24 the verdict of guilty, but as I sat there
25 nothing in me leaped for joy because at the end

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1 of the day, my brother is still not here.

2 Where can I possibly begin? Mere words
3 aren't enough to express the volume of hurt,
4 magnitude of sadness and insurmountable pain
5 that my family and I had experienced and are
6 experiencing every day as we try to cope with
7 this senseless murder. Even though it has been
8 nearly two years since I heard the grief-filled
9 cry of my mother urging me to get to the
10 hospital, I can still feel every emotion, recite
11 every moment, every play, every word I spoke or
12 heard during the dreadful day my family was
13 given the news that we lost Kenny -- who was a
14 father, a son, a brother, an uncle, a teacher, a
15 minister and best friend.

16 Kenny was special to me. He was my
17 brother. He was my friend. He was my biggest
18 supporter. His death has affected me in a lot
19 of different ways. For a time it made me second
20 guess the one thing that has kept me grounded
21 for most of my life, and that has been my
22 spiritual believes. I couldn't believe that God
23 would allow something like this to happen to
24 someone who loved Him so much.

25 I surely didn't believe that this no

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1 matter how horrific it would be would kill him.
2 I didn't believe he would die. I didn't believe
3 I would have to fight for my sanity and search
4 so deep within to stand through what he looked
5 like in the hospital. To stand through what the
6 doctors said, to stand through hearing them
7 pronounce him brain dead. To stand as I heard
8 my mother pray, cry and plead with God all the
9 night through. To stand as I helped my mother
10 make funeral arrangements for my young son. I
11 never dreamt he would die. Or I had muster up
12 the strength to speak at his funeral, kiss him
13 goodbye, or watch them lower his body into the
14 cold bitter earth.

15 No, this my brother. He was the child
16 that most resembled my deceased father. He was
17 the one who always did his very best to protect
18 me and guide me to God's best for me. He was
19 the one who brought me flowers to my college
20 graduation, and the one who helped to take care
21 of my mom when my oldest brother and I couldn't
22 be around. Kenny possessed the gentle hand that
23 clung to mine and reminded me that it would all
24 right at my father's funeral.

25 Kenneth was a constant reminder that

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1 our faith is an overcoming faith. It can
2 withstand, endure and conquer every situation we
3 go through. Kenny's life was a gift from God
4 and a present to everyone he met. His death was
5 unfair. It was undeserved, unwarranted and
6 incomprehensible.

7 No one should be permitted to take what
8 they lack the ability to give, and that's life.

9 Although I have gone through many
10 emotions that range from being sick on my
11 stomach, crying uncontrollably, sitting and
12 staring, I have never allowed anger to penetrate
13 my heart. Why? The heart is a symbol of love
14 and it is the one vital organ that determines
15 life. I have refused to allow the people who
16 took my brother's life to have mine, too.

17 My prayer is that justice will be done
18 and that no family will have to ensure the
19 unimaginable pain that my family has had to
20 endure as a result of this senseless act.

21 Thank you, Your Honor.

22 THE COURT: Yes, ma'am. Thank you.

23 MS. BROWN: This statement is from
24 Kenny Mack's oldest brother, Anthony. I am
25 going to read it on his behalf, (reading):

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1 "Brotherly love is something that two
2 brothers share. It's a love bond and a type of
3 friendship. Kenneth Mack was my best friend
4 since birth. He was also my mentor, he was my
5 little Big Brother. I called him that because
6 although he was younger than me, he was my
7 inspiration because he inspired me.

8 The death of my little brother has had
9 a devastating impact on my life. It's been very
10 hard for me to function. During the time of my
11 brother's death, I was on dialysis waiting for a
12 kidney donor. It was a very difficult and low
13 time for me. My little brother would call me
14 three times a day just to check on me and
15 encourage me to keep the faith.

16 Kenny was there for me during the bad
17 times and the good times. He was there when I
18 He was there when he was sick and well. My
19 brother was a spiritual man. He believed in
20 ministering to anyone who would listen.

21 His death has really taken a toll on
22 me. It hurt so bad not being able to hear his
23 voice or talk to him about the things he and I
24 talked about. There is no doubt that my little
25 brother would have given his life just to save

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1 mine. He was an angel that God sent me. A day
2 doesn't go by that I don't find myself expecting
3 him to call. I was used to him calling and
4 asking me whether I was okay and hearing him
5 say, " I love you, man." That was our bond.

6 So when all is said and done, Kenneth
7 Mack was my brother and best friend. I miss him
8 more and more every day. He died on his
9 birthday, which was Valentine's Day. On that
10 day a part of me died too.

11 My little brother is also still alive
12 because he lives inside of me. I received my
13 little brother's kidney. Because of his gift, I
14 have a second chance of life -- along with three
15 other men, who are also alive because my little
16 brother's organs were donated to save their
17 lives.

18 Kenneth will always be loved and
19 missed, but he will never be forgotten. I love
20 you, Kenny.

21 In closing, I hope and pray that those
22 who took my brother's life will find peace with
23 their God and they will never have a mind to
24 kill again. We do believe in justice and the
25 scripture that says, "What you sow, that you

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1 shall reap." God bless."

2 Anthony Mack, read by Nakia Brown with
3 the Solicitor's office.

4 THE COURT: Anything further?

5 MS. CAMPBELL: No, sir.

6 THE COURT: Mr. Farley, do you have
7 anything you wish to say on behalf of your
8 client?

9 MR. FARLEY: Yes, Your Honor. I know
10 Ms. Reese is very upset at this moment. We
11 would hope that given that you've sat through
12 this trial for the last five days you would --
13 when you go to give your sentence on Ms. Reese,
14 you would try to give the most lenient sentence
15 you possibly can. Thank you, Your Honor.

16 THE COURT: Robin Reese, do you have
17 anything you wish to say?

18 DEFENDANT REESE: To the family, my
19 heart goes out to you all. To sit up here and
20 say that I believe I even played a part in
21 taking his life, I don't feel I did -- but I
22 apologize, and I just ask for your forgiveness.

23 THE COURT: All right. Ms. Reese, the
24 jury having convicted you of murder and lynching
25 in the first degree, the murder carries a

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1 mandatory minimum of thirty (30) years. On both
2 charges you shall be committed to the State
3 Department of Corrections for a period of thirty
4 (30) years. Both sentences to run concurrent,
5 you are given credit for time served if you
6 served any time before today. Good luck to you,
7 ma'am.

8 (DEFENDANT REESE EXITS COURTROOM)

9 THE COURT: All right, Solicitor.

10 MS. CAMPBELL: May it please the
11 court, Your Honor, Mr. Gray's prior record
12 starts back in 1989. He received an armed
13 robbery conviction for which he received a YOA.

14 THE COURT: '89, YOA.

15 MS. CAMPBELL: Yeah, and he has a
16 '94 YOA revocation. I'm just going through the
17 convictions.

18 In 1998 -- actually, the conviction was
19 in 2000 for PWID cocaine. That was his first
20 drug offense.

21 In 2000, he was convicted of two counts
22 of criminal domestic violence.

23 His second drug conviction was in 2005
24 for PWID cocaine.. Looks like a third offense.
25 It's missing an offense.

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1 Then, Your Honor, he has pending right
2 now, a trafficking in marijuana and trafficking
3 in cocaine charge that are still pending in our
4 office, that he picked up after this charge.

5 THE COURT: Mr. Chaplin?

6 MR. CHAPLIN: Yes, sir. As far as
7 mitigation is concerned, Your Honor, are you
8 ready for that now?

9 THE COURT: Yes, sir.

10 MR. CHAPLIN: Thank you very much.
11 Your Honor, I have met with Mr. Gray on numerous
12 occasions as we got ready for this trial.
13 Mr. Gray has been an good person to work with.
14 He's a good man and he's got a family out here
15 and I know that he feels badly what about has
16 occurred to the Mack family as well. He's a
17 little choked up right now and can't really
18 express a lot of that, but we're asking that you
19 show some leniency and mercy on him, Your Honor.
20 We would ask that whatever is a pending, all of
21 that be resolved at this time.

22 (TELEPHONE RINGING)

23 THE COURT: Please turn that off.
24 You'll just have to that up with the solicitor's
25 office. That's not a matter for this court.

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1 MR. CHAPLIN: That's right.

2 THE COURT: Mr. Gray, do you have
3 anything you want to say?

4 DEFENDANT GRAY: To the Mack family, I
5 ask the Lord for forgiveness for what they say I
6 did, and I ask you for your forgiveness. I'm
7 not a killer. I'm really not. I have kids, so
8 I can understand how you feel. I'm asking
9 you'll have -- and I deeply apologize for your
10 loss, deeply.

11 THE COURT: All right. Mr. Mack, the
12 same sentence as your sister on both charges,
13 that you be committed to the State Department of
14 Corrections for a period of thirty (30) years.
15 Both sentences to run concurrent. I'll give you
16 credit for time served. Any time served prior
17 to now will be credited against your sentence.

18 Do you happen to know how long that is,
19 Mr. Chaplin.

20 MR. CHAPLIN: It's been since ---

21 THE COURT: It will be important to
22 him later.

23 MR. CHAPLIN: Yes, sir. Your
24 Honor, I can't say exactly what the date is
25 right now.

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1 THE COURT: Well, I'm going to leave
2 it up to the Department of Corrections to
3 calculate it. They'll do it for you, but it's a
4 lot easier and it's more helpful to put it on
5 the sentencing sheet.

6 MR. CHAPLIN: If you could give me a
7 few minutes to verify that. I'll be glad to do
8 it -- since July of 2011, Your Honor.

9 MS. CAMPBELL: I'll check it, Your
10 Honor, and get back to you.

11 THE COURT: Well, we turn in these
12 sentencing sheets in.

13 MS. CAMPBELL: Can I bring it to you in
14 five minutes?

15 MR. CHAPLIN: July 15th, Your Honor.

16 THE COURT: All right. I'm going to
17 give that to you.

18 MS. CAMPBELL: 2011.

19 THE COURT: Good luck to you Mr. Gray.

20 (DEFENDANT GRAY IN CUSTODY)

21 THE COURT: That concludes this
22 matter.

23 (TRIAL CONCLUDED)

24

25

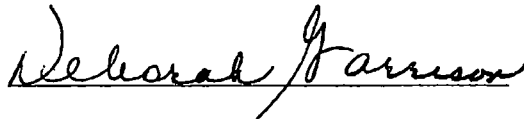
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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate transcript of the jury trial held
before The Honorable Thomas G. Cooper, Jr.,
February 28 through March 2, 2012, as prepared
from the notes of Karen Ambroziak, Court
Reporter;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

June 19, 2012

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
OCT 21 2013
SC Court of Appeals

Appeal from Richland County
G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY GRAY,

APPELLANT

APPELLATE CASE NO. 2012-209426

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant?

2.

Whether the trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight?

STATEMENT OF THE CASE

On March 10, 2010, appellant Henry Gray ("Gray") was indicted in Richland County for lynching, first degree. On October 5, 2011, he was also indicted for murder. On February 28 – March 2, 2012, Gray was tried before the Honorable Thomas G. Cooper, Jr. and a jury. R. 1.

Gray was tried together with his sister, Robin Gray Reese ("Reese"). R. 1. Appellant Gray was represented by Mathias Chaplin. R. 1. Reese was represented by Andrew Farley. R. 1. Luck Campbell, April Sampson, and Nicole Simpson represented the State. R. 1. The jury convicted Gray and Reese on both counts. R. 909 1, l. 17 – 910, l. 12. The trial judge sentenced Gray to thirty years' imprisonment on both charges, to run concurrently. R. 918, ll. 11 – 17. On March 5, 2012, Gray served his notice of appeal. This appeal follows.

ARGUMENT

1.

The trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant.

Relevant Facts

Introduction

On February 13, 2010, Kenneth Mack (“Mack”) died at the Gonzales Gardens apartments in Columbia. Multiple purported eyewitnesses testified about the events preceding Mack’s death. Two eyewitnesses who had no connection to Gonzales Gardens testified that Mack was severely beaten by a group of men near a convenience store at the edge of the apartment complex. Marcellius Brooks, a resident of Gonzales Gardens whose nickname is “Bloom,” admitting attacking Mack and was charged with his murder. R. 392, ll. 13 – 18; R. 398, ll. 4 – 19; R. 414, ll. 6 – 14. No evidence showed Gray or co-defendant Robin Reese participated in this beating. Several women who lived in Gonzales Gardens and were connected to Bloom testified they saw a second beating of Mack in between two buildings in Gonzales Gardens that involved Gray and Reese. Bloom was not tried with Gray and Reese and his charges were pending during their trial. R. 414, ll. 12 – 14. A summary of this testimony follows.

The Disinterested Witnesses

Amber Hardy (“Hardy”) managed a pharmacy near Gonzales Gardens. R. 313, l. 23 – 314, l. 14. She was in her car following a shoplifter when she witnessed a fight near a convenience store on McDuffie Street. R. 314, ll. 20 – 315, l. 13. Hardy saw four or five males and one female attacking another male, who turned out to be Mack. R.

315, l. 23 – 316, ll. 7. The mob took turns beating Mack. R. 316, ll. 8 – 10. The beating was “brutal.” R. 319, ll. 20 – 22. The men “were just taking turns and he would fall and they would kick him and punch him and like karate kicks like you a break a board in half.” R. 322, ll. 11 – 16. Mack was “kicked everywhere,” including his head. R. 328, ll. 4 – 6. Hardy saw Mack get up after the beating and dizzily stagger away. R. 328, l. 22 – 329, l. 7.

Kiki Burns (“Burns”) worked at the gas station across from Gonzales Gardens. R. 768, l. 25 – 829, l. 5. She witnessed the beating that took place near McDuffie Street. R. 830, l. 24 – 831, l. 10. Burns saw four or five people chasing Mack. R. 831, ll. 2 – 10. Mack tripped over something and fell. R. 831, ll. 17 – 21. The people chasing him then began to beat him. R. 831, ll. 22 – 24. In response to a question whether or not the men were “kicking and stomping” Mack, Burns said, “I just seen [them] all just getting on him.” R. 832, l. 2. She also saw a female participating in the beating. R. 832, ll. 6 – 12.

After the mob left, Mack “tried to stand up and he stumbled back down.” R. 832, ll. 20 – 23. Burns called 911 as a result of the incident. R. 839, ll. 10 – 21.

Testimony of Melquanna S.

Melquanna S. is Reese’s daughter. R. 757, ll. 5 – 13. On the afternoon of February 13, 2010, Melquanna S. was going to a manicurist. R. 758, ll. 15 – 17. The manicurist was very close to a convenience store where her mother was playing video poker. R. 758, l. 23 – 759, l. 10. She was thirteen years old at the time. R. 759, ll. 18 – 20.

The manicurist was closed, and as she was knocking, Melquanna S. heard Mack, who was say to her, “You can come in my house.” R. 760, ll. 14 – 23. Melquanna S.

did not know Mack.¹ R. 760, ll. 24 – 25. Mack was over thirty years old. R. 421, ll. 9 – 13. She went into the convenience store and bought some potato chips. R. 761, ll. 12 – 15. As she was walking home Mack again approached this young girl unbidden and asked for some chips. R. 761, ll. 17 – 19. Melquanna S. told him to leave her alone. R. 761, ll. 19 – 20. She tried to walk away from him but Mack continued to hinder her progress and then threw a snowball at her. R. 761, l. 17 – 762, l. 4. Melquanna S. told Mack that she was going to go get her mother and Mack grabbed her. R. 762, ll. 3 – 7. She hit Mack. He picked her up, threw her into the bushes, and they began to fight. R. 762, ll. 8 – 13.

With Mack on top of her, Melquanna S. saw Bloom tackle Mack and “hit him a couple of times.” R. 762, ll. 14 – 15. Other men came “and jumped on” Mack. R. 762, ll. 14 – 16. Melquanna S. hit Mack “a couple of times.” R. 762, ll. 20 – 25. Bloom took Melquanna S. back to the store and they told her mother what happened. R. 763, l. 8 – 764, l. 13. Reese took Melquanna S. back to their apartment in Gonzales Gardens. R. 764, ll. 14 – 17. Melquanna S. said that her mother went back to the store and played video poker the rest of the afternoon. R. 769, ll. 3 – 11.

¹ The medical testimony revealed Mack had been using marijuana and Ativan. R. 687, l. 1 – 688, l. 1.

Bloom's Testimony

Bloom lived next door to Reese and Melquanna S. for a couple of years in Gonzales Gardens. R. 393, l. 11 – 394, l. 4. He did not know Gray personally. R. 394, ll. 5 – 6. Bloom had never seen Mack before the day of the beating. R. 396, ll. 17 – 23.

Bloom claimed that he saw Mack “pick [Melquanna S.] up and slam her to the ground.” R. 396, ll. 11 – 16. Bloom claimed that he tackled Mack to get him off of Melquanna S. R. 398, ll. 4 – 13. Bloom was on top of Mack and hit him twice with a closed fist. R. 398, ll. 16 – 19. At this point, Bloom claimed that he was pulled off of Mack by Angelo “Little Ricky” Boyd (“Boyd”). R. 399, ll. 3 – 9. Bloom claimed that Mack then “got up and ran off.” R. 399, ll. 3 – 9. Bloom denied kicking Mack. R. 400, ll. 20 – 21. He also denied that anyone other than Melquanna S. joined in the fight. R. 400, ll. 12 – 16.

Bloom said that he took Melquanna S. into the convenience store to talk to Reese. R. 402, ll. 7 – 16. They told Reese what happened. R. 402, l. 24 – 403, l. 5. He claimed Reese was upset. R. 404, ll. 1 – 6. Bloom claimed that after Reese walked outside the store he saw her talking on her phone, but did not know who she called. R. 404, ll. 19 – 25.

Later that day, Bloom got a phone call from his brother telling him the police were looking for him. R. 409, l. 22 – 410, l. 7. The police called Bloom the next day and he went to the police station. R. 410, ll. 10 – 13. The police told Bloom they were investigating him for Mack’s murder. R. 411, ll. 11 – 12. He was arrested.² R. 414, ll. 8

² In addition to the murder and lynching charges related to Mack’s death, Bloom had pending charges for criminal domestic violence, malicious injury to property, possession of marijuana, and possession of marijuana with intent to distribute. R. 415, ll. 4 – 15.

– 9. After being arrested for murder, Bloom told police there had been a second attack on Mack. R. 430, ll. 18 – 22. He gave the police names of witnesses who saw the alleged second attack. R. 430, ll. 23 – 25. The names of those witnesses were Donetti Perry (“Perry”), Kara Chase (“Chase”), and Sanovia Thompson (“Thompson”). R. 433, ll. 4 – 15.

The Gonzales Gardens Witnesses

Bloom’s witnesses—Perry, Chase, and Thompson—did not approach police until after Bloom was arrested. R. 655, ll. 5 – 23. They were all interviewed within an hour of each other. R. 655, ll. 13 – 24.

Perry, who was twenty-eight years old at the time of the trial, testified that she was upset and scared to be in court. R. 117, ll. 22 – 23. She lived in Gonzales Gardens. R. 113, ll. 22 – 24. Perry was a friend of Bloom’s brother, Lamar a/k/a “Big Baby.” R. 144, l. 23 – 145, l. 2; R. 160, ll. 5 – 7. She also knew Bloom. R. 154, ll. 16 – 155, l. 16. She knew appellant Gray because his father’s apartment was across from her’s. R. 116, ll. 9 – 23.

Perry claimed she saw Mack and Gray having a conversation near her apartment. R. 115, ll. 19 – 23. Mack “looked like he’d been beat up or something.” R. 118, ll. 1 – 2. Gray supposedly asked Mack, “Man what happened to you?” R. 118, ll. 5 – 10. Perry claimed that Gray’s phone rang. R. 119, l. 21 – 120, l. 4. Perry then claimed that Gray swept Mack’s feet out from under him. R. 118, l. 14 – 119, l. 7. She said Mack fell and hit his head. R. 119, ll. 10 – 12. Gray supposedly began kicking Mack. R. 120, ll. 16 – 21. Perry also claimed that Reese arrived and joined in kicking Mack and also hit Mack repeatedly with a metal chair. R. 123, l. 17 – 124, l. 9; R. 125, ll. 9 – 13.

Thompson had been living in Gonzales Gardens for almost five years. R. 471, ll. 18 – 21. She was thirty-three years old. R. 471, ll. 16 – 17. She claimed that she saw Mack walking down the sidewalk while she was sweeping her steps. R. 473, l. 18 – 474, ll. 16. She did not know Mack. R. 474, ll. 22 – 23. She described him as having “a knot on his head” and that he was bleeding. She stated that Mack “was kind of like staggering like he might have been intoxicated.” R. 475, ll. 2 – 5. She said that Gray asked Mack “What happened to you?” and then Gray “went on about his business.” R. 475, ll. 18 – 20.

Thompson claimed Gray went into his father’s apartment because the phone was ringing. R. 477, ll. 16 – 20. Gray supposedly then came outside, grabbed Mack by the collar, and told him, “You put your hand on my niece. We’re going to talk to my sister.” R. 477, ll. 21 – 25. Thompson walked behind her building. R. 479, ll. 19 – 25. When she came around the other side, she saw Mack on the ground and Reese coming down the sidewalk. R. 480, ll. 22 – 25. Thompson claimed that Reese said “Why did you put your hand on my baby?” and then kicked Mack “on the leg one or two times.” R. 481, ll. 13 – 18. According to Thompson, Gray and Reese then walked away. R. 481, ll. 14 – 20. Thompson never saw anyone use a chair to hit Mack. R. 487, ll. 11 – 13.

Chase, who was blind by the time of trial, was homeless and living temporarily with Thompson on the day of Mack’s death. R. 473, ll. 7 – 13; R. 240, ll. 22 – 23; R. 233, ll. 2 – 5. She was thirty-two years old at the time of trial. R. 232, ll. 23 – 24. Chase did not approach the police until after the incident “because a friend of mine’s brother was being accused of a murder that I know he didn’t commit.” R. 253, l. 22 – 254, l. 2. That friend was Bloom. R. 254, ll. 3 – 4.

Chase testified that Mack was walking away with Gray when Gray tried to hit Mack and “pretty much almost missed. R. 238, l. 11 – 239 – 13. Chase said that Gray “did not kick the man down.” R. 239, ll. 16 – 18. She claimed that Mack “lost his balance” and then fell. R. 239, ll. 18 – 22. She saw Mack move around as if to defend himself. R. 240, ll. 1 – 5. The solicitor, using a prior statement, attempted to get Chase to admit that Mack never got up after his initial fall, but Chase rebuffed her. R. 244, l. 21 – 245, l. 3. Chase testified “He did get up after that. I told the police that. I told investigators that. He did get up from that spot and move, he never stayed right there on that sidewalk.” R. 244, l. 25 – 245, l. 3. Chase said that Gray “walked off” after Mack fell. R. 240, ll. 11 – 18. Chase denied the contents of a written statement that she gave the police which described a further assault by Gray and Reese on Mack. R. 245, l. 4 – 253, l. 2.

Several other witnesses from Gonzales Gardens testified. Isaac Weathers saw the fight that occurred near the convenience store. R. 493, ll. 18 – 19. He saw Mack and Melquanna S. arguing. R. 493, ll. 20 – 22. They both fell to the ground. R. 493, ll. 20 – 22. At this point “a few guys” jumped on Mack. R. 494, ll. 9 – 14. Weathers saw a bunch of people kicking Mack. R. 496, ll. 10 – 11. Weathers said that the people who were kicking Mack were people he knew by their nicknames. R. 505, ll. 9 – 11. The people he saw the beating Mack were: Trigger, Little Ricky, Juve, and Bloom. R. 505, ll. 13 – 21. After the beating, he saw all of them go into the store. R. 506, ll. 7 – 9. Weathers never saw Gray. R. 507, ll. 9 – 11.

Mary Anderson knew Mack from a barber shop where he worked. R. 190, ll. 3 – 7. Anderson knew Bloom because he was friends with her brother. R. 210, ll. 13 – 23.

She was convicted of fraud in 2009. R. 200, ll. 2 – 4. She claimed that she witnessed a second assault during which Gray and Reese kicked and stomped Mack. R. 189, ll. 8 – 13.

Boyd, Bloom's friend, testified that he saw Bloom tackle Mack. R. 85, ll. 19 – 25. Boyd went to Bloom's aid. R. 85, ll. 20 – 25. Boyd and Bloom told Melquanna S. to hit Mack, which she did. R. 85, l. 19 – 247, l. 25. Boyd, who was wearing Timberland boots, **kicked Mack in the head**. R. 99, l. 21 – 100, l. 5. Boyd claimed that Mack walked away from the fight. R. 88, ll. 8 – 15.

The Medical Testimony

Three pathologists all agreed that the cause of Mack's death was blunt force trauma to the head. R. 534, ll. 14 – 20; R. 685, ll. 3 – 7; R. 749, l. 8 – 750, l. 25. Gray's pathologist, Dr. Adel Shaker, testified that the blunt force trauma could not have been caused by a metal chair because it would have caused extensive lacerations of the scalp. R. 692, ll. 6 – 23. Dr. Shaker also explained that even after a severe brain injury, a person can have a "lucid interval," during which that person can walk, talk, or do other activities for up to one hour after the injury. R. 694, ll. 8 – 14. The lucid interval occurs because it takes time for blood to accumulate and create pressure on the brain stem. R. 694, ll. 15 – 22. Pressure on Mack's brain stem led to herniation in the brain which stopped his respiratory or cardiac activity. R. 694, ll. 15 – 25. Dr. Shaker confirmed the State's pathologist's finding that marijuana and Ativan were present in Mack's system. R. 687, l. 1 – 688, l. 1. Dr. Shaker testified that the combination of these two drugs depresses the central nervous system and can affect a person's balance. R. 688, ll. 12 – 22.

The State's pathologist, Dr. Bradley Marcus, performed the autopsy on Mack. R. 517, l. 16 – 518, l. 9. Marcus began describing his findings using two diagrams depicting Mack's injuries. R. 518, l. 10 – 519, l. 6; (Exhibits 86, 87). These diagrams were entered into evidence without any objection. R. 518, l. 10 – 519, l. 6; (Exhibits 86, 87). Exhibit 86 depicts front and rear views of the human body with notations describing various injuries that Mack received. (Exhibit 86).

Dr. Marcus explained what is depicted in Exhibit 87. R. 522, l. 1 – 524, l. 9. Exhibit 87 shows what, at first glance, appears to be a mask over a person's face. (Exhibit 87). Dr. Marcus explained it is not a mask:

We concentrate on the head. The way we do the head is, to preserve the body for the funeral, we make an incision along the back of the scalp here. We very carefully reflect the scalp. We pull the scalp over this way. You just literally just pull it over and that's what you're actually seeing here. That's a side view of the head just pull it over and pull it back here. We can actually put it all right back together and you can't tell in the funeral home.

It actually makes it very nice so that you can see trauma. What we have is we have the scalp and it is reflected. This skull is here, the scalp is here. We can see here, we've got some pretty good – and this is just my markings – scamp [sic]. We call it reflective. The skull is here. The scalp is here. We can see here [we've got] some pretty good – these are just my markings showing hemorrhage along the scalp here. Think of it being the right side here, where that bruise I explained to you was – right here. Underneath the skin there is corresponding hemorrhage there, confirming my findings from the outside underneath there. Confirming what I saw. That all confirms that.

There is also some hemorrhage back here on the skull area here. I call ... this pericranial. Peri means surrounding the skull, "peri" surrounding the skull. It's back here.

Now there's also some hemorrhage on the back here of the skull, also on the back of the scalp back here.

Also there some more hemorrhage, not a lot, on the other side of the head – on the left side. So, again, he had some sort of traumatic event

that occurred right here. You can't see anything on the outside that he had some traumatic injury over here. Okay?

R. 522, ll. 7 – 523, l. 19. The solicitor then attempted to introduce autopsy photographs into evidence. R. 524, ll. 2 – 3. Counsel for Gray asked to see them and then objected. R. 525, ll. 4 – 5; R. 525, ll. 7 – 9. Reese's counsel joined in the objection, stating that the photographs were "highly prejudicial to our clients," and that the pathologist could illustrate the autopsy through his own testimony. R. 525, ll. 12 – 17. Gray's attorney attempted to add to this objection when Judge Cooper sent the jury out of the courtroom. R. 525, ll. 18 – 25.

The solicitor then proffered Dr. Marcus's testimony regarding the autopsy photographs. R. 526, l. 2 – 532, l. 5. Among these photographs were Exhibits 80 to 83. R. 529, ll. 6 – 14. Exhibits 80 through 83 are gruesome photographs of the autopsy of Mack's head. (Exhibits 80 – 83). Exhibits 80 and 83 show a hand holding the top of Mack's sawed-off, bloody skull with his brain completely exposed. (Exhibits 80, 83). Mack's brain protrudes from his open skull like a red tip from a tube of lipstick. (Exhibit 83). Exhibit 81 shows Mack's scalp pulled down over his face and the back part of his scalp pulled away from his skull. (Exhibit 81). What is depicted in Exhibit 81 is barely recognizable as human. (Exhibit 81).

Dr. Marcus told the court these photographs were necessary because they depicted the cause of death and he could not diagram them. R. 529, ll. 12 – 14. During the proffer, Gray's attorney asked the following:

MR. CHAPLIN: As far as those photographs are concerned, what they show is the trauma that you just discussed, correct?

THE WITNESS: Yes, sir.

MR. CHAPLIN: All right. But you can't testify as to the cause of that trauma?

THE WITNESS: I can testify that blunt trauma caused the trauma.

MR. CHAPLIN: Okay.

THE WITNESS: Blunt trauma.

MR. CHAPLIN: But you couldn't say specifically when the trauma occurred?

THE WITNESS: No. I can't say when it occurred.

MR. CHAPLIN: You can't say the location that it occurred?

THE WITNESS: I can't say the location, no.

MR. CHAPLIN: You just know that it is blunt force trauma?

THE WITNESS: Yes, blunt force trauma.

MR. CHAPLIN: And that would be the extent of your presentation?

THE WITNESS: I believe so, yes.

R. 531, ll. 1 – 25. Without hearing any further argument, Judge Cooper overruled the defendant's objection to the admission of these photographs. R. 532, ll. 2 – 3.

When the jury returned, Dr. Marcus then used Exhibit 87 – the diagram of Mack's head – to explain the location of a skull fracture and a brain hemorrhage. R. 535, l. 20 – 536, l. 9. Still referring to the diagram, Dr. Marcus opined that a significant amount of force would be necessary to cause this kind of skull fracture. R. 536, ll. 10 – 12. Without referring to the photographs, Dr. Marcus then explained that once he looked inside Mack's skull at his brain he saw subdural hemorrhages and cerebral contusions. R. 536, l. 21 – 537, l. 15. Dr. Marcus said that blunt trauma causes these injuries "when the brain bangs up against the skull itself." R. 537, ll. 16 – 24.

It was only after this testimony explaining Mack's injuries that the solicitor introduced Exhibits 80 – 83 over the defendants' objection. When she introduced the exhibits, the solicitor proclaimed, "**These are graphic.**" R. 538, l. 25 (emphasis added). After Dr. Marcus merely repeated his testimony concerning subdural hemorrhages and cerebral contusions, the solicitor published the photographs to the jury. R. 539, l. 1 – 541, l. 9. The witness then again opined, exactly as he did before, that the cause of Mack's death was a closed head injury due to blunt trauma. R. 542, ll. 1 – 7.

Discussion

The trial court abused its discretion by admitting these horrific autopsy photographs. These photographs were inadmissible under Rule 403. See SCRE 403. "[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986); see also State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010).

The Supreme Court's analysis of prejudicial photographs in Middleton is instructive. In Middleton, the State sought the introduction of autopsy photographs, including a photograph of a surgically opened vagina. See Middleton at 24, 339 S.E.2d at 693. The Supreme Court found the information contained in the photographs was "not really at issue." See id. The Supreme Court held that "the prejudice created by the photographs clearly outweighed *any* evidentiary value." Id. (emphasis in original).

Just as in Middleton, the photographs of Mack's autopsy had limited probative value because the cause of death—blunt force trauma to the head—was not contested at trial. Furthermore, the pathologist used diagrams to explain Mack's injuries to the jury

before resorting to the photographs. His testimony, coupled with his diagrams, more than adequately explained to the jury the uncontested nature of Mack's death. The photographs, which the solicitor telegraphed to the jury as "graphic," were used to inflame the passions of the jurors and engender sympathy for Mack.

This Court's thorough Rule 403 analysis of unfairly prejudicial photographs in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (2012) provides the correct rubric for deciding this case. In Collins, the Court of Appeals reversed because of the improper admission of photographs of a boy's half-eaten corpse. The boy had been attacked by dogs. The Collins court's analysis followed several steps. First, it examined the reasons why the State sought the photographs' admission. Next, it determined whether the State's reasons matched any of the elements of the crime charged. Third, it evaluated the prejudicial impact of the photographs. Finally, the court determined whether the photographs corroborated other testimony.

In this case, the only real issues at trial were whether the State's witnesses credibly described Gray as being involved in an attack on Mack, and whether the beating administered by Bloom and others caused Mack's death. The State argued it needed the photographs "to show malice" and because "cause of death is definitely an issue." None of these reasons matched the evidence by Dr. Marcus. The State's pathologist admitted that he could not tell whether all of the injuries were received from Bloom's attack. R. 548, ll. 7 – 11. When asked whether he could tell whether the injuries to Mack's head were from the first or second attack, the pathologist responded, "No, I can't tell that. Absolutely not." R. 555, ll. 8 – 12. He candidly admitted that Mack's injuries could

have been caused by “four to five men kicking, stomping, and beating the victim.” R. 557, l. 25 – 558, l. 7.

The State failed to show how the autopsy photographs of Mack’s sawed-off skull and bloody brain were relevant to malice. These graphic photographs all depicted Mack’s body after it had been severely altered by the autopsy. Cf. State v. Powers, 331 S.C. 37, 47, 501 S.E.2d 116, 120 (1998) (holding that unpleasant autopsy photographs which depicted the victim’s body “in substantially the same condition” as left by the defendant were admissible). They were not probative of whether Gray acted with malice, especially when the pathologist could not tell the jury when the injuries were sustained. Therefore, the State’s admission of the photographs did not relate to any of the elements of the offense or any contested fact.

“Photographs pose a danger of unfair prejudice when they have an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Lee, 399 S.C. 521, 529, 732 S.E.2d 225, 239 (Ct. App 2012). The emotional impact of the photographs cannot be contested. Mack’s head has been cut in half and he was scalped both front and back. Mack’s face wears his inside-out scalp like a mask. The outline of his face is visible underneath his bloody scalp. The Court only need look at the horrific images of Exhibits 80 – 83 to understand their prejudicial impact on the jury. To use the solicitor’s word, the “graphic” nature of these photographs renders them unduly prejudicial.

Nor can the State argue that the photographs are admissible because they tend to have a corroborating effect on the pathologist’s testimony. Normally, if photographs serve to corroborate the testimony of a witness, it is not an abuse of discretion to admit them. See

State v. Jarrell, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002). But the mere existence of a photograph's tendency to corroborate a witness's testimony is not enough to overcome exclusion on Rule 403 grounds. As in Collins, "the photos relate to the expert's opinion only to the extent they show the same fact testified to by the [expert]. . . ." Collins, at 205, 727 S.E.2d at 755.

The photographs of Mack's brain and skull only corroborated a fact already testified to by the pathologist: that Mack died from blunt force trauma to the head. The defendants' pathologists said the same thing. "[T]he limited extent to which these photos corroborate the testimony of the witnesses does not significantly increase the minimal probative value of the photos." Collins, at 211, 727 S.E.2d at 759. The minimal corroborative effect of these photographs cannot overcome their exclusion under Rule 403. Because the trial court improperly admitted these photographs, this Court should reverse and remand for a new trial.

2.

The trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight.

The record contains evidence that supported an involuntary manslaughter charge. Gray asked for an involuntary manslaughter charge and Judge Cooper denied his motion. R. 883, ll. 2 – 15. "Involuntary manslaughter is defined as (1) the unintentional killing of another without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice but while engaged in a lawful activity with reckless disregard for the safety of others." State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008). "A trial court

should refuse to charge the lesser-included offense of involuntary manslaughter only where there is no evidence the defendant committed the lesser offense.” Id.; see also State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999).

“The law to be charged must be determined from the evidence presented at trial.” State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). “A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence” Id. “In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant.” Id. Viewing the facts in Gray’s favor, the court erred in refusing an involuntary manslaughter charge.

In examining these facts, it is important to remember that it was undisputed at trial that Mack suffered a severe beating at the hands of people other than the defendants. The evidence showed that after this beating, Mack was dizzy and staggering. R. 328, l. 22 – 329, l. 7. Chase testified that Mack was walking away with Gray when Gray tried to hit Mack and “pretty much almost missed.” R. 238, l. 11 – 239 – 13. Chase said that Gray “did not kick the man down.” R. 239, ll. 16 – 18. She claimed that Mack “lost his balance” and then fell. R. 239, ll. 18 – 22. Chase that said that Mack got up after this incident. R. 244, l. 25 – 245, l. 3.

The “unlawful activity” as defined in involuntary manslaughter cannot amount to a felony. See State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). Gray’s conduct, at worst, constituted the misdemeanors of either assault and battery of a high and aggravated nature or simple assault and battery. See State v. Fennell, 340 S.C. 266, 274-75 & n.1, 531 S.E.2d 512, 516-17 & n.1 (2000) (describing ABHAN and simple

assault and battery as misdemeanors. If Chase's testimony is to be believed, as it must for purposes of this analysis, Gray only attempted to swing at Mack and Mack fell down. This type of assault would not normally cause great bodily injury.

In State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999), the Supreme Court reversed for failing to give an involuntary manslaughter charge when the defendant's conduct was only an assault and battery that did not tend to cause death or great bodily harm. In Chatman, the defendant and the victim engaged in a fight. The victim grabbed the defendant's testicles while appellant applied a "choke hold." Id. at 151, 519 S.E.2d at 101. The victim died of asphyxiation due to manual strangulation. Id. the Chatman court stated:

This is not the traditional strangulation type situation. Appellant was not attempting to strangle victim by placing his hands around victim's neck. As such, we think appellant's actions were not the kind which would naturally tend to cause serious bodily injury or death. Under the facts of this case, we think appellant was entitled to a charge on involuntary manslaughter.

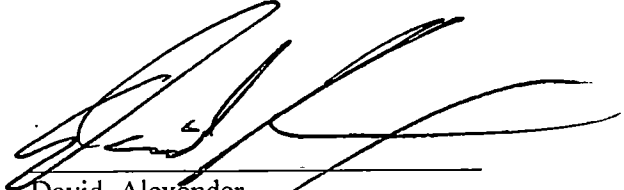
Id. at 153, 519 S.E.2d at 102.

Just as in Chatman, Chase's testimony shows that Gray and Mack got into a trivial fight. Viewing this evidence in the light most favorable to Gray, great bodily injury or death was unlikely to occur. Because the facts of this case were contested and the witnesses who testified against Gray were biased and unreliable, the trial court's failure to give this charge prejudiced Gray. Therefore, he is entitled to a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse Gray's conviction and remand this case for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of October, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

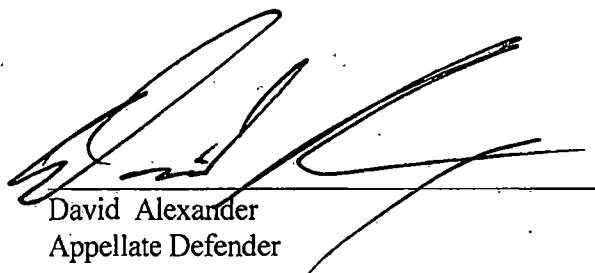
HENRY GRAY,

APPELLANT

APPELLATE CASE NO. 2012-209426

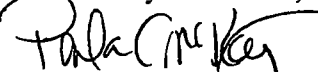
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of October, 2013.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of October, 2013.

 (L.S.)

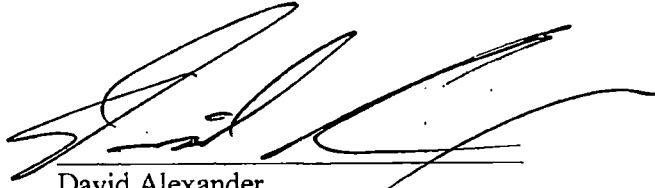
Notary Public for South Carolina

My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 21st, 2013

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

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ORIGINAL

STATE OF SOUTH CAROLINA
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The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.: 2012-209426

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FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant?

2.

Whether the trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight?

COUNTERSTATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge abused his discretion by allowing the State to introduce State's Exhibits 80-83, autopsy photographs, through the pathologist who conducted the autopsy?

2.

Whether Gray's argument is preserved for appellate review; and whether the trial judge abused his discretion by denying Gray's request to charge the jury on involuntary manslaughter?

STATEMENT OF THE CASE

Appellant, Henry Gray (Gray), is presently confined in the South Carolina Department of Corrections (SCDC), as the result of his Richland County convictions and sentence. The Richland County Grand Jury indicted Gray on March 10, 2010, for lynching in the first degree. The Richland County Grand Jury indicted him on October 5, 2011 for murder. The Richland County Grand Jury indicted his sister, Robin Reese (Reese), in March 2010 for lynching in the first degree, (2010-GS-40-0040), and then for murder, in October 2011, (2011-GS-40-4916).

On February 28-March 2, 2012, Reese and Gray received a joint jury trial before the Honorable G. Thomas Cooper.¹ At trial, Andrew Farley, Esquire, represented Reese and Mathias Chaplin, Esquire, represented Gray. Fifth Circuit Deputy Solicitor K. Luck Campbell, and Assistant Solicitors April Sampson and Nicole Simpson prosecuted the case.

Judge Cooper instructed the jury on voluntary manslaughter but he denied each defendant's request to charge involuntary manslaughter. **R. pp. 879-83; see also Argument II, *infra*.** The jury convicted both defendants, as charged. Judge Cooper imposed concurrent sentences of thirty years imprisonment for each conviction, on each defendant. Both defendants timely served and filed notices of appeal.²

¹ Judge Cooper denied the defendants' pretrial motions for a severance.

² Reese's appeal is pending before this Court and he has raised the same two issues in his Initial Brief of Appellant. See *State v. Reese*, Appellate Case No. 2012-209826.

ARGUMENTS

- I. The trial judge did not abuse his discretion by allowing the State to introduce State's Exhibits 80-83, autopsy photographs, through the pathologist who conducted the autopsy because the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice.**

Gray maintains that the trial judge erred by allowing the State to introduce State's Exhibits 80-83, autopsy photographs, through the pathologist who conducted the autopsy because the probative value of these photographs was substantially outweighed by the danger of unfair prejudice. Respondent submits that Gray's argument lacks merit and that there was no abuse of discretion. Here, the photographs were extremely probative since they corroborated the findings of both of the State's pathologists about the cause of death, by illustrating the serious and fatal injuries suffered by the victim that were found on autopsy; the photographs were presented in the course of the autopsy pathologist's scientific and almost educational discussion of his findings; and the autopsy pathologist testified that the photographs were necessary to demonstrate his findings. Also, Reese and Gray had each made cause of death and when the cause of death was inflicted issues in the case by presenting a pathologist who disputed some of the findings of the pathologist who conducted the autopsy; and each defense pathologist relied upon the autopsy photographs in reaching a conclusion of the cause of death and the timing of when that injury was received.

A. How issue developed at trial.

Prior to trial, the trial judge noted a defense motion to suppress autopsy photographs. He stated that "my normal rule on photographs is that if they assist your pathologist in determining the cause of death, then they are admissible. If they are just for shock value, then they would not be admissible. But I will review them at the proper time." R. p. 11, line 17 – p. 12, line 2.

The Deputy Solicitor stated, "I will show them to Your Honor. In this case there is some issue as to cause of death, which may make them more relevant." **R. p. 12, lines 3-6.**

On direct examination of Dr. Marcus, the pathologist who performed the autopsy of the victim, the State showed him **State's Exhibits 51-57**. After he had looked at them, the State asked if these photographs were taken after the autopsy had been completed. Dr. Marcus replied that they had been taken before the autopsy. He also indicated that those photographs illustrated some of the injuries that he had described to the victim's head and eye areas. **R. p. 524, line 10 – p. 525, line 1.**

The State then moved to introduce these photographs into evidence and both defendants objected. Gray noted an objection. Then, Reese argued that they were highly prejudicial and that Dr. Marcus testimony could adequately describe the injuries that he had found. When Gray's counsel began to add to this objection, the trial judge sent the jury out, and addressed the question of admissibility *in camera*. **R. p. 525, line 2 – p. 526, line 1.**

The State showed the remaining photographs that it intended to introduce, **State's Exhibits 80-83**. The State then argued that cause of death was at issue and that the State had to prove malice. It also noted that both defendants had employed pathologists to dispute the autopsy findings. Therefore, the jury needed to have a clear understanding of precisely what injuries the victim sustained, "perhaps more than [in] any other [case]." **R. p. 526, line 12 – p. 527, line 2.**

The judge directed the State to make its proffer. The State made the following proffer through Dr. Marcus:

MS. SAMPSON: Do these [State's Exhibits 51-57] illustrate some of the areas of injuries, as well has the areas of lack of injury that you noted in your diagram?

THE WITNESS: Yes, they do.

MS. SAMPSON: Were those helpful in determining the cause of death in this case as far as what you observed?

THE WITNESS: Yes, they do.

MS. SAMPSON: Then I'll go to the next set. Doctor, I'm going to show you State's Exhibits 80 through 83. Were those photographs that you actually picked out that went through these that show significant findings as to the cause of death in this case?

THE WITNESS: Yes, these photos depict the cause of death. I can't diagram this.

MS. SAMPSON: And these would be crucial?

THE COURT: What numbers?

MS. SAMPSON: Eighty-one (81) through 83 -- to illustrate to the jury what you're talking about.

THE WITNESS: Yes.

THE COURT: Three photographs?

MS. SAMPSON: Four.

THE COURT: You said 81 through 83.

MS. SAMPSON: Maybe I misstated it.

THE COURT: Yes.

MR. FARLEY: Your Honor, my objection would just [be] -- they are saying that all of the photographs are necessary or some of the photographs are superfluous and some just more essential than others? I guess they want all [of] the trauma to come in. Dr. Marcus is saying it's necessary to have every single one of those.

THE COURT: You want to ask him? You want to ask [a] hypothetical?

MR. FARLEY: Yes. Dr. Marcus, you're saying you must have every one of those photographs or are some of ... those photographs [unnecessary] for your demonstrate.

THE WITNESS: I'd like to have every photograph.

MR. FARLEY: I didn't ask you what you'd like to have, I said are they necessary?

THE WITNESS: I feel they're necessary, yes.

MR. FARLEY: Thank you, Your Honor.

THE COURT: Mr. Chaplin.

MR. CHAPLIN: Yes, Dr. Marcus, ---

THE WITNESS: Yes, sir?

MR. CHAPLIN: As far as those photographs are concerned, what they show is the trauma that you just discussed, correct?

THE WITNESS: Yes, sir.

MR. CHAPLIN: All right. But you can't testify as to the cause of that trauma?

THE WITNESS: I can testify that blunt trauma caused the trauma.

MR. CHAPLIN: Okay.

THE WITNESS: Blunt trauma.

MR. CHAPLIN: But you couldn't say specifically when the trauma occurred?

THE WITNESS: No. I can't say when it occurred.

MR. CHAPLIN: You can't say the location that it occurred?

THE WITNESS: I can't say the location, no.

MR. CHAPLIN: You just know that it is blunt force trauma?

THE WITNESS: Yes, blunt force trauma.

MR. CHAPLIN: And that would be the extents of your presentation?

THE WITNESS: I believe so, yes.

R. p. 528, line 22 – p. 531, line 25. The trial judge overruled the objection without further argument. **R. p. 532, lines 1-3.**

Before the jury, Dr. Marcus utilized **State's Exhibits 51-57** to help him illustrate a contusion caused by blunt force trauma on the right portion of the face (**State's Exhibits 51- 52**); a laceration over the left eye (**State's Exhibit 53**); a laceration to the side of the left eyebrow (**State's Exhibit 53**); sclera hemorrhaging in whites of the eyes (**State's Exhibit 54**); and an injury to victim's inner lip that had hemorrhaged (**State's Exhibit 55**). **R. pp. 532-34.**³

Dr. Marcus utilized **State's Exhibits 80-83** to illustrate the injuries to the victim's brain that he found. He explained that **State's Exhibit 81** was a photograph of how the scalp looked when the brain was exposed and it "shows some of the area of hemorrhage of the area of the brain." In a normal brain, this "area should be clean with no hemorrhage or anything to that area at all." **R. pp. 538-39.** He apparently used the remaining photographs, although not specifically identified on the record, to demonstrate the remaining brain injuries that he found. **R. pp. 539-41.**⁴

B. Discussion.

Gray is not entitled to relief. "The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008) (citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)). "The relevancy, materiality, and admissibility of photographs as

³ **State's Exhibits 56-57** depict the injuries to victim's back and legs, respectively, and neither exhibit is even remotely prejudicial.

⁴ **State's Exhibit 82** depicts the injuries to the left side of the victim's face before the autopsy and is not prejudicial. **State's Exhibit 80** depicts the subdural hemorrhaging and **State's Exhibit 83**, shows the exposed brain and contusions and bleeding on the brain.

evidence are matters left to the sound discretion of the trial court.” *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986).⁵

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). “To constitute unfair prejudice, the photographs must create a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’” *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149). A trial judge’s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. *State v. Hamilton*, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct.App. 2001), overruled on other grounds, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Further, “[i]f the offered photograph[s] serve[] to corroborate testimony, it is not an abuse of discretion to admit [them].” *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (quoting *Nance*, 320 S.C. at 508, 466 S.E.2d at 353).

In the present case, the trial judge admitted the photographs, **State’s Exhibits 80-83**, over the defendants’ objection that they were prejudicial and that they were unnecessary, since the testimony of Dr. Marcus adequately described the injuries that he found on autopsy. Respondent submits that the trial judge did not abuse his discretion by rejecting the Rule 403 argument made by Reese.

First, **State’s Exhibits 80-83** were extremely probative since they depicted the serious and fatal injuries suffered by the victim that were found on autopsy. The photographs thereby corroborated the findings of both of the State’s pathologists about the cause of death. *See Torres*,

⁵ All relevant evidence is admissible. Rule 402, SCRE. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE.

390 S.C. at 623, 703 S.E.2d at 229; *Nance*, 320 S.C. at 508, 466 S.E.2d at 353. Although Dr. Marcus' opinion was that he could not determine in which of the two incidents the fatal injury occurred based upon his autopsy findings, he opined that the injury causing the cerebral contusion and the hemorrhaging would require a "[s]ignificant amount of force." He further opined that it was "[a]bsolutely" consistent with a person having his feet swept out from under him and landing on his head. **R. pp. 535-36; 540-48; 555.**

In reply, Dr. Clay Nichols, the former chief medical examiner for Richland County when the autopsy was performed, testified that he had reviewed the autopsy procedures followed by Dr. Marcus and concluded that the autopsy was correctly performed. **R. pp. 843-46.** Also, Dr. Nichols had reviewed Dr. Marcus' findings and the history that had been provided. He opined that "[t]he timeline and injuries indicate that it would have been a second assault where the deceased fell and hit the concrete, resulting in closed head injury. The first assault, the evidence isn't there for a head injury. The second assault, there is real good evidence for a head injury." **R. p. 847, lines 8-15.**

Thus, the photographs were also relevant to prove the cause of death and to circumstantially negate that the cause of death was the result of any acts by Reese and or Gray that were not malicious. This is particularly true in light of the degree of force required in order for the blunt force trauma to have been inflicted. The State had the burden of proof and had the right to prove its case in the manner it chose, rather than solely relying upon Dr. Marcus' expert testimony. *See Martucci*, 380 S.C. at 249, 669 S.E.2d at 607.

Secondly, and despite Gray's hyperbole as to what is depicted in the photographs, the photographs were presented in the course of the Dr. Marcus' clinically scientific and almost educational discussion of his findings. For most of the photographs, he explained precisely what

was depicted and why the matter depicted in the photograph was significant. Thirdly, Dr. Marcus' *in camera* testimony was clear: he thought that all of the selected photographs were necessary to fully illustrate and depict his findings. These findings were not something that he could clearly convey to the jury by a diagram.

Fourth, both Reese and Gray had chosen to make the cause of death and when the cause of death was inflicted issues in the case. Each defendant retained and presented a pathologist who offered differing opinions of what was revealed by the autopsy. As the Assistant Solicitor correctly observed during the *in camera* proffer, because of the position taken by Reese and Gray with respect to what the autopsy showed, the jury needed to have a clear understanding of precisely what injuries the victim sustained, "perhaps more than [in] any other [case]." **R. p. 526, line 12 – p. 527, line 2.** Having elected to base her defense, in part, upon a challenge to the findings on autopsy, Reese should not be heard to complain that the State was allowed to introduce photographs that the State's expert testified were necessary to illustrate his findings.

Fifth, both defense pathologists relied upon the autopsy photographs in reaching a conclusion of the cause of death and the timing of when that injury was received. **R. pp. 689-90; 700; 730; 735; 748; 750-51.** Reese's pathologist was somewhat critical of the photographs because the failure to include a ruler in them was not according to the protocol of the National Association of Medical Examiners. **R. p. 689, line 15 - p. 690, line 4.** However, he quickly added, "Otherwise [these] are beautiful pictures and good ones." **R. p. 690, lines 4-5.**

Given the manner in which the photographs were presented and the testimony about what they depict, Respondent submits that they did not create a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71; *Alexander*, 303 S.C. at 377, 401 S.E.2d at 149. Particularly in this day and

age, where forensic matters are graphically shown in popular prime time television programs like C.S.I. and its progeny, the jurors simply would not be so shocked by these photographs that they would have rendered a verdict based on an emotional basis. Rather, they would have understood that the autopsy was a necessary and indispensable process to determine the cause of death. In other words, the photographs were relevant and necessary, and they were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury. *Id. See also Martucci*, 380 S.C. at 249-50, 669 S.E.2d at 607-08.

Additionally, the photographs complained of here, specifically **State's Exhibits 80-83**, were not beyond "the outer limits of what our law permits a jury to consider." See *State v. Collins*, 398 S.C. 197, 210, 727 S.E.2d 751, 758 (Ct. App. 2012) (citing *Torres*, 390 S.C. at 624, 703 S.E.2d at 229) (emphasis in original). In *Collins*, this Court found that the probative value of photographs of the 10-year-old child's partially eaten face and body, taken by a forensic pathologist before he performed an autopsy on child killed by dogs, was substantially outweighed by danger of unfair prejudice. *Collins*, 398 S.C. at 202-10, 727 S.E.2d at 754-58.

The defendant in *Collins* was charged with involuntary manslaughter and three counts of owning a dangerous animal. This Court found that the photographs in *Collins* added little to the testimony of witnesses; the issues to which the photographs related involved the conduct of defendant's dogs, as opposed to the defendant's own conduct; and that they were not material to the issues of defendant's conduct and whether his conduct was criminal. Also, this Court found that the photographs were graphic and shocking; that they prompted an intense emotional response; and that they had an overwhelming capacity to lure the jury into declaring guilt on the emotional basis of sympathy for the child and his mother, as well as horror at the sight of the child's body.

Unlike the photographs in *Collins*, however, the photographs in this case were material to the issues of cause of death, the timing of the cause of death and whether the injuries were inflicted maliciously. Further, the photographs here depicted injuries that the State alleged were caused by the Gray and or Reese, while acting as accomplices. The photographs are not of injuries caused by dogs, or anyone or anything but the actions of Reese and Gray.

Also, the photographs were not inflammatory simply because they were taken at autopsy or because they were “graphic.” To the contrary, both this Court and the South Carolina Supreme Court have upheld the introduction of autopsy photographs or graphic crime scene photographs that pass a Rule 403 analysis in a number of cases. *See, e.g., State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution, despite claim that, because victim's body was found in woods 46 days after crime was committed, weather or local fauna could have altered crime scene during that period; photographs corroborated other testimony concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *Martucci*, 380 S.C. at 249-50, 669 S.E.2d at 607-08 (upholding admitting autopsy photographs of child victim's internal organs and other injuries); *State v. Todd*, 290 S.C. at 214, 349 S.E.2d at 340 (black and white photograph of the victim's right upper chest with the breast exposed showing the location of the bullet wound was admissible to corroborate pathologist's testimony regarding location of wound, and did not prejudice defendant, since there was explicit testimony that victim's blouse and brassiere had been removed by medical personnel when they arrived at scene in order to administer medical assistance); *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002) (upholding the admission of graphic autopsy photographs in homicide

by child abuse case because they corroborated testimony and demonstrated the extent of the injuries); *State v. Ward*, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007) (upholding trial court's finding that probative value of two photographs illustrating graze wounds on the victim's back outweighed their prejudicial effect, since the jury's knowledge of the graze wound was necessary to rebut the defense's arguments about the angle of the shot); *State v. Dial*, ___ S.E.2d ___, Op. No. 5157, 2013 WL 3456559 (Ct.App., Jul 10, 2013) (probative value of three autopsy photographs of five-month-old victim's head injuries was not outweighed by danger of unfair prejudice in prosecution for homicide by child abuse; where photographs were introduced to corroborate testimony of forensic pathologist who performed autopsy that victim's various injuries were inconsistent with an accidental injury as defendant claimed had occurred; and they were highly probative of whether victim was abused and whether abuse was cause of his death, both integral elements of charged offense); *State v. Nichols*, 325 S.C. 111, 121, 481 S.E.2d 118, 124 (1997) (admitting a photograph of the victim's face because it demonstrated the angle and distance from which the victim was shot).

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since their introduction could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). At worst, these photographs were cumulative to the other expert testimony concerning the victim's injuries. *See State v. Brazell*, 325 S.C. 65, 79, 480

S.E.2d 64, 72 (1997) ("Even if the descriptive testimony of the prosecution's witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage") (citing *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587 (1942) (finding the photographs unnecessary but harmless because they were not prejudicial or inflammatory)).

In addition to the previously stated reasons, there was overwhelming evidence of Gray's and Reese's guilt, both individually and under a theory of accomplice liability. This evidence is discussed in **Argument II, *infra***. On the other hand, Gray did not challenge that the injuries occurred, but when they occurred. He did this through Dr. Shaker's expert testimony that the fatal blow could have occurred in the first beating and the victim had a lucid interval in which he was ambulatory and could communicate. He also benefited from and relied upon Reese's testimony that she and Gray did not have any contact with the victim until after he was lying motionless on the ground. Also, neither she nor Gray did anything that could have caused the victim's death.

Under these circumstances any error must be viewed as harmless. Therefore, Gray's argument is without merit and there was no abuse of discretion.

II. Assuming *arguendo* that the Court finds Gray's argument preserved for appellate review, the trial judge did not abuse his discretion by denying Gray's request to charge the jury on involuntary manslaughter because there was no evidence presented at trial that supported this instruction.

Gray's remaining argument is that the trial judge erred by refusing his request for a jury instruction on involuntary manslaughter, as a lesser-included offense of murder.⁶ On appeal, he argues for the first time that involuntary manslaughter should have been charged because "there

⁶ Thus, this allegation has no bearing on his conviction and sentence for lynching in the first degree.

was evidence from which the jury could have concluded that co-defendant Reese and Gray, under the hand of one is the hand of all theory argued by the prosecution, were engaged in an unlawful assault and battery, not of a character of itself to cause death, but which resulted in the unintentional killing of Mack, without malice.” Respondent submits that this argument is not preserved for appellate review because he did not present the same argument to, and obtain a ruling on it from, the trial judge. Alternatively, Respondent submits that the trial judge did not abuse his discretion by denying Gray’s request to charge the jury on involuntary manslaughter because there was no evidence presented at trial that supported this instruction.

A. The evidence presented at trial.

1. The prosecution’s case.

On the afternoon of February 13, 2010, two officers with the Columbia Police Department were dispatched to a fight involving several people on McDuffie Street. They were told that one person involved in the altercation was wearing a red hoodie or hat and that another person involved in it had on a black sweat shirt or hoodie and was carrying a red backpack or satchel. **R. pp. 14; 16-17; 31-35; 45.**

The officers did not find a fight when they first arrived at McDuffie Street. However, one officer saw an individual with a red backpack enter an apartment, as they drove through an apartment complex near this street. So, after notifying the other officer of what he was going to do, this officer went to that apartment and spoke with Ms. Valerie Goodwin. She told him that that "Bloom," Marcellius Brooks, had come into her apartment but was no longer there. **R. pp. 17-18; 21; 28-29; 35-37; 44-46.**

The officers then received a call that there was a person on the ground between two buildings in the apartment complex. When they investigated the call, they found an unconscious

man, later identified as Kenneth Mack, lying on the ground. Mr. Mack looked like he had fallen and he had injuries to his nose and lip. Also, he did not respond to a sternum rub and it appeared that he was having a seizure.⁷ So, the officers immediately called EMS, and the man was transported to Richland Memorial Hospital shortly before 3:30 p.m. **R. pp. 18-20; 23; 37-39; 221-27; 514-16.** This man, Mr. Kenneth Mack, was pronounced brain dead shortly after he arrived at the hospital. **R. pp. 515-16; 595.**

A number of witnesses testified at trial to the attacks that ultimately resulted in Mr. Mack's death. As can be expected, these eyewitnesses gave varying accounts of the attacks. The first eyewitness called by the State was Angelo "Ricky" Boyd. Boyd testified that he was sixteen years old when the beatings occurred and that he lives on McDuffie St. On February 13, 2010, Boyd met up with his friend, Marcellius Brooks, that afternoon and the two started walking to Cousins Mini Mart, on Forrest Dr., which was a very short distance from where the victim was later found. **R. pp. 81-84; 93; 362-64.**

As the two were walking, they saw a man grabbing on the arm of Melquanna S., a/k/a "Lucy," Reese's thirteen year old daughter. "She was yelling 'Stop.'" The man did not stop and, eventually, he "threw her to the ground." Boyd is a friend of Lucy and her brother. So, he and Brooks intervened. Brooks tackled the man and held him down. Boyd kicked the man's face or body with his Timberland boots and, at the insistence of Brooks and Boyd, Lucy hit him "a couple" of times while Brooks held him down. **R. pp. 84-87; 93-94; 99-102.**

By this time, a crowd had gathered. After this beating, Brooks and Boyd took Lucy to Cousins Mini Mart, to let Reese know about what had happened. They also let her know that "it

⁷ Mr. Kevin Thomas, a Richland County EMT who responded to the call testified that Mr. Mack "was having some posturing signs," and he explained that this is an involuntary response that is similar to a seizure "but it is more indicative of a brain injury. It's a different part of the brain than a seizure." **R. p. 225, lines 9-18.**

was already good.” Reese looked as if she was going to finish her video poker game.⁸ Boyd and Brooks then both left the store. **R. pp. 87-93; 95-96.**

Police reviewed the store’s surveillance video and could see that several men came into the store and approached a woman who was playing video poker. The men then left and headed back towards the apartment complex. **R. pp. 296-97; 362-67; 633-34; State’s Exhibit 78.** Malik Akbar, one of the store’s co-owners at the time testified that he ran the store’s restaurant. He was familiar with Reese, Gray, and Brooks, and that Reese would come into the store and play video poker. **R. pp. 367-69; 369-70.**

Mr. Akbar testified that he saw Reese playing video poker there on the afternoon of February 13th. At some point, a group came into the store and Mr. Akbar saw the group, including Lucy and Brooks, talking to Reese and “dancing around” where Reese sat. Also, there was “quiet fussing.” Lucy and Reese left a short time later. **R. pp. 371-78; 380-81.**

Police also reviewed a video of a nearby fish market. **State’s Exhibit 93.** This video “corroborated that Brooks went to the store after the attack, “told Ms. Reese about the assault with her daughter and that she had left with her daughter and that she was on the cell phone at the time when she walked out the door.” However, there were technical problems when police tried to seize the video. **R. pp. 608-610.**

Ms. Donnetti Perry lives in the Columbia apartment complex where the crimes occurred, across the hall from Gray’s father.⁹ Her friend, Sanovia Thompson, came to her door about mid-

⁸ While Boyd did not recall doing so, he admitted that he could have told police that upon hearing that the man was harassing her daughter, Reese “jumped up and said, ‘Hell, no.’” He also could have told police that Reese stayed in the store and finished her video poker game. **R. pp. 89-90; 92.**

⁹ Although not redacted in Gray’s Initial Brief of Appellant, Respondent has not identified the apartment complex by name because many of the eyewitnesses, such as Ms. Perry, lived in complex. *See In re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, 375 S.C. 56, 57, 650 S.E.2d 462, 462 (2007).

afternoon on February 13, 2010, and told her that something was happening outside. When Ms. Perry went to her door and looked outside, she saw Mr. Mack having a conversation with “Six,” or Gray.¹⁰ **R. pp. 113-18.**

Gray was apparently unaware of the previous difficulty at that time and Gray asked Mr. Mack what had happened to him because Mr. Mack looked like he had been in a fight. As soon as Gray received a phone call, however, Gray used his feet to “clip” or undercut Mr. Mack’s feet from under Mack. Mr. Mack immediately fell to the ground, striking his head. **R. pp. 118-120.**

Although Mr. Mack stayed on the ground, Gray repeatedly kicked him “all over.” Gray also cussed him and asked him what he had done to Gray’s niece. At some point, Reese came from her apartment and joined the fracas. Reese said, “yes, that’s him’ and started kicking him [while] saying ... ‘I’m going to teach you for messing with my daughter’ ... [or] something similar to that.” Mr. Mack never got off of the ground or “put up a fight.” Nevertheless, Reese got a metal chair off of a nearby porch, and both she and Gray hit Mr. Mack with it “two or three times.” **R. pp. 120-26; 140; 142-45.**¹¹

By then, a crowd had gathered. Eventually, the siblings stopped their savage onslaught and walked back to their respective apartments. Perry testified that she could see that Mr. Mack was injured “all over,” and that blood was coming from his mouth. Thompson called the police. **R. pp. 126-29.**

¹⁰ Ms. Perry did not know Mr. Mack at the time and she was unaware of the first assault. **R. pp. 139-35.**

¹¹ Police seized the chair (**State’s Exhibit 72**) and it was swabbed for DNA. **R. pp. 283-85; 287-88.** Subsequent testing of these swabs by SLED DNA analyst Katie Ukra revealed that a presumptive test for the presence of blood was positive on several swabs. More importantly, a partial DNA profile was developed from the bottom seat of the chair and this partial profile matched the DNA profile of Mr. Mack, the victim. “The probability of randomly selecting an unrelated individual having a DNA profile matching this item is one in approximately twenty-five million.” **R. pp. 444-451.** Respondent has not designated **State’s Exhibit 72** as part of the record, but would represent as an officer of the Court that the chair is both sturdy and sufficiently heavy that using this object to strike another person is clearly indicative of malice.

Ms. Mary Anderson testified that her deceased sister also lived in the same apartment complex in February 2010, and that she had visited her sister on the afternoon of February 13th. As she was leaving, she saw Reese and Gray¹² “beating the boy down [on] the ground[,] stomping [him], kicking him, doing everything and beating him with an iron chair” while the victim “wasn’t moving at all.”¹³ She was unable to recall who used the chair. However, but she had indicated in her statement to police that both defendants did. Reese was wearing a pair of boots. **R. pp. 186-192; 200; 206-27; 218-19.**

As Reese was attacking Mr. Mack, Ms. Anderson heard Reese say, “motherfucker, why [did] you approach my 13-year-old?” The attack “[l]asted for a while” and was so intense that Ms. Anderson momentarily turned away from it and eventually had to leave. She was concerned that Reese and Gray were going to kill the man. After Reese and Gray stopped their attack, they walked to their father’s apartment. **R. pp. 192-95; 200; 207.**

In February 2010, Ms. Kara Chase was homeless but her best friend, Synovia Thompson, lived in the apartment complex where the beatings occurred.¹⁴ On the afternoon of February 13th, she and Ms. Thompson were outside and they had one of the children of Ms. Thompson’s cousin with them. Ms. Chase remembered seeing a man whom she did not know, Mr. Mack, walking down the street that runs through the complex. This man had a “disagreement” with “Six,” *i.e.*, Gray, over something the man had said. Gray grabbed the man and told him, “you[’re] gonna talk to me.” **R. pp. 232-38.**

¹² She knew them through their father and recognized both. She identified Gray as “Six.” **R. p. 188.**

¹³ She did not know the victim but knew that he worked at a Forest Drive barber shop. **R. p. 190.**

¹⁴ She was blind and on dialysis at the time of trial. **R. p. 240, lines 22-23.**

The grab “wasn’t forceful but it looked like Mr. Mack didn’t want to go with him either.” Something else was said and Gray hit Mr. Mack hard enough to take Mr. Mack’s feet out from under him. Mr. Mack fell to the ground and did not get up. **R. pp. 238-40; 242.**¹⁵

“That’s where it kind of gets blurry to me because I don’t remember exactly what happened from right there while the man was lying on that particular area. ... I know when the man hit the ground that [Gray] walked off.” Ms. Chase remembered Mr. Mack saying, “I’m not going anywhere;” Reese saying, “That’s him;” and Reese hitting Mr. Mack. She also remembered telling police that it looked like Mack hit his head when he fell to the ground and was “out cold” after this point, and that “the other man continued to kick and stomp the man in his face once the female stopped.” However, she did not remember Reese striking Mr. Mack with a chair or even picking up a chair. **R. pp. 240-46; 249; 251-52; 261-63.**

During the attack, Gray hit Mr. Mack with the chair. Also, Gray was wearing construction boots in the attack. Once the attack ended, Mr. Mack just lay on the ground. “Either he was faking it, so that way nothing else would happen to him, or he was seriously hurt.” **R. pp. 246-47; 251-52.**

Because of the inconsistencies between Ms. Chase’s testimony and what she told police, the State was allowed to introduce and publish her February 16, 2010 statement to police, as **State’s Exhibit 88**. In her statement, she stated that:

I saw the victim in between ... [two] buildings of [the apartment complex] having a conversation with another man. The other man grabbed the victim and went to

¹⁵ Ms. Chase’s daughter is the best friend of Reese’s daughter (**R. p. 241**) and, unfortunately because of that friendship, her physical limitations or because Reese, Gray and Lucy S. are all affiliated with the Bloods (**R. p. 600; 634-35; 662; 665**), Ms. Chase’s trial testimony deviated wildly from her statements to police, beginning at this point forward. *See also R. pp. 260, lines 22-24* (admitting that she would like to do what she could to help the defendants). Because the evidence must be viewed in the light most favorable to the accused in determining whether or not to submit lesser included offenses, *see State v. Meckler*, 379 S.C. 12, 15, 664 S.E.2d 477, 479 (2008) (“A trial court should refuse to charge the lesser-included offense of involuntary manslaughter only where there is no evidence the defendant committed the lesser offense”), however, Respondent has discussed the remainder of it.

walk him down the sidewalk. The victim snatched back and the other man swept the victim from [off] his feet causing the victim to hit his head on the pavement A few seconds later a female runs up the street saying "That's him." She begins kicking the man repeatedly, picking up an old metal chair, throwing it on top of the victim. The other man continued to kick and stomp the man in his face. Once the female stopped, the victim laid on the ground the whole time this was occurring."

Tr. p. 585, lines 1-16. See also State's Exhibit 88, R. pp. ____-____.¹⁶

She did not know the victim but she identified the male attacker as "Six" and the female attacker as his sister. Likewise, she had heard Mr. Mack say, "I am not going anywhere. Just do what you're doing to do to me here." Further, she indicated that Mr. Mack "did not have a chance to fight back or flee" and that "Six" was wearing construction boots. **R. pp. 585-87.**

On February 13, 2010, Amber Hardy was the pharmacy manager at the CVS pharmacy located on Forest Drive near the apartment complex. While she was in her car that afternoon, following a shoplifter and on the phone with police, she saw four black males and a black female taking turns kicking and punching another black male on McDuffie Street. The victim was trying to defend himself. Although the beating only lasted for about "five minutes," Ms. Hardy testified that "[i]t seemed like forever." **R. pp. 313-17; 319-22; 329.**

After the "brutal" attack was over, the attackers walked away from the victim and to the open air market. The victim could stand after the attack. However, he was very unsteady on his feet. Ms. Hardy returned to CVS. **R. pp. 316-17; 328-29.**

Marcellius Brooks, a/k/a "Bloom," testified that he had been charged with murder in this case, but that he cooperated with law enforcement and was testifying because he was innocent of killing Mr. Mack. **R. p. 411, line 1 – p. 412, line 9; p. 414, lines 3-14; p. 417, lines 16 – p. 418,**

¹⁶ Also, an investigator with the Fifth Circuit Solicitor's Office interviewed Ms. Chase on the day before the trial started. She confirmed at that time that her February 16th statement was correct. **R. pp. 567-571; 580.**

line 1; p. 431, lines 14-24. Brooks used to live in the apartment complex where the beatings occurred and he was familiar “with the open air market ... on Forest Drive,” Cousins. He was friends with Reese and he used to be her next door neighbor. He also knew that Reese had a thirteen year old daughter named Lucy. He “knew of” Gray, to whom he referred as “Six.” **R. pp. 391-95; 419.**

As Brooks was walking down McDuffie Street on the afternoon of February 13, 2010, he saw Lucy involved in an altercation with a man that he had never seen. At first, she and the man were talking, but she soon slapped him. After that, the man picked up Lucy and slammed her on the ground. In response, Brooks decided to help Lucy. **R. pp. 395-97; 421.**

Brooks “bum rushed” the man, which he described as “tackling him off of her.” Brooks admitted that he hit the man twice “[w]ith a closed fist” while he held the man down. Brooks denied kicking the man or that anyone else participated except for Lucy, whom Brooks persuaded to kick the man several times. However, Brooks was on top of the man and she could not kick him cleanly. As they were on the ground, a crowd started to gather. **R. pp. 397-400.**

At some point, Boyd pulled Brooks off of the man. The man ran away from Brooks and “towards the bottom of [the complex].” The man had a busted lip. **R. pp. 401; 408; 422; 429-30.**

Brooks then got Lucy, and he and Boyd walked her to the open air market because Reese was there playing video poker and he wanted to tell Reese about what happened. The crowd followed them. When Brooks told Reese what had happened, she was “upset.” Reese asked who the man was, and both Brooks and Lucy said that they did not know. **R. pp. 401-04; 436.**

Reese and Lucy soon left the store. She called someone on her cell phone as she was leaving, but Brooks did not know whom she had called. When Reese and Lucy left the store, Reese was mad and she walked down Forest Drive. Brooks did not accompany them. Instead, he

walked down McDuffie Street and went to Valerie Goodwin's apartment, as he had previously planned to do, and got some money to give to her incarcerated son. Brooks' mother then picked him up and took him to her home. **R. pp. 404-09.**

The police called Brooks' phone the following day and he turned himself in on February 15th. The charges against him were still pending at the time of trial and he had not received any promises or consideration on his charges, in exchange for his testimony. **R. pp. 409-415; 417-18.**

Ms. Sanovia Thompson testified that she lives in the apartment complex where the beatings occurred. On the afternoon of February 13, 2010, Ms. Thompson was babysitting her cousin and five children. The children were running around playing outside, but Ms. Thompson "was back and forth" because Ms. Chase was staying with her at the time. As Ms. Thompson was sweeping her stairs outside, she saw a man whom she did not know walking on the sidewalk on Forest Drive, "with his hand over his head. He appeared to be intoxicated" **R. pp. 471-74.**

Although the man could talk, he "had a knot on his head and it obviously was bleeding. He was kind of like staggering." After the man spoke to someone else, Gray looked at him and asked, "[w]hat happened to you?" Gray then started to go "on about his business." The man "said something about some young b-i-t-c-h up the street." Just then, Gray's telephone rang and he went into his father's apartment answer it. **R. pp. 473-77.**

As soon as Gray came back outside, his demeanor had changed. He said, "you put your hand on my niece." He grabbed [the man] on the collar. He said, 'we're going to talk to my sister.'¹⁷ Ms. Thompson followed the men, and when she saw them again, the man was on the

¹⁷ Thompson had known Reese for roughly five years at the time. **R. p. 478.**

ground. Reese was walking up the sidewalk and “looked like she was upset, maybe crying.” **R. pp. 478-481; 489.**

Because Ms. Thompson was unsure about what would happen next, she took the children inside. When she came back out, she saw Reese ask the man, “‘Why did you put your hand on my baby’ or something like that. She kicked him on the leg one or two times.” Then, Reese and Gray walked away from the man, who had never defended himself and did not get up. Ms. Thompson called 911 and Ms. Chase reported that the man was lying on the ground. **R. pp. 481-83; 486.**¹⁸

Mr. Issac Weathers testified that he lived in the same apartment complex in February 2010, and that he witnessed a fight on February 13th. “A young lady and a guy [were] arguing.” At first, Mr. Weathers thought that they were playing. They got “tangled up and they fell.” Then, “a bunch of guys just went and jumped on him.” Brooks or “Bloom” was the first person to hit the man. The girl also hit him at Brooks’ invitation for her to “‘get your licks in.” **R. pp. 492-94; 498; 500.**

The man who was being beaten tried to convince his attackers that he and Lucy had been playing. Also, he tried to defend himself. When the attackers stopped beating him, the man “jumped up and ran.” The attackers went to the store. Mr. Weathers heard Brooks say that he did not get the man good enough. **R. pp. 494-96; 501; 506-07.**

Dr. Bradley Marcus testified that he is a forensic pathologist and he works as the coroner and chief medical examiner for Richland County. **R. p. 508-09; 513.** On February 16, 2010, Dr.

¹⁸ At some point, Ms. Thompson noticed that a neighbor’s chair was in the grass instead of where it was normally kept. **R. p. 482.**

Marcus performed an autopsy on Kenneth Mack.¹⁹ Dr. Marcus detailed the injuries that he found on autopsy through diagrams (State's Exhibit 86-87) and photographs (State's Exhibits 51-57 and 80-83). *See Argument I.* There was a contusion caused by blunt force trauma on the right portion of the face (State's Exhibit 52); a laceration over the left eye (State's Exhibit 53); a laceration to the side of the left eyebrow (State's Exhibit 53); sclera hemorrhaging in whites of the eyes (State's Exhibit 54); an injury to his inner lip that had hemorrhaged (State's Exhibit 55); hemorrhaging along the scalp on the right side; hemorrhaging in the scalp on the back of the head; and hemorrhaging in the skin underneath the blunt force trauma contusion. **R. pp. 517-525; 532-34.**

Dr. Marcus' internal examination focused on the head area and he concluded that the cause of death was a closed head injury due to blunt force trauma to the head. When he removed the skull cap and looked at the victim's brain, Dr. Marcus found "a significant injury and the ultimate cause of his death. ... There was a massive amount of subdural hemorrhage, a massive area of blood around the left area of the head." On the right, Dr. Marcus likewise found a subarachnoid hemorrhage and "cerebral contusions, which is actually hemorrhage in the brain itself." This is usually caused by blunt force trauma and required a "significant amount of trauma." **R. pp. 534-39; 542; 546-47; 552-53.** *See also State's Exhibits 80-83.*

Dr. Marcus explained that a person can live with trauma on the scalp but a person cannot live with the hemorrhage on the brain, itself. Dr. Marcus opined that the victim could have possibly lived if there had only been a subdural hemorrhage. **R. pp. 539-41.**

Dr. Marcus also found a skull fracture "in the right parietal area," or "[t]owards the back of the head" and in the same area where he found the cerebral contusion and the hemorrhaging.

¹⁹ Although Mr. Mack was declared brain dead shortly after arriving at the hospital on February 13th, he was kept on life support until his organs could be harvested. **R. pp. 515-16.**

Such an injury would require a “[s]ignificant amount of force” and it was “[a]bsolutely” consistent with a person having his feet swept out from under him and landing on his head. **R. pp. 535-36; 540-41; 546-47; 548.**

The injuries that Dr. Marcus found on autopsy were also consistent with the “posturing observed by the EMT. Dr. Marcus opined that “[t]he second assault certainly contributed to [the victim’s] death in this case,” but he could not distinguish which injuries were sustained in the first attack from those injuries that were sustained in the second attack. **R. pp. 542-45; 548; 555.**

On cross-examination, Reese elicited that a toxicology screen on the victim’s blood reflected that he had marijuana and .125 mg. of Lorazepam, or Ativan in his system. Lorazepam is an anti-anxiety medication that is used to relax people. This level of Lorazepam was “in the midrange of therapeutic” and would not have contributed to the victim’s death. **R. pp. 548-541; 562.²⁰**

Inv. William Pegram testified that he is the supervisor of the City of Columbia Police Department’s violent crimes unit and that he was the lead investigator in this case. The victim was already brain dead by the time he reached the hospital on February 13, 2010. **R. pp. 593-95.** As part of the investigation, a search warrant was issued and the records obtained for Brook’s Nextel cell phone. **R. p. 606; see also State’s Exhibit 75** (portions of Brooks’ records). Also, investigators spoke to many of the witnesses, including Brooks, as well as Reese and her

²⁰ Dr. Clay Nichols, a forensic pathologist, testified that he was the chief medical examiner for Richland County when the autopsy was performed. In that role, he had reviewed the autopsy procedures followed by Dr. Marcus and concluded that it was correctly performed. **R. pp. 843-46.** Dr. Nichols had also reviewed Dr. Marcus’ findings and the history that had been provided. He explained that “[t]he timeline and injuries indicate that it would have been a second assault where the deceased fell and hit the concrete, resulting in closed head injury. The first assault, the evidence isn’t there for a head injury. The second assault, there is real good evidence for a head injury.” **R. p. 847, lines 8-15.** Dr. Nichols had discussed his opinion with both the coroner’s office and police and he adhered to that opinion. **Tr. p. 847, lines 16-25.**

daughter, Lucy.²¹ Police were unaware of the second attack when Reese and her daughter were questioned. **R. pp. 604-06; 610-16.**

Because Reese's calls from her cell phone became important, Inv. Pegram testified that a search warrant was likewise issued and the records obtained for her Nextel cell phone. **R. pp. 621-22; see also State's Exhibit 76** (portions of Reese's records). He explained that there was a phone call from Reese to Brooks at 3:11 p.m. on the 13th and other calls between them that day. This showed deception in that Brooks and Reese knew each other, whereas they had tried to distance themselves from each other when interviewed. There was also a call from Reese to her father's telephone at 3:07 p.m. on the 13th, which police believed corroborated information that Gray had received a call before his attack on the victim. **R. pp. 623-26.**

Among the witnesses presented in reply, the State presented SLED toxicologist Quintas Young, who testified that he had analyzed blood samples of the victim. There was "a negative blood alcohol." However, the drug screen was "positive for [benzodiazepines] and tetrahydrocannabinos[,] which we found later to be Lorazepam and a [metabolite] of marijuana/THC." Mr. Young indicated that the carboxyl THC that was present was "inactive" or non-interfering. This just meant that there was marijuana use in the past, and that it could possibly have been a week earlier, depending on the frequency of use. **R. pp. 850-51; 853-55.**

Mr. Young further explained that Lorazepam, or Ativan, is in a class of drugs called "benzodiazepines." Benzodiazepines are commonly used to treat anxiety. However, "Lorazepam is normally administered in hospitals for head injuries ... [because] it [slows] the brain activity to prevent brain swelling." Ativan is "a very simple central nervous system depressant similar to that of alcohol" and the amount of Ativan found in Mr. Mack's system fell within the therapeutic

²¹ Lucy was interviewed on February 14th and provided information about Brooks. A warrant was obtained for Brooks' arrest on the 15th. **R. pp. 604-05.** Reese had not mentioned being involved in an incident involving a chair and police were focusing on Brooks because they did not know that there had been a second attack. **R. pp. 871-75.**

range. Even combined with Ativan, the THC found in Mr. Mack's system "would not play a role in impairment" because it was inactive. **R. pp. 855-57.**

2. Gray's evidence.

Gray's first witness was Dr. Adel Shaker, a forensic pathologist. Dr. Shaker was critical of the manner in which the autopsy had been performed. However, he agreed that the cause of death was blunt force trauma to the head and that he could not determine which attack led to the death. However, Dr. Shaker opined that the fatal blow could have been struck in the attack on McDuffie Street and that the victim could have experienced a lucid interval before herniation due to bleeding of the brain. Dr. Shaker further opined that, during the lucid interval, the victim could have walked to the location where the second attack occurred and then collapsed. **R. pp. 679; 684-86; 689-695; 701-02; 727-28; 730.**

Dr. Shaker further opined that the injuries he observed were not consistent with being beaten with a metal chair. Also, he hypothesized that the level of benzodiazepine in the victim's system, when combined with marijuana could have made the victim so unsteady on his feet that he fell. However, the drugs were unrelated to the cause of death and he conceded that hospital personnel had given the victim Ativan when he was admitted. **R. pp. 687-88; 692; 698; 718; 724; 735.**

Ms. Kiki Burns testified that she had witnessed an incident on February 13, 2010, and that she had given a statement to police. She was working at a BP gas station immediately across Forest Drive from McDuffie Street. As she was waiting on customers, she saw "four or five people running up the street." One man was in front of the others, and the others wore black hoods. **R. pp. 828-831.**

The man in front ran to his left and he "must have tripped over a chain or something and he fell." The people who had chased him then beat him. Ms. Burns also saw a black female involved in the beating. After the attackers had walked away, the man tried to stand. However, "he stumbled back down." Ms. Burns "went to turn around and look and he was gone." **R. pp. 831-32; 837-39.**

3. Reese's evidence.

Dr. Sandra Conradi, Reese's forensic pathologist, testified that she had reviewed the autopsy report, the coroner's report, the investigative reports from the City of Columbia Police Department, the laboratory report and the photographs in this case. **R. pp. 747-48.** Based upon Dr. Conradi's review of this evidence, she opined that the cause of death was brain injury, as the result of blunt force trauma to the head. **R. pp. 750-51.**

She further opined that:

Mr. Mack was fatally injured in the second fight and in my opinion, he struck, his head on a hard surface, fractured his skull, suffered very severe head injuries including bleeding between the scalp and his skull, bleeding under the skull, between the skull and the brain and he had bruising or contusions of his brain along with the other fractures and associated abrasions and contusions of his face and mouth, which were not fatal. The fatal injury was the brain injury. He suffered that from falling and being propelled onto a hard surface on the back of his head.

R. p. 749, lines 8-20. See also R. p. 753, line 24 – p. 754, line 6.

She explained that it takes "quite a severe" force to fracture a skull, and this could not be caused by simply falling to the ground. Rather, "you have to be propelled very hard to fracture the skull as this Mr. Mack did on the right side of his head and causing the degree of brain bruising and bleeding that he had." **R. p. 751, lines 17-25.**

Melquanna "Lucy" S. testified that she was thirteen years old in February 2010. She had planned to get her nails done, at a salon on Forest Drive, on the afternoon of February 13th. However, the store was locked and a lady told her that it would not be open until Thursday.²² As she was standing there, a man approached her and said that she could come in his house. Although she did not know the man at the time, she later learned that this man was Mr. Mack. **R. pp. 756-761.**

Lucy went into the open air market and told her mother that she could not get her nails done that day and she bought some potato chips. As she was walking home, Mr. Mack approached her again and asked her if he could have some chips. Lucy told him to leave her alone because she was "trying to avoid having a conversation with him." However, he stopped her in her tracks and was "jerking" her around. **R. pp. 761-62.**

He also threw a snowball at her. When she told him that she was going to get her mother, he grabbed her with his right hand. In response, Lucy hit him with her right hand. Mr. Mack then picked her up, threw her between two bushes and they began "tussling." At that point, Brooks came over, "got [Mr. Mack] off of me, hit him a couple of times and then some dudes came and jumped on him." **R. p. 762.**

Lucy also got in "some licks," meaning that she hit him "a couple of times" because she was upset and thought that Mr. Mack had "harassed" her.²³ After the fight, Brooks took her to the open air market, with the other participants in the beating following. They told her mother what had occurred, and Reese took Lucy home. When they got home Lucy was crying and she

²² A review of a 2010 calendar reflects that February 13, 2010, was a Saturday.

²³ She admitted on cross-examination that she had told police that she had also kicked him "a time or two. **R. p. 767, lines 4-7.**

told her mother that the man had attacked her. Reese was also upset, but they did not call the police. **R. pp. 762-64; 768-69.**

The remaining defense witness was Robin Reese, who testified that she went to the open air market on February 13th to play a video game. Lucy "was on punishment" that day because of her grades but Reese allowed her to go to the nail salon because it was close to Valentine's Day. When Lucy came back and told her the salon was closed, Reese told her to go home. Lucy left after buying a bag of potato chips with money that Reese had given to her. Reese stayed and continued playing the video game. **R. pp. 771-73.**

Between twenty and twenty-five minutes later, Lucy came back, accompanied by Brooks and another man. At first, Reese was mad because she thought that Lucy had disobeyed her. However, Brooks, who had been Reese's neighbor, told her that he had just pulled a man off of Lucy. Lucy was crying and wet. Upset by what she had heard, Reese "wanted to know what happened and what do you mean 'pulled off?'" **R. pp. 773-75; 790-91; 794; 797-98.**²⁴

Reese got the tickets for her video game, took them to the counter and cashed them in. She and Lucy then left the open air market. She tried to call her brother but her father answered the phone. Reese hung up because he was too intoxicated to speak. **R. pp. 776-77; 790; 799.**

I still wasn't satisfied. The only thing I know at this time was a grown man on top of my daughter. So I called [Brooks] and asked him what happened. He said that he really didn't know, that he'd just seen that the guy was tugging at her. He knew that was Lucy but he didn't know that grown man.

So after he seen it, they told me that it happened like two or three times that he had pulled on her coat. She'd turned around and hit him. He scooped her up and was on top of her and that's when [Brooks] came to her.

I was never a part of this. This is what came back to me.

²⁴ She did not think to call the police. **R. pp. 798; 804-05.**

R. p. 777, line 18 – p. 778, line 6.²⁵

Following this conversation, Reese walked Lucy back home. After talking to Lucy to make sure that she had not been touched sexually, Reese “told her that I was going back to the store.” Reese left the apartment. Instead of going back to the store, however, she went to an area where she was told the man had gone and where a crowd had gathered because she wanted to know who had been on top of Lucy. **R. pp. 778-79.**

Gray was on his way back from the Lizard’s Thicket at that point. By the time Reese first saw the man, he was “[lying] on the ground and he had his hands ... covering his face.” The man was “all bloodied up,” but Reese did not see how he got that way. Also, she never saw the man’s face but his clothes matched the description that Lucy had given her. **R. pp. 779-81; 811-13.**

So I was raising hell, excuse me, excuse me, and I just wanted to know ... 'Why [were] you on top of her? Why would you even be hav[ing] a conversation or anything with a thirteen year old.' But he was just [lying] there. When I ran up, I tried to kick him but I slipped and fell because ... [of] the ice and stuff.

So instead of getting back up, I just reached over and I slapped him across his face and told him 'you stay away from my kid, you need to round grown women, there's grown people out here that you can be around.'

R. p. 781, lines 8-19.

According to Reese, this is when Gray first appeared at the scene and he helped her back to her feet. While she was still upset, he told her to let the police handle the matter. Reese saw the metal chair in front of an apartment and she slung it onto the grass. It did not, however, make contact with Mr. Mack’s body. The man was not moving when Reese walked back to her apartment. **R. pp. 781-82; 812-13.**

B. The charge conference.

²⁵ Reese also unsuccessfully attempted to call her then-husband, Lucy’s stepfather. **R. p. 778.**

During Gray's case, the trial judge asked the parties to submit their requests to charge and they did so. **R. p. 826, line 10 – p. 827, line 11.**

After the State rested its case in reply, the trial judge held a charge conference. He began by noting that the only issue for discussion was whether or not he should instruct the jury on involuntary manslaughter. Also, he asked, "[W]hat is involuntary about this death/killing when [Reese] says she didn't do anything to kill him?" **R. p. 879, lines 9-19.**

Reese's counsel and the trial judge then had the following exchange:

MR. FARLEY: ... Your Honor, I would just say that we believe Ms. Reese does deserve a charge of involuntary manslaughter given the facts that have been put forth by the witnesses in this case. We believe she has done nothing that could have led to the intentional death of the victim in this case.

THE COURT: We are not talking about the intentional.

MR. FARLEY: Yes, sir.

THE COURT: We're talking about – I hate to use the word "accident", but it's very similar to an accident.

MR. FARLEY: Well, again, Your Honor, I think that's exactly the case. As far as the actions of Ms. Reese, ---

THE COURT: She doesn't even admit that she did anything to kill him.

MR. FARLEY: That's correct. So if death is the end result, I think that has to be considered involuntary manslaughter. She did nothing to facilitate the death given the facts that she was involved with.

THE COURT: But there has to be a killing. For involuntary manslaughter, there has to be a killing, first, and then there has to be an unlawful act, not []tending to cause death or great bodily harm.

If I assume that the unlawful act that she admits is throwing the chair, she says it didn't hit him. She says it didn't kill him.

Now, if she had said on the stand 'I threw a chair, but I didn't mean to hit him but it hit him and killed him', then I've got the link between the killing and

her act. But she says none of that happened. She says she got age angry (sic) and threw a chair that did not hit him, so there's no killing as a result of ... involuntary actions. There has to be both. There has to be a killing and it has to be done involuntarily.

It's the shooting of an unintended victim a mile away that the bullet comes down and kills somebody.

But she doesn't admit the killing. She admits an unlawful act but there's no killing. It's got to be both to warrant an involuntary manslaughter charge.

MR. FARLEY: I understand.

THE COURT: If I look at the testimony in the light most favorable to her and if the jury believes everything she said, there's still not an involuntary killing because she doesn't admit to killing.

She says she didn't mean[] to kill him. She says that if something killed him, it was not me. So it's not to be a not guilty or involuntary or voluntary or murder. So ---

MR. FARLEY: I understand, Your Honor.

THE COURT: That's the way I read the case law.

MR. FARLEY: I understand, Your Honor. Thank you.

THE COURT: All right. I respectfully deny your request to charge involuntary because there's been no involuntary killing.

R. p. 880, line 5 – p. 882, line 19.

Gray then put his requests-to-charge on the record. He did not further argue the request for a charge on involuntary manslaughter. Of relevance to the present issue, the trial judge granted the request for a voluntary manslaughter charge but he declined to give an involuntary manslaughter instruction for the same reasons as he had refused Reese's request. **R. p. 882, line 23 – p. 883, line 20.**

C. Discussion.

1. Gray's argument is procedurally barred.

On appeal, Gray claims, for the first time, that involuntary manslaughter should have been charged because

Gray's conduct, at worst, constituted the misdemeanors of either assault and battery of a high and aggravated nature or simple assault and battery. ... If Chase's testimony is to be believed, as it must for purposes of this analysis, Gray only attempted to swing at Mack and Mack fell down. This type of assault would not normally cause great bodily injury.

Brief of Appellant, pp. 20-21. He also cites to *State v. Chatman*, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999), in support of his position. However, his argument is not preserved for appellate review because he did not present the same argument to, and obtain a ruling on it from, the trial judge.

It is a well settled rule in this state that an issue is not preserved for appellate review unless it is both presented to and passed upon by the trial judge. *E.g.*, *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003) (an issue must be raised to and ruled upon by trial court to be preserved for appellate 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"); *State v. Fleming*, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970) ("It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal"). An analogous rule of appellate procedure is that an appellant may not raise a different argument on appeal in support of an objection or motion from the argument that he or she raised in the trial court. *See, e.g.*, *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. Beekman*, ___ S.E.2d ___, ___ 2013 WL 3199303, *5 (S.C. Ct.App. Jun. 24, 2013) ("Because Beekman's only objection at trial on the basis that it was prior bad act evidence related to evidence of prior inappropriate touchings of Stepson, his argument on appeal that the

substantive evidence surrounding the charges as to Stepdaughter and Stepson were inadmissible in the joint trial as they did not fall within an exception allowing prior bad act evidence is not preserved for our review”). *See also State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000) (issue not preserved if party argues one ground for objection at trial and a different ground on appeal); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same). Finally, a motion or objection must be clearly stated at trial, so the party alerts the trial judge of the precise nature of why the objection or motion should be granted. *E.g., 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).

As shown, neither Reese nor Gray made this argument in the trial court. **R. pp. 879-882.** Therefore, the foregoing authorities make clear that Gray’s argument is not properly before this Court on appeal.

2. The trial judge did not err.

Yet, even assuming *arguendo* that this Court finds his argument is preserved for appellate review, it is without merit. The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence. *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). In determining whether to charge the lesser included offense of manslaughter, the trial judge must view the evidence in the light most favorable to the defendant. *Id.* “[T]o warrant a court’s eliminating the offense of [involuntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter.” *State v. Brayboy*, 387 S.C. 174, 691 S.E.2d 482 (Ct.App. 2010) (emphasis in original).

Under South Carolina law, involuntary manslaughter is the killing of another without malice and unintentionally **while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others.** *State v. Murray*, 404 S.C. 300, ___, 744 S.E.2d 607, 609 (Ct.App. 2013); *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Respondent submits that Gray's problem is that there is no evidence in the record that would have entitled him to an instruction on involuntary manslaughter because she does not fit in either of these two (2) categories.

First, Reese's testimony was that neither she nor Gray did anything that would have caused the victim's death. She claimed that she did not see the victim until he was already motionless on the ground, and that Gray did not arrive on the scene until after she had missed in her effort to kick the victim and had simply slapped him. Although Reese's pathologist, Dr. Conradi, testified that the victim received the fatal blow when he struck his head after being knocked from his feet in the second attack, under Reese's testimony, neither she nor Gray caused this to occur.

Likewise, the opinion of Gray's pathologist, Dr. Shaker, did not support a manslaughter instruction. Dr. Shaker further distanced Gray from culpability by hypothesizing that the fatal blow was received in the initial beating and that the victim had a lucid interval during which he walked and communicated before collapsing where he was found. Indeed, the problem correctly recognized by the trial judge was that there was no causal connection between Reese's testimony that would show a misdemeanor assault and battery and the victim's death.

Further, Respondent submits that the State's evidence was vastly unlike the factual scenario in *Chapman* and did not support the requested charge. There was not a "trivial fight," as

Gray suggests. **Brief of Appellant 21.** Under the State's evidence, Reese and Gray were both guilty of murder under a theory of accomplice liability. *See State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct.App.2007) (“Under the ‘hand of one is the hand of all’ theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.’ ... ‘[The defendant’s] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal’”) (citations omitted). The State’s evidence showed that after the first beating, which was administered for harassing thirteen year old Lucy S., the victim had visible injuries and he was very unsteady on his feet. His injuries included an injury to his head. However, he was alive, was walking and could communicate.

Gray had seen this and, initially, wondered what had happened to the victim. Gray did not become hostile until he received a telephone call, inferably from his sister, alerting him to what Mr. Mack had done to Lucy. Meanwhile, Reese had formulated a plan to, at the least, severely beat Mr. Mack after she had been told what he had done and even though she was aware that he had already been beaten.

Thereafter, Gray swept Mr. Mack’s feet out from under him. This caused him to fall and, inferably, hit his head because he never made any effort to defend himself or escape the maliciously brutal attack that ensued. Either Reese or Gray, or both of them, repeatedly kicked and stomped on the victim with construction boots, and beat him one or more times with a metal chair.

In *Chapman*, on the other hand, the appellant was engaged in an assault and battery. However, the Court found that his act of pressing his shoulder into the victim’s neck, during the

course of their fight, was not the type of action naturally tending to cause death or great bodily harm. *Chapman*, 336 S.C. at 152-153, 509 S.E.2d at 101. Here, though, the injuries suffered by the victim and the testimony of the various eyewitnesses as to how those injuries were inflicted belie any contention that the defendants' actions were not the type of action naturally tending to cause death or great bodily harm.

Moreover, Reese and Gray were engaged in at least two felonies at the time the injuries were inflicted: lynching under S.C. Code Ann. § 16-3-210 (Supp. 2009)²⁶ and assault and battery with intent to kill.²⁷

Finally, Gray supports his argument by segregating Ms. Chase's testimony on direct and cross-examination from the remainder of the State's case and from the statement that the prosecution used by to impeach her testimony. However, "a lesser-included offense may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011); *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) (same); *State v. Tyndall*, 336 S.C. 8, 22, 518 S.E.2d 278,

²⁶ As this Court explained in *State v. Barksdale*, 311 S.C. 210, 428 S.E.2d 498 (Ct.App. 1993):

The crime of lynching in the first degree is defined in S.C. Code Ann. § 16-3-210 as "[a]ny act of violence inflicted by a mob upon the body of another person which results in the death of the person...." To constitute the crime of lynching, the death must have been inflicted by a mob. A mob is defined in § 16-3-230 as the "assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." In cases of lynching, a mob has been equated to an "unlawful assemblage of persons." *Cantey v. Clarendon County*, 101 S.C. 141, 143, 85 S.E. 228, 229 (1915).

Barksdale, 311 S.C. at 213, 428 S.E.2d at 500. See also *State v. Smith*, 352 S.C. 133, 572 S.E.2d 473 (Ct. App. 2002) (involving lynching in the second degree).

²⁷ "ABIK is an unlawful act of violent nature to the person of another with malice aforethought, either express or implied." *State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (2003). "Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence ... of the intent to commit the crime when intent or state of mind is in issue." Danny R. Collins, *South Carolina Evidence* 319 (2d ed.2000). "State of mind is an issue any time malice or willfulness is an element of the crime." *Id.* Here, the State established the clear motive discussed above.

285 (Ct.App. 1999) ("The possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation and on the remaining evidence found the defendant guilty of simple assault and battery does not entitle the defendant to have the lesser offense submitted to the jury"); *State v. Foxworth*, 269 S.C. 496, 238 S.E.2d 172 (1977). Therefore, an involuntary manslaughter charge would have been improper. Because there was no evidence presented to support the requested charge, the trial judge properly denied it. *See Knoten*, 347 S.C. at 302, 555 S.E.2d at 394. *See also Tucker*, 324 S.C. at 170-71, 478 S.E.2d at 268; *State v. Gibson*, 390 S.C. 347, 355-58, 701 S.E.2d 766, 771-72 (Ct.App. 2010).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court must be affirmed.

Respectfully submitted,

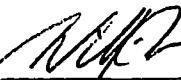
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October 4, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.: 2012-209426

THE STATE,

RESPONDENT,

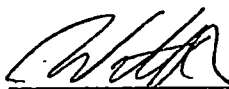
v.

HENRY GRAY,

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

October 4, 2013

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
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THE STATE,

RESPONDENT,

v.

HENRY GRAY,

APPELLANT.

CERTIFICATE OF CERTIFICATE

I, **William Edgar Salter, III**, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the Inter-Agency Mail, postage prepaid, to David Alexander, Appellant Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 4th day of October, 2013.



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Senior Assistant Attorney General

RECEIVED

OCT 04 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Henry Gray, Appellant.

Appellate Case No. 2012-209426

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5240
Heard May 13, 2014 – Filed June 11, 2014

AFFIRMED

Appellate Defender David Alexander, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
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Solicitor Daniel Edward Johnson, all of Columbia, for
Respondent.

FEW, C.J.: The State indicted Henry Gray for murder and first-degree lynching, and the jury convicted him of both charges. Gray argues the trial court erred by

not excluding graphic autopsy photographs under Rule 403, SCRE. We find the trial court acted within its discretion, and affirm.¹

I. Facts and Procedural History

On the afternoon of February 13, 2010, Kenneth Mack was severely beaten during the course of two fights. The first fight occurred on McDuffie Street near Gonzales Gardens—a public housing complex in Columbia consisting of thirty apartment buildings. The second fight occurred moments later between two buildings in Gonzales Gardens. Mack died several days later from injuries he received during the fights.

Multiple eyewitnesses testified to the details of the two fights. According to their accounts, Gray and his co-defendant Robin Reese, who is also his sister, were involved only in the second fight. They were both charged with murder and first-degree lynching. The following testimony was presented at their joint trial.

A. Testimony Regarding the First Fight

Issac Weathers, who lived in Gonzales Gardens, testified the first fight began when Mack and a "young lady," later identified as Reese's thirteen-year-old daughter and Gray's niece, started "arguing . . . and they fell" to the ground. Weathers testified that after they fell, "a bunch of guys went and jumped on [Mack]" and began attacking him.

Amber Hardy testified she called 911 when she witnessed four men and a girl "beating up [Mack]." She described the fight as "brutal" and claimed the group

¹ Gray also appeals the trial court's refusal to charge involuntary manslaughter. Gray's trial counsel asserted no argument in support of an involuntary manslaughter charge but simply told the court, "I made some . . . requests for charges, if you would please deny those on the record, I would appreciate it." We decline to address this issue because we find it is not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); *Gilchrist v. State*, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005) (finding "trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve [his argument] for review" because "[w]hen given the opportunity, counsel must articulate a reason for the requested charge").

members "took turns" kicking and punching Mack. Hardy testified that after the fight ended, Mack stood up and walked away, but was unsteady on his feet and kept "reaching out to . . . brace himself."

Two men involved in the first fight—Marcellius Brooks, who lived in Gonzales Gardens, and Angelo Boyd, who lived in a house next to Gonzales Gardens—testified they were walking down McDuffie Street when they saw Reese's daughter arguing with Mack. Brooks claimed that when Mack "pick[ed her] up and slam[med] her to the ground," Brooks "tackled [Mack] off her." Brooks admitted hitting Mack twice with a "closed fist," but denied kicking him and stated no one else was involved in the fight. Boyd admitted kicking Mack once, and stated Reese's daughter hit him "a couple times," but similarly denied that anyone else was involved. Both testified that after the fight, Mack got up and ran toward Gonzales Gardens.

B. Testimony Regarding the Second Fight

Reese, who lived in Gonzales Gardens, testified she learned about the assault on her daughter shortly after it occurred and became upset. Although Reese initially denied calling Gray, she later admitted she called Gray and told him "some grown man [was on] my daughter." She then decided to search for the man who attacked her daughter. According to Reese, she discovered Mack lying on the ground in front of her father's apartment building in Gonzales Gardens. Reese testified she "tried to kick [Mack] but [she] slipped and fell." She then "reached over and slapped him across his face and told him 'you stay away from my kid.'" At that point, Gray arrived and pulled her off Mack and told her "let the police handle it." She testified she was still angry, so she grabbed a chair, which other witnesses described as a "metal lawn chair," and "slung it" at Mack, although "[i]t didn't even come in contact with his body."

Several eyewitnesses described the second fight much differently.² Donnetti Perry, who lived in Gonzales Gardens, testified he saw Gray and Mack talking in front of the building where Gray and Reese's father lived. According to Perry, Gray received a phone call during this conversation, and when he hung up, Gray "swept [Mack's] feet out from under him," causing him to fall and hit his head on the ground. He claimed Gray kicked Mack "all over" and yelled, "[W]hat [did] you do to my niece?" He testified Reese arrived at that point and said to Gray, "[T]hat's him," and started kicking Mack and yelling, "I'm going to teach you for messing

² Gray did not testify at trial.

with my daughter." He claimed Reese then "got [the] chair and hit him" two or three times, and Gray also hit Mack with the chair a couple of times. Perry testified Mack remained on the ground throughout the fight and did not "resist" or otherwise defend himself.

Kara Chase, who was staying with a friend in Gonzales Gardens, gave a statement to police shortly after the second fight. In this statement, which was introduced into evidence, she claimed Gray "swept [Mack] from under his feet causing [him] to hit his head on the pavement." Afterward, Reese "[ran] up the street saying 'that's him'" and "kick[ed] [Mack] repeatedly, picking up an old metal chair and throwing it on top of [him]." Gray "continued to kick and stomp [Mack] in his face," and Mack "laid on the ground the whole time this was occurring." At trial, however, Chase testified to a different version of events. She denied Gray kicked Mack's legs out from under him, or that Reese hit Mack with the metal chair. She also claimed Mack got up during the fight and did not remain on the ground the entire time.

C. Medical Testimony

The State called Dr. Bradley Marcus, the pathologist who performed Mack's autopsy, as an expert witness. During Dr. Marcus's testimony, the State offered into evidence eleven photographs taken before and during the autopsy. Both Gray and Reese objected to the admission of the photos under Rule 403, SCRE, arguing the danger of unfair prejudice substantially outweighed their probative value. After a hearing outside of the jury's presence, the trial court admitted the photos.

Dr. Marcus continued his testimony and relied on the photos to describe Mack's injuries to the jury. He testified "the cause of death was a closed head injury due to blunt head trauma." He explained that during the autopsy, he discovered Mack suffered a skull fracture to the back right side of his head and had "a massive amount of subdural hemorrhage" where the skull fracture was located. He testified this was "a significant injury" and the "ultimate cause of death." Although he could not determine if the fatal injury occurred during the first or second fight, Dr. Marcus testified the brain injury was consistent with someone "having their feet swept out from under them and landing on their head."

Gray and Reese each called forensic pathologists to testify regarding Mack's death. Both pathologists agreed with Dr. Marcus's testimony that blunt force trauma caused Mack's death. However, Gray's pathologist, Dr. Adel Shaker, commented on the thoroughness of the autopsy, stating it "was a hospital autopsy, not a

forensic one," and explained "there is a great difference" between the two in regard to the level of detail. While Dr. Shaker did not know whether the first or second fight caused Mack's skull fracture, he stated, "[A]ll of the attacks that [Mack] experienced earlier . . . [left] an impact" and ultimately caused "the final result"—death. Dr. Shaker further testified a person could receive fatal head injuries and experience a "lucid interval," during which the person may "be unsteady on [his] feet" but can otherwise "walk, talk, [and] do regular activities for a few minutes" before succumbing to his injuries. He testified Mack could have suffered a fatal brain injury during the first fight and experienced a lucid interval at the time of the second fight, which caused him to "los[e] his balance, and hit his head."

In reply, the State called Dr. Clay Nichols, the chief medical examiner for Richland County at the time of Mack's death, to refute Dr. Shaker's testimony casting doubt upon the reliability of the autopsy. Dr. Nichols also testified he believed Mack's skull fracture occurred during the second fight when "[Mack] fell and hit the concrete."

D. Verdicts and Sentencing

The jury found Gray and Reese guilty of murder and first-degree lynching.³ The trial court sentenced them to thirty years in prison for each conviction, with the sentences to run concurrent.

II. Admission of Autopsy Photos

Gray contends the trial court erred in admitting the autopsy photos. He argues the court should have excluded them under Rule 403, SCRE because their probative value was substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE (stating relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

A. Standard of Review

"The admission of evidence is within the circuit court's discretion and will not be reversed on appeal absent an abuse of that discretion." *State v. Dickerson*, 395

³ The former crime of lynching was defined in section 16-3-210 of the South Carolina Code (2003). The section was amended effective June 2, 2010 and redefined first-degree lynching as "assault and battery by mob in the first degree." S.C. Code Ann. § 16-3-210(B) (Supp. 2013).

S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); *see also State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("We . . . are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). In exercising its discretion on a Rule 403 objection to the admissibility of autopsy photographs, the trial court "must balance the [unfair prejudice] of graphic photos against their probative value." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted).

B. Description of the Photos

There are eleven autopsy photos at issue in this appeal. Eight of these—Exhibits 51 through 57 and 82—were taken before the autopsy began and show Mack's external injuries to his face, back, and legs. It was important for the jury to see the nature and location of these injuries in order to understand the witnesses' testimony about the fights and the pathologists' testimony about the injuries. These eight photographs contain no blood or gory anatomical details, and thus pose little, if any, danger of unfair prejudice. Because Exhibits 51 through 57 and 82 had high probative value and minimal danger of unfair prejudice, it was clearly within the trial court's discretion to admit them.

The other three photos—Exhibit 80, 81, and 83—were taken during the autopsy and show Mack's exposed skull and brain. Exhibit 81 is a side view of Mack's head that shows his inside-out scalp pulled down over his face. At first glance, it appears Mack is wearing a mask over his face. In explaining what the viewer sees in Exhibit 81, Dr. Marcus testified:

The way we do the head is . . . we make an incision along the back of the scalp here. . . . We pull the scalp over this way. You just literally just pull it over [the face] and that's what you're actually seeing here.

Exhibit 83 is a side view of Mack's exposed brain protruding from his open skull after the top part of his skull—referred to as the "skull cap"—was cut off. A gloved hand is holding the sawed-off skull cap, which is filled with blood on one side. Exhibit 80 is a close-up image of the hand holding Mack's skull cap, showing

the details of the inside of his skull. The remainder of our discussion focuses on whether the trial court acted within its discretion to admit these three photos.

C. Probative Value

Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means "[t]ending to prove or disprove." *Black's Law Dictionary* 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. "[T]he more essential the evidence, the greater its probative value." *United States v. Stout*, 509 F.3d 796, 804 (6th Cir. 2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. As our supreme court stated in *State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010), "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not *necessary* to substantiate *material* facts or conditions." 390 S.C. at 623, 703 S.E.2d at 228 (emphasis added). The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case. *See State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) ("When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case." (citing *State v. Gillian*, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

So that we may analyze the probative value of these three photos in the practical context of the issues at stake in this trial, we summarize Dr. Marcus's testimony and the evidence upon which he relied to explain his opinions to the jury.

Before the State introduced the autopsy photos, Dr. Marcus relied on two diagrams he made during the autopsy. These diagrams, which Dr. Marcus characterized as "crude," consist of hand-drawn depictions of a human form with markings to identify the location of Mack's external and internal injuries. Dr. Marcus testified the diagrams would "assist [him] in explaining [his findings] to the jury."

The State then offered the autopsy photos, which Dr. Marcus described as "crucial" and "necessary" for helping the jury understand his testimony. Dr. Marcus testified Exhibits 51 through 57 illustrated Mack's external injuries and were "helpful in determining the cause of death in this case." He described the injuries depicted in

each photo and stated they were "consistent with blunt force trauma to the head." As for Exhibits 80, 81, and 83, Dr. Marcus explained these photos were taken during the autopsy and "depict the cause of death" in a manner that he could not diagram. He testified the photos "actually illustrate what happened to this man's brain" and "would . . . aid [him] in describing the injuries to the jury."

Dr. Marcus then explained each step of the autopsy and his associated findings. He told the jury he first examined Mack's skull by removing the scalp, at which point he discovered Mack suffered a skull fracture to the back right side of the head. He stated it would take a "[s]ignificant amount of force" to cause this skull fracture, and it was consistent with someone "having their feet swept out from under them and landing on their head." He then explained the next step in the autopsy process—removing the skull cap to observe the brain—and discussed his findings. Dr. Marcus testified that when he removed Mack's skull cap, he found "a significant injury" that was "the ultimate cause of death." He explained there was "a massive amount of subdural hemorrhage" and "cerebral contusions" where the skull fracture was located. He testified cerebral contusions indicate a significant amount of trauma and often occur in high-impact car collisions.

At this point in his testimony, Dr. Marcus began describing Exhibits 80, 81, and 83 and explaining what each photo depicted. Starting with Exhibit 81, he testified this photo showed Mack's skull with the scalp removed, and allowed the jury to see "some of the hemorrhage area" caused by the blunt force trauma. The bloody hemorrhage area shown in Exhibit 81 clearly demonstrates the location of the skull fracture Dr. Marcus was attempting to explain. He stated, "That area should be clean with no hemorrhage or anything." Although he did not specifically identify Exhibits 80 and 83 on the record, it is apparent from the context of his testimony and the content of the photos that he was showing the jury these two exhibits to explain his findings:

- A. The next part we do is actually removing the skull cap itself and *that's* showing all the hemorrhage in the brain that should not be there, having the brain hemorrhage like that is incompatible to life.
- Q. And in order for the brain itself to suffer this kind of hemorrhage, is that more significant than ---
- A. Yes, yes. You can live with trauma on the scalp. You cannot live with that hemorrhage on the brain.

That's incompatible with life. *That is just a close-up* showing that [the hemorrhage has] been there -- it's probably been there about three days.

(emphasis added). Following this testimony, the photos were handed to the jury. Dr. Marcus continued his testimony, stating "the cause of death was a closed head injury due to blunt head trauma." Although he could not determine if the fatal injury occurred during the first or second fight, Dr. Marcus testified the cerebral contusions were "consistent with someone falling" onto a hard surface.

Dr. Marcus's testimony as summarized above increased the probative value of the photos because his use of the photos to explain Mack's injuries demonstrated "the extent and nature of the injuries in a way that would not be as easily understood based on [expert] testimony alone." *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009). The medical testimony related to Mack's brain injuries and the severity of these injuries, which we do not consider to be a matter readily understood by most jurors, who are typically "unversed in medical matters." 382 S.C. at 291, 676 S.E.2d at 697. We also rely on Dr. Marcus's own testimony that the photos would help him explain to the jury the medical significance of Mack's injuries. *See* 382 S.C. at 290-91, 676 S.E.2d at 697 (relying on pathologist's testimony that autopsy photos would help him demonstrate certain "anatomic relationships" that could not otherwise be explained to the jury); *Dial*, 405 S.C. at 261, 746 S.E.2d at 502 (finding no abuse of discretion to admit autopsy photos when the expert "testified the photographs would aid in her testimony").

The State argues the photos had probative value because they corroborated Dr. Marcus's findings concerning the extent and location of Mack's head injuries, as well as the cause of death. We agree. *See Dial*, 405 S.C. at 260-61, 746 S.E.2d at 502 (finding autopsy photos "were highly probative" to the issue of cause of death because they corroborated expert testimony that victim's injuries were "inconsistent with an accidental injury"); *State v. Jarrell*, 350 S.C. 90, 106-07, 564 S.E.2d 362, 371 (Ct. App. 2002) (affirming admission of autopsy photos that "corroborated . . . the pathologist's testimony regarding the extent of th[e] injuries"). When a photo derives probative value from its tendency to corroborate testimony, the measure of this value varies depending on the facts of each individual case. Photos that corroborate important testimony on issues significant to the case may have very high probative value, while photos that corroborate only testimony related to collateral issues will have less probative value. Therefore, we discuss the two reasons this corroborative effect was important on the facts of this case.

First, Gray and Reese each retained their own pathologist to testify at trial. The State knew before trial that Gray and Reese intended to call pathologists to testify, and it must have known the general nature of the testimony they would give. However, the State did not know the substance of their opinions, nor the effect their testimony would have on the credibility of its own pathologist's testimony. This uncertainty affects our analysis of probative value because it made it more important for the State to present evidence to corroborate Dr. Marcus's testimony.

Moreover, as Gray conceded at oral argument, the State reasonably anticipated Gray's pathologist would testify Mack died as a result of injuries he received in the first fight. In fact, while Dr. Shaker testified he could not conclude whether Mack's death resulted from the first or second fight, he clearly suggested the injuries from the first fight would have been fatal. To explain how Mack was able to walk around after these fatal injuries, and even have a conversation with Gray, Dr. Shaker put forth a theory that Mack may have experienced a "lucid interval" at the time of the second fight. However, because the lucid interval was only temporary, Mack would have succumbed to his injuries regardless of Gray's conduct. From such evidence, Gray could argue his actions did not cause Mack's death. *See State v. Jenkins*, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981) (stating "one who inflicts an injury on another is deemed by law to be guilty of [murder] *where the injury contributes . . . to the death of the other*" (emphasis added)). Thus, the corroborative effect of the photos served to rebut testimony the State reasonably anticipated Gray's pathologist would offer.

The second reason the corroborative effect of these photos was important is that it aided the State in proving the fatal brain injury occurred during the second fight. Perry testified Gray "swept [Mack's] feet out from under him," which caused Mack to hit his head on the ground. The autopsy photos and Dr. Marcus's testimony link this act—Gray causing Mack to fall—with the fatal brain injury in two ways. First, the photos show extensive cranial bleeding on the back of Mack's head, and Dr. Marcus testified this fatal injury was "consistent with someone falling" onto a hard surface. Second, there was no testimony regarding the first fight that specifically mentioned any blow to the back of Mack's head. Thus, to prove Mack died as a result of Gray's actions during the second fight, it was important for the State to show the jury the significance and exact location of the injury that caused Mack's death.

The State also argues the photos were important to prove malice. *See* S.C. Code Ann. § 16-3-10 (2003) (defining "murder" as "the killing of any person with *malice*").

aforethought, either express or implied" (emphasis added)). According to the testimony of the pathologists, a significant amount of force was necessary to cause Mack's injuries. The photos show Mack had a massive amount of cranial bleeding in the back part of his brain, which demonstrated the severity of the force needed to inflict this injury. Thus, the photos were important to the State's ability to establish that Gray and Reese acted with malice. See *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996) (finding photos of the victim's stab wounds were "relevant to the issue of malice, an element of assault and battery with intent to kill"); *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 371 (1995) (finding photos of the crime scene "depicted the excess nature of the killing" and were probative to "the issue of malice");⁴ *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) (stating the autopsy photos were relevant to prove "the [child] abuse manifested an extreme indifference to human life"—the required mental state for homicide by child abuse).

Gray argues, however, that any probative value of the photos was minimal because cause of death was not disputed. Gray explains that neither his nor Reese's pathologist contested the cause of death to which Dr. Marcus testified. We find the argument unpersuasive. Neither the State nor the trial court knew at the time the photos were offered and admitted into evidence that the defense pathologists would agree with Dr. Marcus as to the cause of death. In fact, Gray concedes the State—and presumably the trial court—reasonably anticipated that the defense pathologists were called for the purpose of disputing Dr. Marcus's testimony, which focused primarily on cause of death. The record supports Gray's concession. When Gray objected to the introduction of the photos, the State argued they were necessary because "cause of death is an issue in this case" and Gray and Reese "have hired two . . . pathologists to dispute the [autopsy] findings." Gray and Reese did not respond, leaving the trial court with the clear impression the State's argument was correct. Therefore, at the time the trial court analyzed probative value, the court was unaware of the primary circumstance Gray relies

⁴ *Kelley* and *Nance* were tried before the Rules of Evidence were effective, and thus Rule 403, SCRE, did not apply. See Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). However, both cases were tried after *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991), in which our supreme court "adopt[ed] the language . . . of Federal Rule of Evidence 403 that, 'although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" 303 S.C. at 382, 401 S.E.2d at 149.

upon for his argument that the photos lacked probative value—that the defense pathologists agreed with the State as to cause of death.

Gray also asserts the photos were unnecessary for the jury to understand Dr. Marcus's testimony because, prior to their introduction, Dr. Marcus relied on diagrams to explain Mack's injuries and the cause of death to the jury. Given the use of these diagrams, Gray argues the probative value of the photos was minimal. We find Dr. Marcus's use of the photos served a different purpose and corroborated different findings than the diagrams. Dr. Marcus described the diagrams as "crude" drawings, and our examination of them convinces us they demonstrated to the jury only the general location of the injuries. In fact, Dr. Marcus stated, "I can't diagram this," in referencing why the photos were necessary to his testimony. The photos demonstrated what the diagrams could not: the significance of the head injury and the specific location of the primary injury—the skull fracture. Thus, we find the admission of the photos was necessary in combination with the diagrams "to substantiate material facts" regarding the extent of the injuries that caused Mack's death. *Dial*, 405 S.C. at 260, 746 S.E.2d at 502.

For these reasons, we find the probative value of Exhibits 80, 81, and 83 was high.

D. Unfair Prejudice

The probative value of the photos must be balanced against "the danger of unfair prejudice." Prejudice that is "unfair" is distinguished from the legitimate impact all evidence has on the outcome of a case. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403]." *Id.* (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)); see also *United States v. Mohr*, 318 F.3d 613, 619-20 (4th Cir. 2003) ("Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion . . .").

Photos pose a danger of unfair prejudice when they have "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Holder*, 382 S.C. at 290, 676 S.E.2d at 697 (internal quotation marks omitted). This definition of unfair prejudice was taken originally from the

Advisory Committee Notes to the formerly identical federal rule 403.⁵ *See State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (adopting the definition of unfair prejudice recited in the Notes of the Federal Rules Advisory Committee). Regarding this definition, the Supreme Court of the United States stated: "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574, 587-88 (1997). Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case. *See State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

The color photos contained in Exhibits 80, 81, and 83 are graphic. Exhibit 81 shows Mack's scalp folded from the back of his head over his face, exposing the surface of his entire skull. Exhibits 80 and 83 show Mack's exposed brain and the inside of his skull cap. These photos pose a danger of unfair prejudice because their graphic quality has some "tendency to suggest a decision on an improper basis." *Holder*, 382 S.C. at 290, 676 S.E.2d at 697.

However, the objective manner in which Dr. Marcus presented the photos mitigated this tendency. Dr. Marcus's technical explanation of the autopsy process followed by his scientific description of the photos—both prior to the jury seeing them—resulted in an overall discussion that was detached from the emotions of the case and educational to the jury. Although graphic, these particular autopsy photos do not evoke intense emotional or sympathetic reactions to the favor or detriment of either party. Thus, we find the danger of unfair prejudice from Exhibits 80, 81, and 83 was no more than moderate.

E. Balancing Probative Value and Unfair Prejudice

In ruling on a Rule 403 objection, the trial court "must balance the [unfair prejudice] of graphic photographs against their probative value." *Dial*, 405 S.C. at

⁵ Rule 403 and other federal rules of evidence were amended on December 1, 2011, "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules." Fed. R. Evid. 403 advisory committee's note to the 2011 amendment. The changes to Rule 403 are "stylistic only," with "no intent to change any result in any ruling on evidence admissibility." *Id.*

260, 746 S.E.2d at 502 (citation omitted). In a pretrial hearing in which the parties and the court discussed the admissibility of these photos, the trial court clearly indicated it would "review them" and evaluate their probative value "at the proper time." When the State offered the photos into evidence during Dr. Marcus's testimony, the trial court excused the jury from the courtroom and conducted a hearing into their admissibility. The trial court allowed the State to proffer the testimony of Dr. Marcus as to how he would use the photos to explain his testimony, and allowed Gray and Reese to cross-examine him.

We have noted a trial court has "particularly wide discretion in ruling on Rule 403 objections." *Lee*, 399 S.C. at 527, 732 S.E.2d at 228. Moreover, a trial court "is not required to exclude relevant evidence merely because it is unpleasant or offensive." *Dial*, 405 S.C. at 260, 746 S.E.2d at 502 (citation omitted). Based on our previous findings regarding the high probative value of the photos and the moderate danger of unfair prejudice, we find the trial court acted within its discretion in admitting them into evidence. See Rule 403 (providing "relevant[] evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice" (emphasis added)).

Gray argues, however, the photos should have been excluded based on *State v. Collins*, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012), *cert. granted*, (Aug. 8, 2013). We find Gray's reliance on *Collins* to be misplaced. In that case, a ten-year-old boy was killed after being attacked by dogs. 398 S.C. at 201, 727 S.E.2d at 753. At trial, the court allowed the State to introduce autopsy photos of the boy's remains, which were "graphic and shocking" and "depict[ed] a ten-year-old boy's body on an autopsy table after being partially eaten by dogs." 398 S.C. at 202, 208, 727 S.E.2d at 754, 757. This court reversed, finding based on the unique facts of that case, "the probative value of the photos is minimal," 398 S.C. at 207, 727 S.E.2d at 756, "[t]he danger of unfair prejudice of the admitted photos is extreme," 398 S.C. at 209, 727 S.E.2d at 757, and "the trial court abused its discretion in admitting the photos." 398 S.C. at 210, 727 S.E.2d at 758.

As we noted in *Collins*, and reaffirm here, both "probative value [and] unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." 398 S.C. at 202, 208, 727 S.E.2d at 754, 757. Focusing on the facts of this case and putting them in the practical context of the issues at stake in this trial, we hold the trial court acted within its discretion to admit the autopsy photos.

III. Conclusion

Accordingly, the trial court's decision to admit the photos, and Gray's convictions for murder and lynching in the first degree, are **AFFIRMED**.

SHORT and GEATHERS, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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June 27, 2014

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Henry Gray
Lower Court Case No. 2011GS4004915
Appellate Case No. 2012-209426

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: David Alexander, Esquire
Donald J. Zelenka, Esquire
Alan McCrory Wilson, Esquire
W. Edgar Salter, III, Esquire
John W. McIntosh, Esquire
Daniel Edward Johnson, Esquire

FORM 5

2014 CP400 4/39

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)Henry Gray # 162134)

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

RICHLAND COUNTY
 FILED
 2014 JUL -1 PM 1:30
 JENNIFER W. MCBRIDE
 C.C.P. & G.S.

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 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 Mc Cormick C.I. 386 Redemption Way
2. Name and location of Court which imposed sentence Gen. Ses. Richland
3. Name(s) of co-defendant(s) (if any) Robin Reese (sister)
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) lynching in the first degree / 10-GS-40-0039 et al
 - (b) Murder
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 30 yrs concurrent
 - (b) 30 yrs

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. 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. Heard May 13, 2014 Filed June 11, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. SEE: Opinion No. 5240
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____ N |
- (b) _____ |
- (c) _____ A |
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) SEE! Attached Sheets 1 of 6 - 6 of 6
- (b) _____
- (c) _____

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.	<u>N</u>
ii.	
iii.	
iv.	<u>A</u>

(b) the name and location of the Court in which each was filed:

i.	<u>N</u>
ii.	
iii.	
iv.	<u>A</u>

(c) the disposition thereof:

i.	<u>N</u>
ii.	
iii.	<u>A</u>

iv. _____ N/A

(d) the date of each such disposition:

i. _____ N

ii. _____

iii. _____

iv. _____ A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____ N

ii. _____

iii. _____

iv. _____ A

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

ii. _____

iii. _____ A

(b) the proceedings in which each ground was raised:

i. _____ N

ii. _____

iii. _____ A

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) See 10 (a) Applicant first time presenting ground

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
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. Mathias Chaplin
- ii. David Alexander - Div. of Appellate Defense
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial & Sentencing
- ii. Appeal
- iii. _____
19. State clearly the relief you seek in filing this application:
New Trial and any other relief I may be entitled to and the
Court deems just and fair
20. Are you now under sentence from any other court that you have not challenged?
NO

STATE OF SOUTH CAROLINA)

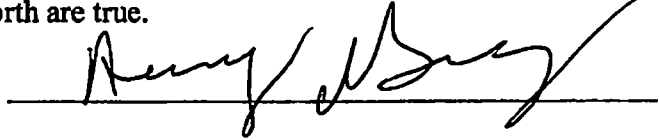
County of)

McCormick)

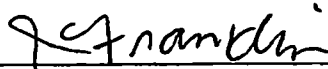
Henry Gray

VERIFICATION

I, , 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 23
day of June, 2014.

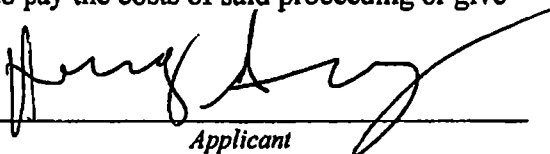
 (L.S.)
Notary Public

My Commission Expires: 12/6/2019

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

Henry Gray
I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

23 day of June, 2014



Notary Public

My Commission Expires: 12-16-2019

RICHLAND COUNTY
 FILED
 2014 JUL -1 PM 1:30
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.

PROOF OF SERVICE

I Henry Gray certify that I have served my form 5/PCR application and grounds upon the below clerk of Ct. By placing the above said into the Mc C.I. mail room on this 23 day of June 2014 to be placed in the U.S. mail with postage prepaid.

Jeannette W. McBride
 P.O. Box 2766
 Col. SC 29202-2766

Sworn to before me
 this 23 day of June 2014

Henry Gray

Franklin
 Notary Public

my Commission Expires 2.16.2019

cc: Personal file

RICHLAND COUNTY
 FILED
 2014 JUL -1 PM 1:30
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.

INEFFECTIVE ASSISTANCE OF COUNSEL

Per the Bill of Rights to the Federal Constitution I was denied the right to effective assistance of counsel. Thereby, my convictions and sentences violates the Constitutions and laws of the United States, as GUARANTEED by the 6th and 14th Amend. Also per. S.C. Const. Article I sec 3 and sec. 14 also see Strickland v Washington 104 S. Ct 2052. I will clearly show PREJUDICE, where there is a

reasonable probability that, but for counsel Mathias Chaplin's unprofessional errors, the result of my trial and or my appeal would have been different. SEE:

Porter v State 629 SE2d 356.

Also see State v Dunbar 587 SE2d 691 ; Gilchrist v State 612 SE2d 702

Where counsel Chaplin undermined the confidence in the outcome of my trial and or my appeal Id.

Also see Cherry v State 386 SE2d 624 ; Johnson v State 480 SE2d 733 and Butler v State 334 SE2d

813.

Here, Counsel Chaplin's acts and or omissions including but not limited to — failure to properly research and investigate the facts, laws and or "any" REASONABLE

Sound trial strategy(ies) surrounding the entitlement of my case

with PREJUDICED my trial and or appeal SEE: Ard v Catoe 642 SE2d

590; Pelzer v State 672 SE2d 790;

Ray v State 401 SE2d 151; U. S.

v Cronin 104 S.Ct. at 2045-2046

therefore, the likelihood of a different result is substantial, as opposed to conceivable SEE: Strickland at S.Ct. 466 - at 693

Which I will prove by the preponderance of evidence SEE: Frasier v State 570 SE2d 172, alone with the aid of P.C.R. counsel SEE: S.C.R. Civil P. Rule 71.1 (d) and Rule 407 S.C.A.C.R. "Rules of Professional Conduct Also see Martinez v Ryan 132 S Ct. 1309

I further argue that grounds set out in my original P.C.R

application expressly or not argued,
is subject to amendments per.

S.C. Code Ann § 17-27-90 Also

See S.C.R. Civil P. Rule 71.1 (d)

Thus, I am entitled to a FULL
and FAIR evidentiary hearing to
prove "all" my claims SEE: Sharper
v State 305 SE2d 247; Odom v
State 523 SE2d 753

Moreover, I would like to bring
to the court, opposing counsel and my
counsel's attention, that I am also
entitled to a ruling upon "all"
my PCR issues, that I argue

during my PCR hearing SEE: S.C.

Code Ann § 17-27-80; Marlar v

State 653 SE2d 266 Also see

Bostick v Stevenson 589 F3d 164

Date: 6/23/2014

Respectfully submitted
/s/ Perry Jones

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Henry L. Gray, #162134,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2014-CP-40-4139

RETURN

Respondent, making its Return to the Application for post-conviction relief filed July 1, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the March 2010 and October 2011 term of the Richland County Grand Jury for Lynching, First Degree (2010-GS-40-39), and Murder (2011-GS-40-4915), respectively. Applicant proceeded to trial where he was convicted as indicted, on March 2, 2012. The Honorable G. Thomas Cooper, Jr. sentenced Applicant to concurrent terms of thirty (30) years imprisonment for each of the charges.

A notice of appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Gray, Op. No. 2014-UP-5240 (filed June 11, 2014). The Remittitur was issued on June 27, 2014.

Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"

- a. "but for counsel Mathias Chaplin's unprofessional errors, the result of my trial and or my appeal would have been different"
- b. "failure to properly research and investigate the facts, laws and or "any" reasonable sound trial strategy(ies) surrounding the entitlement of my case with prejudiced my trial and or appeal [sic]"

Any claims not specifically enumerated in the application or amendments filed by counsel of record will be opposed by Respondent at an evidentiary hearing, and Respondent will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCR.

III.

For purposes of this Return, Respondent interprets Applicant's allegations to be allegations of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, (1984); Butler, 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 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.

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.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claim of ineffective assistance of counsel.

[signatures on following page]

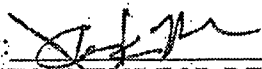
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

November 19, 2014.

STATE OF SOUTH CAROLINA.	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	2014-CP-40-04139
	)	
HENRY L. GRAY, #162134	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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:

Anna Rawl Good, Esquire
 Law Office of Anna Good, LLC
 1720 Main St., Ste. 303
 Columbia, SC 29201

DATED this 19th day of November, 2014.


 Sara Moore, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
 2014-CP-40-4139

Henry Gray, #162134,)
 Applicant,)

vs.)

AMENDED APPLICATION
 FOR POST CONVICTION RELIEF

State of South Carolina,)
 Respondant.)

2017 JUL 10 PM 2:00
 JEANNETTE W. MCBRIDE
 C.P. & G.S.
 RICHLAND COUNTY
 FILED

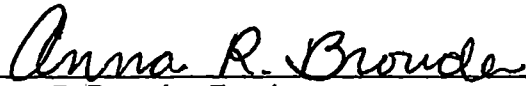
Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows to include in addition to prior grounds stated in the original application for post-conviction relief:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Ineffective assistance of counsel – counsel failed to adequately prepare for trial with Applicant;
- (b) Ineffective assistance of trial counsel—counsel failed to object and allowed Applicant to be shackled during entirety of trial;
- (c) Ineffective assistance of trial counsel—counsel failed to object to the same jury pool being used after a Batson motion was granted;
- (d) Ineffective assistance of trial counsel—counsel failed to object to witnesses testifying they were scared to testify;
- (e) Ineffective assistance of trial counsel—counsel failed to object to information regarding gangs being introduced and/or opening the door to such testimony;
- (f) Ineffective assistance of trial counsel—counsel failed to object to burden-shifting in the State's closing argument;

- (g) Ineffective assistance of trial counsel—counsel forced the Applicant to not testify regarding his defense; and
- (h) Ineffective assistance of trial counsel—counsel failed to obtain a ruling on the record regarding a lesser-included charge on lynching.

LAW OFFICE OF ANNA BROWDER, LLC



Anna R. Browder, Esquire
Attorney for Applicant
PO Box 7284
Columbia, SC 29202
803-661-6758
803-403-8752 (fax)

Columbia, South Carolina
This 7th day of July, 2017

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Henry Gray,

Applicant,

vs.

The State of South Carolina,

Respondent.

CASE No. 2014-CP-40-4139

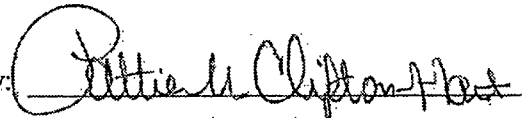
AFFIDAVIT OF SERVICE BY MAIL

AMENDED APPLICATION

Pattie M. Clifton-Hart, certifies that on the 10th day of July 2017, she served the Amended Application for Post-Conviction Relief to, Jessica Kinard by placing a copy of the same in the U.S. Mail with due and proper postage attached thereto, addressed as follows:

Jessica Kinard
Assistant Attorney General
P.O Box 11549
Columbia, SC 29211

By:



Pattie M. Clifton-Hart
Paralegal

**LAW OFFICE OF ANNA BROWDER,
LLC**

P.O. Box 7284
Columbia, SC 29202
(803) 661-6758

Columbia, South Carolina

This 10th day of July, 2017

State of South Carolina)	In the Court of Common Pleas
County of Richland)	Fifth Judicial Circuit
	2014-CP-40-4139

Henry Gray,	)	
	)	
Applicant,	)	
	)	
vs.	)	Transcript of Record
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

August 30, 2017
Columbia, South Carolina

B E F O R E:

The Honorable Paul M. Burch, Judge

A P P E A R A N C E S:

Anna Rawl Browder, Esquire
Attorney for Applicant

Jessica E. Kinard, Esquire
Attorney for Respondent

Maryann S. Nevers, CVR-M-CM
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>

No exhibits marked during proceeding.

TRANSCRIPT OF RECORD

(Whereupon, the proceeding was commenced at 10:58 a.m.)

THE COURT: All right. I think we've got everybody.
Madam Attorney General?

MS. KINARD: Thank you, Your Honor. And may it please
the Court: This is the matter of *Henry Gray v. the State
of South Carolina*. It's Case No. 2014-CP-40-4139. We're
before the Court on an application for postconviction
relief that was filed July 1st, 2014.

Mr. Gray is presently confined in the South Carolina
Department of Corrections pursuant to orders of commitment
of the Richland County Clerk of Court. He was indicted
during the March 2010 and October 2011 terms of the
Richland County Grand Jury for lynching first-degree, and
murder, respectively.

He proceeded to trial, where he was convicted as
indicted on March 2nd, 2012. The Honorable G. Thomas
Cooper, Jr., sentenced him to concurrent terms of 30 years
imprisonment for each of the charges.

A notice of appeal was filed and perfected. The South
Carolina Columbia affirmed his conviction and sentence, and
remittitur was returned June 27th, 2014.

The state is present and ready to proceed. Mr. Gray
is present and represented by Anna Browder.

THE COURT: All right. Mr. Gray, good morning.

1 THE APPLICANT: Good morning. How you doing?

2 THE COURT: I have looked over your application and --
3 and some of the documents within the file. And I noticed,
4 in your particular case, that the situation, I think, calls
5 for me to discuss with you some of the pitfalls about
6 postconviction relief. And I'm sure you've probably
7 discussed that with counsel.

8 But I just want to make sure that you understand some
9 of those pitfalls. Because I -- in -- in my past
10 experience, I have seen occur that have caused some
11 problems for petitioners.

12 First of all, I need to explain that the Court does
13 not have authority to modify a sentence. So if you filed a
14 petition, having been provided information, it would be
15 erroneous that the Court has the authority to modify a
16 sentence. That is not possible.

17 The other problem that pops up from time to time --
18 and I've seen it have some drastic effects -- is when you
19 were convicted of an offense, you did not receive a maximum
20 sentence. If the Court were to find in your favor and
21 grant relief, most likely it would result in possible
22 retrial. And what has happened in the past would not limit
23 the sentencing judge at that time if you were to be
24 convicted again on a particular sentence.

25 I can quite remember well an incident in Darlington

1 County where a postconviction relief was granted to a
2 gentleman that had gotten a -- I think, about a 15-year
3 sentence on a voluntary manslaughter. And he went back for
4 trial, and he wound up with a 28-year sentence.

5 So that was a disaster to him. And that is one of the
6 primary pitfalls, should you prevail on this. So you need
7 to give some thought to that.

8 Also, sometimes under particular circumstances it can
9 affect time served and credits. So that's another angle
10 that needs to be considered.

11 So I just wanted to relay that to you, since I
12 noticed, in your particular case, that I think there were
13 two convictions and a concurrent sentence was given in your
14 particular case. So if you have any questions as to what
15 I've just gone over with you, if you will discuss those
16 with Ms. Browder at this time, that will be fine. And I
17 will give you ample time to do that.

18 (Whereupon, Ms. Browder and the applicant conferred.)

19 MS. BROWDER: He's ready to proceed, Your Honor.

20 THE COURT: All right. Very good.

21 MS. BROWDER: All right.

22 THE COURT: Ms. Browder?

23 MS. BROWDER: At this time I call Henry Gray to the
24 stand.

25 (Whereupon, the witness came forward.)

DIRECT EXAMINATION BY MS. BROWDER - HENRY GRAY

7

1 HENRY GRAY, having been first duly sworn,
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MS. BROWDER:

5 Q Can you state your name for the court reporter,
6 please?

7 A Henry Gray.

8 (Off the record briefly.)

9 A Henry Gray.

10 Q All right. Mr. Gray, you were originally arrested in
11 February of 2010 on these murder and lynching charges,
12 correct?

13 A Yes, ma'am.

14 Q Okay. And when you were originally arrested, who did
15 you have as your attorney?

16 A Mathias.

17 Q Okay. Mathias Chaplin?

18 A (Nodded head up and down.)

19 Q Okay. And at some point you had Nate Roberson as
20 well, correct?

21 A Yeah.

22 Q Okay.

23 A Had him in -- in my bond.

24 Q Okay. And you're going to have to speak up just a ---

25 A I had ---

- 1 Q --- little bit.
- 2 A --- him in my bond hearing.
- 3 Q Okay. So Nate Roberson only did your bond hearing?
- 4 A Yes.
- 5 Q And Mathias had you for everything else?
- 6 A Yes, ma'am.
- 7 Q Okay. And did you bond out in this case?
- 8 A Yes, ma'am.
- 9 Q Okay. You bonded out approximately February 2010 ---
- 10 A Yes, ma'am.
- 11 Q --- after your ---
- 12 A Like ---
- 13 Q --- arrest ---
- 14 A Yeah. Like a week -- a week later.
- 15 Q Okay. And then, ultimately, you were put back in due
- 16 to some other unrelated charges to this?
- 17 A Yes, ma'am.
- 18 Q Okay. And that was in July of 2011?
- 19 A Yes, ma'am.
- 20 Q Okay. And this trial was in February 2012, correct --
- 21 till March?
- 22 A Yes, ma'am.
- 23 Q Okay. During the time between your arrest and the
- 24 time of trial, how many times did you meet with Mr.
- 25 Chaplin? Do you recall?

1 A Maybe three/four.

2 Q Three or four?

3 A (Nodded head up and down.)

4 Q Okay. And do you remember the first time you met with
5 him?

6 A That's when I got out. I mean, when I got out on
7 bond, I met him -- with him at his office.

8 Q Okay. So you met with him real quick at -- at his
9 office?

10 A (Nodded head up and down.)

11 Q Approximately how long did that meeting last?

12 A I can't recall.

13 Q Okay. Was it long? Was it short?

14 A Maybe about an hour -- about ---

15 Q Okay.

16 A --- an -- I don't know.

17 Q And during that meeting did anything significant
18 happen, when it came to your relationship with Mr. Chaplin?

19 A We had a disagreement at first.

20 Q Okay. And do you remember what that disagreement was
21 about?

22 A Not right offhands.

23 Q Okay. And then, you had another meeting again, I
24 guess, November of 2011, once you were back incarcerated?

25 A Yeah. I was at Alvin S. Glenn.

1 Q Okay. And at that time do you remember again having a
2 disagreement with him?

3 A Yes. Yes. Yeah.

4 Q Okay. And do you remember what it was about at that
5 time?

6 A What I wanted to say.

7 Q Okay. So y'all had started talking about trial at
8 this point?

9 A (Nodded head up and down.)

10 Q You got to say "yes" or "no" for the ---

11 A Oh.

12 Q --- court reporter.

13 A Yes, ma'am.

14 Q Okay. And when you say what you wanted to say, were
15 y'all discussing at that point about whether you should
16 testify or not?

17 A If I can recall, he was -- like I say, I wanted to
18 tell my side of the story. I mean ---

19 Q Okay.

20 A --- you know, I wanted to them him ---

21 Q All right.

22 A --- you know ---

23 Q And ---

24 A --- what happened

25 Q --- at that point y'all started discussing whether you

DIRECT EXAMINATION BY MS. BROWDER - HENRY GRAY

11

1 would testify at trial and whether you would get -- give
2 your side of the story?

3 A Yes.

4 Q Okay. And at that point you were indicating you
5 wanted to testify, correct?

6 A Yes, ma'am.

7 Q Okay. And just to give a little background,
8 essentially, this case -- and I'm going to paraphrase. And
9 if I get anything substantially wrong, I'm sure Ms. Kinard
10 will let me know.

11 But essentially, there -- the victim in this case, the
12 man who died, had an encounter earlier in the evening with
13 another individual named Marcellius Brooks and some other
14 people and got in an altercation with them, correct?

15 A Yes, ma'am. For ---

16 Q Okay.

17 A --- like I ---

18 Q Over ---

19 A --- say, I wasn't there, though. But that's what I
20 heard.

21 Q Right.

22 A Yes.

23 Q Right. This one -- that had nothing to do with you.

24 An earlier ---

25 A Yes.

1 Q --- fight, kind of over your niece?

2 A Yes, ma'am.

3 Q Okay. Something that occurred with your niece?

4 A (Nodded head up and down.)

5 Q And then, ultimately, later the state alleged at trial
6 you were ultimately convicted that you got in a fight,
7 along with your sister, Robin Reese, who was your
8 codefendant, with the victim over this kind of same
9 situation. And ultimately, he died. And the issue at
10 trial was whether the first fight helped in him dying or
11 whether it was your actions that caused him to die,
12 correct?

13 A Yes, ma'am.

14 Q Okay. And when you talk about wanting to tell your
15 side of the story, you were discussing with him whether you
16 wanted to testify as to what happened with your
17 altercation, if there was one, with the man who died in
18 this case ---

19 A Yes, ma'am.

20 Q --- the victim?

21 Okay. Do you recall how long that meeting was? Was
22 it long? Was it short?

23 A Maybe 30 -- maybe 30 minutes.

24 Q Okay. And at that point did you ever -- or at any
25 point did you file a motion to relieve Mr. Chaplin as your

1 counsel?

2 A Yes, ma'am.

3 Q Okay. And what ever happened with that motion?

4 A Like I said, I really didn't even -- you know, didn't
5 know what he was going to do about it. But so I just --
6 you know, I signed another paper just to just go ahead and
7 keep him.

8 Q Okay. And ultimately, again, you had another meeting
9 with him, according to your memory, in January of 2012,
10 correct?

11 A Yes, ma'am.

12 Q Okay. Was that a long/short meeting?

13 A Short.

14 Q Okay. Did you ever have any really long meetings with
15 Mr. Chaplin?

16 A No.

17 Q Okay.

18 A No, ma'am.

19 Q You did have a copy of your discovery, correct?

20 A Yes, ma'am.

21 Q Did you ever go over it with it -- with Mr. Chaplin,
22 starting to get the strategy for the trial?

23 A Yeah. We scanned through it.

24 Q You scanned through it?

25 A Yeah.

1 Q Okay. Prior to trial was there any plea offers?

2 A Not I know of.

3 Q Not that you were aware of?

4 A (Shook head from side to side.)

5 Q Okay. Was there ever any plea offers given at any
6 point?

7 A Yeah. It -- but when -- when picking the -- like, the
8 second jury ---

9 Q Okay.

10 A --- it was one.

11 Q And I'll get to the second jury in a minute so the
12 judge understands. But after the second jury was picked,
13 there was a plea offer?

14 A No, ma'am.

15 Q Okay. There wasn't or there was?

16 A I'm saying, before they picked the second jury, it
17 was.

18 Q Okay. Before you picked the second jury, there ---

19 A Yeah.

20 Q --- was a plea offer?

21 And you declined that, correct?

22 A Yes, ma'am.

23 Q Okay. When you get to the trial, essentially -- when
24 getting ready for the trial, did Mr. Chaplin discuss
25 anything with you regarding the strategy on what y'all were

1 going to do at the trial?

2 A Yes, ma'am.

3 Q Okay. And did you agree ---

4 A Excuse me.

5 Q --- with it -- did you agree with that strategy?

6 A No, ma'am.

7 Q Okay.

8 A No.

9 Q And why was the main reason you did not agree with
10 that strategy?

11 A Because I didn't get to tell, like, my side of the
12 story.

13 Q Okay. Because you wanted to testify?

14 A Yeah.

15 Q Okay. All right. So prior to trial, as y'all began
16 -- the day of trial, you were tried with your codefendant?

17 A Yes, ma'am.

18 Q Okay. And during the entire time of jury selection,
19 during the trial, any time that was happening while you
20 were here at the courthouse, were you shackled?

21 A Yes, ma'am.

22 Q Okay. And how were you shackled?

23 A Legs and around my wrists.

24 Q Kind of like you are now?

25 A Yeah, like I am now.

1 Q Okay. Were you dressed out in clothes?

2 A Yes, ma'am.

3 Q Okay. So you were in regular, everyday clothes, but
4 you were still completely shackled?

5 A Yes, ma'am.

6 Q Okay. And during jury selection did you stand up to
7 turn around to look at the jury?

8 A Yes, ma'am.

9 Q Okay. So kind of the introduction was part with every
10 ---

11 A Yes, ma'am.

12 Q --- jury selection?

13 Okay. And so it's fair to say that the jurors
14 would've definitely seen you with your shackles?

15 A Yes, ma'am.

16 Q Okay. And you moved around the courtroom in front of
17 jurors with the shackles on?

18 A Yes, ma'am.

19 Q Okay. And there was never objection by Mr. Chaplin
20 regarding you being shackled during the trial, was there?

21 A No, ma'am.

22 Q Okay. And it -- to the best of your knowledge, can
23 you recall that there's anything in the record indicating
24 why you should be shackled, why it was needed?

25 A No, ma'am.

DIRECT EXAMINATION BY MS. BROWDER - HENRY GRAY

17

1 Q Okay. And your codefendant, she was shackled as well,
2 correct?

3 A Yes, ma'am.

4 Q Okay. And just for my understanding, how was the
5 courtroom set up? Were you and the codefendant and all the
6 attorneys at one table, or did y'all have separate tables?

7 A We sat at the same table.

8 Q Okay. So all -- everybody was around the same table?

9 A On a long table.

10 Q Okay. All right. So throughout the trial you were
11 restrained the entire time?

12 A Yes, ma'am.

13 Q Okay. All right. To get to this jury issue -- and
14 you were tried with your codefendant, correct?

15 A Yes, ma'am.

16 Q Okay. So the first jury was picked. And at that time
17 the state presented a *Batson* motion, correct?

18 A Yes, ma'am.

19 Q Okay. And it was determined during that *Batson* motion
20 that the jury was not a proper jury and it needed to be
21 repicked, correct?

22 A Yes, ma'am.

23 Q And was that based on your attorney's strikes or the
24 codefendant's attorney's strikes?

25 A Both.

1 Q Both?

2 A (Nodded head up and down.)

3 Q Okay. And particularly, there was one juror who ended
4 up on your jury that was struck previously, correct?

5 A Yes, ma'am.

6 Q One that was struck by the codefendant's counsel that
7 was friends with the head solicitor of the case?

8 A Yes, ma'am.

9 Q Okay. And -- or the head solicitor of Richland
10 County?

11 A (Nodded head up and down.)

12 Q Did your attorney object at any time to the fact that
13 you would then be subjected to a jury based on the fact
14 that your codefendant's counsel couldn't give a reason why
15 they struck somebody?

16 A I'm not understanding.

17 Q Did your attorney ever object to this second jury
18 being picked?

19 A I can't recall.

20 Q Okay. I'm going to -- through the trial there was a
21 witness, particularly one named Donnetti Perry. Do you
22 recall that witness?

23 A Yes, ma'am.

24 Q Okay. And that witness during testimony -- do you
25 recall that witness giving her opinion as to how she was

1 scared to be there to testify?

2 A Yes, ma'am.

3 Q Okay. And did she indicate why she was scared?

4 A No, ma'am.

5 Q Okay. But she indicated she was scared to testify at
6 this trial?

7 A Yes, ma'am.

8 Q Okay. And did your attorney object at that time to
9 her testimony or her testifying that she was scared?

10 A No, ma'am.

11 Q Okay. And do you believe he should've objected to
12 that?

13 A Yes.

14 Q Okay. In addition, prior to trial there was mentioned
15 that there would be no mention of gangs, correct?

16 A Yes, ma'am.

17 Q As you were a former gang member and there didn't want
18 to be any type of gang -- or somebody would -- had
19 something to do with gangs and we didn't ---

20 A This ---

21 Q --- want to prejudice ---

22 A --- that was ---

23 Q --- you ---

24 A --- the neighborhood that my father stayed in. I've
25 never been a gang member, though.

1 Q Okay. But the neighborhood was gang-related

2 A Yes, ma'am.

3 Q Okay. And it was -- everybody agreed pretrial that
4 there would be no mention of these gangs so it wouldn't
5 prejudice you or your codefendant, correct?

6 A Yes, ma'am.

7 Q Okay. Ultimately, statements regarding gangs came
8 into testimony, was it not?

9 A Yes, ma'am. Was ---

10 Q Okay.

11 A --- brought up.

12 Q And based on the transcript, which is in the record,
13 it was ruled that your attorney actually opened the door to
14 the gang stuff coming in, correct?

15 A Yes, ma'am.

16 Q And then, he tried to object to it, but it was too
17 late at that point?

18 A Yes, ma'am.

19 Q Okay. And you believe -- you're asking the judge
20 today to find that he was ineffective for allowing that
21 information to come in and opening the door to the gang
22 information?

23 A Yes, ma'am.

24 Q Okay. Okay. And I'm going to get to you testifying
25 in a minute. But in the closing argument, is there

1 statements you believe that Mr. Chaplin should have
2 objected to regarding burden-shifting: basically, the
3 state saying you haven't proved that you were innocent?

4 A I'm not understanding what you're saying.

5 Q Do you believe your attorney should've objected during
6 closings regarding some statements that the state made?

7 A Yes, ma'am.

8 Q Okay. And did he object?

9 A No, ma'am.

10 Q Okay. Getting back to you testifying, the judge -- I
11 guess, prior to the trial, you indicated you wanted to
12 testify, correct?

13 A Yes, ma'am.

14 Q Okay. And your attorney did put up a witness -- a
15 couple witnesses, actually, for your trial, correct?

16 A Yes, ma'am.

17 Q All right. So if you would've testified, it wouldn't
18 have changed the fact of when your attorney got to do
19 closing arguments, correct?

20 A No, ma'am.

21 Q Okay. And you had indicated to Mr. Chaplin you wanted
22 to testify?

23 A Yes, ma'am.

24 Q Okay. And what was his opinion regarding that?

25 A He didn't want me to do it.

1 Q Okay. And did he tell you any particular reasons why
2 he didn't believe you should testify?

3 A I guess whatever game plan he had. I don't know.

4 Q Okay.

5 A And then, like I say, one of our previous arguments
6 was that I wanted to tell, you know, that I had put my hand
7 on him. But he didn't want me to do that.

8 Q Okay. And during the trial the judge, just kind of
9 like the judge just now, gave you information regarding if
10 this case went forward, consequences, what would happen,
11 that sort of thing. The judge went over your right to
12 testify with you at the trial, correct?

13 A Yes, ma'am.

14 Q Okay. And you ultimately said no, you did not want to
15 testify; isn't that right?

16 A Yes, ma'am.

17 Q And why did you say that at that time?

18 A Because my attorney advised me.

19 Q Okay. And -- but that wasn't what you wanted to do?

20 A No. I wanted to testify.

21 Q If your attorney had allowed you to testify that day,
22 what did you want to say in your testimony? What would you
23 have testified to?

24 A That it was a freak accident. I mean, I came. When I
25 got there, like I say, I came with my daddy -- my father's

1 back door. And I walked out the front door. Mr. Mack was
2 talking to another fellow that was ---

3 Q Okay. Just for the record, Mr. Mack is the victim in
4 this case?

5 A Yes, ma'am.

6 Q Okay.

7 A And he ---

8 Q Go ahead.

9 A --- was talking to another fella when I rolled out the
10 front door. So I asked -- I'm looking at him. He all bust
11 up, head knot and stuff on his head, bleeding.

12 So I said, "Oh, what happened to you?"

13 You know, he said, "Just beat."

14 So I ain't pay it no more attention. I walked back
15 into my daddy house. Phone rang. My sister. She told me
16 my niece was attacked. Dude slam her was on top of her.

17 Q And that's Mr. Mack?

18 A Mr. Mack, yeah.

19 Q Okay.

20 A So I asked her, "What -- what he got on?"

21 She said, "This and that."

22 So I said, "Well, he around here." So I hung up the
23 phone.

24 So I walked back off the porch. And I asked him,
25 like, "Yo, what you did to my niece?"

1 So by then, I grabbed him from the -- by, like, back
2 of shirt on around the collar. And we was -- proceeded to
3 walk down the sidewalk. We were going to meet my sister
4 and my niece.

5 He snatch away; startle me. I clipped him up.

6 Q And when you say you clipped him up, what does that
7 mean?

8 A I -- like I say, when he turn around and jump around,
9 I clipped his feet from under.

10 Q Okay.

11 A So like I said, after that, like I said, he was -- he
12 -- he hit the ground. He was laying on the ground with his
13 hand over his face. I walked to the edge of building to
14 see -- if I could see my sister and my niece coming.

15 So they came around and, like I said, say that was
16 him. And, you know, like I say, we roughed him up a little
17 bit. And then we went on about our way.

18 Q So you essentially wanted to testify that you never
19 had any intent to kill Mr. Mack?

20 A No, ma'am. That's -- when -- when I -- like I say, I
21 grabbed him by the back of the shirt so we could go find
22 out what's happening. That's why I said we was walking
23 down the sideway.

24 Q Okay.

25 A But he snatch away; startled me. I clipped him up.

1 And he hit the ground.

2 Q Okay. And your attorney did put up other testimony --
3 testimony from a doctor, as well as the codefendant's
4 testimony, basically testifying that this first fight had a
5 part in Mr. Mack's injuries, correct?

6 A Yes, ma'am.

7 Q Okay. And that was the fight you were not involved
8 in?

9 A No, ma'am.

10 Q Okay. If you would've testified, do you believe you
11 would've gotten potentially a lesser-included charge as
12 part of the charges the jury could've considered?

13 A Yes, ma'am.

14 Q Okay. But in your case, it was noted by the judge,
15 there was no testimony regarding anything that could've
16 been voluntary manslaughter or involuntary, so he wasn't
17 going to do that, correct?

18 A Yeah. He -- my lawyer didn't put up -- put up
19 nothing.

20 Q Okay. And if you had testified, you believe you
21 would've potentially maybe been able to get a lesser-
22 included charge?

23 A Yes, ma'am.

24 Q Okay.

25 MS. BROWDER: Beg the Court's indulgence.

1 Q Can you think of anything else -- or -- well, your
2 codefendant, your sister, she did testify, correct?

3 A Yes, ma'am.

4 Q Okay. And when she walked to the witness stand to
5 testify, was she completely shackled at that time?

6 A Yes, ma'am.

7 Q Okay. And you both were?

8 A The whole five days.

9 Q Okay. And it was very clear that you were shackled?

10 A Yes, ma'am.

11 Q Were you wearing long sleeves or short sleeves?

12 A Long sleeve.

13 Q Long sleeve?

14 A Yeah.

15 Q Were your shackles still visible?

16 A It was like I am now.

17 Q Okay. And were you -- you -- you testified earlier,
18 you were standing up at some point, at least, in front of
19 the jury where the jury would've seen them?

20 A Yes, ma'am.

21 Q Okay. And when your sister walked up to the stand, as
22 well as any time you moved, was there any -- ever any noise
23 when you moved?

24 A Yes, ma'am.

25 Q Okay. And what kind of noise was it?

CROSS-EXAMINATION BY MS. KINARD - HENRY GRAY

27

1 A Shackles.

2 Q The shackles?

3 A Yes, ma'am.

4 MS. BROWDER: No further questions, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. KINARD:

7 Q Okay. Now, you testified that when you started
8 meeting with Mr. Chaplin, you had some disagreements, but
9 ---

10 A Yes, ma'am.

11 Q --- you couldn't remember what most of those were; is
12 that accurate?

13 A Like I say, the first one, like I say, was, like I
14 say, I wanted to testify when he came to the county. What
15 I wanted to tell him, that's what we had the disagreement
16 about then.

17 Q Okay. How did y'all usually get in touch with each
18 other? Did he ask you to come in his office and meet?

19 A Well, I went to his office and met one time. That's
20 when I first got out. I didn't -- you know, and we ain't
21 never did meet again till I was in the county.

22 Q Okay. So how long were you bonded out?

23 A Like, a week after -- after the incident. So I stayed
24 out till, like, July of '11.

25 Q Okay. So not quite a year and half? Does that sound

1 fair?

2 A Yes.

3 Q Okay. Because you were arrested in February 2010?

4 A Yeah. So it'd been about a -- like, about a year --
5 about ---

6 Q Okay.

7 A --- year and a half.

8 Q And why did you move to relieve Mr. Chaplin?

9 A Why?

10 Q Why?

11 A Because we had the disagreements.

12 Q And when -- you keep referring to these disagreements.
13 Were those just about whether you were going to testify or
14 not?

15 A The first one -- well, like I say, when I got out, we
16 had a disagreement when I went to his place of business.
17 The second one came when he came to the county. Like I
18 said, I wanted to tell the story of how -- what -- like I
19 said, that I put my hand on the man, but he didn't wanted
20 me to say that.

21 Q So -- so you had two different arguments about the
22 same thing?

23 A Yes, ma'am.

24 Q Okay. Thank you. That's what I didn't understand.
25 And you testified you didn't have any long meetings

1 with him?

2 A No, ma'am.

3 Q So the longest would've been about an hour, as you've

4 ---

5 A About ---

6 Q --- testified?

7 A Yeah. Almost close to a hour.

8 Q Okay. But you did go over all the discovery with him?

9 A Scanned through it.

10 Q And you had a copy of it? He ---

11 A Yeah.

12 Q --- gave you a copy of it?

13 A Yes, ma'am. I had a copy.

14 Q Okay. Did he talk to you about the charges you were
15 facing?

16 A Yes, ma'am.

17 Q And what the state would have to prove?

18 A Yes, ma'am.

19 Q And you understood all those things?

20 A Yes, ma'am.

21 Q Okay. And you understood the benefits and risks of
22 pleading guilty versus going to trial?

23 A Yes, ma'am.

24 Q Okay. And you testified that you didn't get a plea
25 offer until between the two jury selections; it ---

- 1 A Yeah.
- 2 Q --- that correct?
- 3 A Yes, ma'am.
- 4 Q And what was that plea offer?
- 5 A Two to twenty.
- 6 Q Two to twenty?
- 7 A Yes, ma'am.
- 8 Q Okay. And what was the actual charge that that would
- 9 be? Was that manslaughter?
- 10 A No. It was just lynching.
- 11 Q Just lynching?
- 12 A At first. Then 18 months later, the murder charge
- 13 came in.
- 14 Q Okay. Well, I'm -- you were at trial for both
- 15 charges, correct?
- 16 A Yes, ma'am.
- 17 Q And so the -- the plea offer was two to twenty on --
- 18 to take care of everything?
- 19 A Yes, ma'am.
- 20 Q Okay. Did you feel like you could have good
- 21 discussions with Mr. Chaplin? You felt like he understood
- 22 what you were saying, and you understood what he was
- 23 saying?
- 24 A No, ma'am.
- 25 Q Can you say why not, please?

1 A No, ma'am.

2 Q Why not? Why ---

3 A Oh.

4 Q --- couldn't you speak with him?

5 A We wasn't -- well, like I said, we wasn't seeing eye
6 to eye, you know, on what I wanted to say, you know, what I
7 wanted to tell. So like I say, I guess his strategy, what
8 he had planned, you know, they see what I wanted to say.
9 So -- but so that's why he never let me, you know, tell
10 it.

11 Q Did you feel like you could ask him questions, though?

12 A Yeah. I mean, I guess.

13 Q Okay. So he never -- even though you disagreed, you
14 felt like you understood what he was trying to say?

15 A Not everything. Because like I say, his -- his
16 strategy he was using, I -- like I say, I didn't really
17 understand it, what he was trying to do.

18 Q Okay. I think I understand.

19 Did you always want to go to trial, or did you want a
20 plea offer?

21 A Yeah. I -- I -- I -- I asked him that, you know, see
22 what the plea -- when he came to the county, I asked him,
23 you know, see what the -- type of plea deal, you know, we
24 can get.

25 Q And you testified you have no gang affiliation; is

1 that correct?

2 A No, ma'am. None.

3 Q Okay. Now, when you just gave your version of events
4 to Ms. Browder, you admit that you grabbed Mr. McGee -- I'm
5 sorry -- you grabbed the victim by the collar and you
6 tripped him when he turned toward you?

7 A Yeah. We went to -- when I grabbed him by the collar,
8 we went to walking down the sidewalk to meet my sister and
9 my niece ---

10 Q Okay.

11 A --- to find out what happened. He snatch away; he
12 startle me. I clipped him up.

13 Q And by clipped him up, you basically took his feet out
14 from under him?

15 A Yes, ma'am. Tripped him up.

16 Q And his head hit the ground?

17 A Yes, ma'am.

18 Q Okay.

19 MS. KINARD: Give me one second.

20 Q Did you talk to your attorney about any lesser-
21 included charges that might be considered at trial?

22 A Yes, ma'am.

23 Q And what were -- what did those conversations consist
24 of?

25 A Involuntary manslaughter.

1 Q Involuntary?

2 A Yes, ma'am.

3 Q Okay. What did he talk to you about the chances of
4 that happening?

5 A The way he was talking, like, his game plan, he could
6 -- he could, you know, get that done or that's what he was
7 shooting for.

8 Q Regarding the state's closing argument and the -- the
9 testimony you just provided regarding burden-shifting, was
10 that something you were aware of during the trial?

11 A No, ma'am.

12 Q Okay. That's something that you and Ms. Browder
13 developed ---

14 A Well, once ---

15 Q --- in your ---

16 A --- I got ---

17 Q --- discussions?

18 A --- once I got to reading -- yeah -- reading what --
19 yeah.

20 Q Okay. And I apologize. You said you met with him
21 three to four times while you were bonded out, or was that
22 total?

23 A Total.

24 Q Total?

25 A (Nodded head up and down.)

DIRECT EXAMINATION BY MS. KINARD - MATHIAS CHAPLIN 34

1 Q So it includes when -- when you went back in ---

2 A Yes, ma'am.

3 Q --- in July '11?

4 Okay. All right. I have no further questions. Thank
5 you.

6 MS. BROWDER: No further questions, Your Honor.

7 THE COURT: You can step down. Thank you, sir.

8 (Whereupon, the witness exited the witness stand.)

9 MS. BROWDER: That's the applicant's case, Your Honor.

10 THE COURT: Okay.

11 MS. KINARD: The state calls Mathias Chaplin.

12 (Whereupon, the witness came forward.)

13 MATHIAS CHAPLIN, having been first duly sworn,
14 testified as follows:

15 THE WITNESS: Good morning.

16 THE COURT: Good morning, sir.

17 DIRECT EXAMINATION

18 BY MS. KINARD:

19 Q Good morning, Mr. Chaplin.

20 A Good morning.

21 Q Thank you for being here. How did you come to
22 represent Mr. McGee [sic]?

23 THE APPLICANT: Gray.

24 A Mr. Gray.

25 Q I am so ---

1 A That's ---

2 Q --- sorry.

3 A --- okay.

4 Q I've done that twice now. Mr. Gray.

5 A Yeah. I was appointed to represent Mr. Gray in this
6 particular matter.

7 Q Is that a conflict from the public defender's office?

8 A Yes, it was.

9 Q Thank you. Do you -- do you recall how soon after his
10 arrest you first met with him?

11 A My practice is to meet with clients immediately after
12 that. And if I'm not meeting with him, I'm making contact,
13 trying to set up a meeting to those orders. I'm pretty
14 sure we met fairly quickly after I got the letter of
15 appointment.

16 Q And that first meeting, was he bonded out yet?

17 A He would've been bonded out. Yes.

18 Q Okay. And do you recall if that was at your office,
19 in that case?

20 A We met several times at my office.

21 Q Do you recall overall, approximately how many times
22 you met?

23 A Well, you know, I listened to what he said. I would
24 say that we probably met somewhere between eight to ten
25 times. And the reason I say that, if I may continue ---

1 Q Please.

2 A --- is that we covered a lot of ground. We needed to
3 develop all of the possible witnesses that we could
4 identify. I had to get an investigator. I think my
5 investigator spoke with Mr. Gray at least once or twice.
6 We had to arrange times to go over to Gonzales Gardens and
7 meet with all of these different witnesses and -- and find
8 out what their versions of it was.

9 Mr. Gray and I also talked extensively about me hiring
10 a expert witness to come in and talk about the actual cause
11 of death. Now, I will admit that a lot of these meetings
12 after that were with me and these other parties. And I --
13 so I know I spent a great deal of time on the case.

14 But I know that I spent a sufficient amount of time
15 with Mr. Gray to apprise him of what I was doing, how I was
16 doing it, and getting his input.

17 Q Okay. And we'll certainly get back to some of those
18 things you mentioned. But during your meetings did you
19 review discovery with Mr. Gray?

20 A Extensively.

21 Q And you believe that their discovery file from the
22 solicitor seemed complete, as far as what you expected to
23 receive?

24 A Yes.

25 Q Okay. And you gave him a copy of ---

1 A I ---

2 Q --- his discovery?

3 A I did.

4 Q Did you discuss with him the charges that he faced, as
5 well as the elements of those?

6 A I did.

7 Q Do you believe he understood those?

8 A Mr. Gray was -- when we met, I -- I remember the
9 meetings to be somewhat pleasant. And he never indicated
10 to me that he was not clear or anything like that as to
11 what I was saying to him. So I guess my recollection is a
12 little bit different than his, as far as all of these
13 disagreements.

14 Q Okay. During his testimony he testified that the
15 disagreements were primarily regarding his desire to
16 testify during his trial.

17 A Okay.

18 Q Is that a fair recollection of what you've heard?

19 A You know, one -- one of the things I tell clients
20 prior to sentencing or whatever the case might be is that,
21 you know, if you believe I did something wrong, you have
22 the right to file a PCR, but I just need you to be honest.
23 And I would have to say, unfortunately, that Mr. Gray is
24 not being honest ---

25 MS. BROWDER: Objection, Your Honor, as to

1 characterization of ---

2 A The statement ---

3 MS. BROWDER: --- whether he's lying or whether he's
4 telling the truth. I think he can stick to what he did as
5 an attorney. I don't believe he can testify as to whether
6 Mr. Gray is lying or telling the truth.

7 THE WITNESS: I can rephrase it, Your Honor.

8 THE COURT: All right.

9 THE WITNESS: Thank you.

10 A I never told Mr. Gray not to testify.

11 Q Do you recall having discussions with him about making
12 the decision to testify?

13 A Well, we talked about it. And from his testimony
14 today, he said that when we got to trial, the plan was that
15 he would testify. However, he then testified that we
16 disagreed about him testifying, as far as -- as early as
17 the first meeting. So ---

18 Q And that's inconsistent with your memory?

19 A It's inconsistent with the memory. And I think his
20 statements are inconsistent. Because when we got to trial,
21 the plan was that he was going to testify. When it came
22 his turn to testify, he indicated that he no longer wished
23 to do so.

24 Q Did you have any indication as to why that was?

25 A I'm not sure. I'm not sure.

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1 I know that his sister testified. And -- and I think
2 that that wasn't a pleasant experience for her. He
3 might've noticed that. But I don't know. I can't
4 speculate.

5 But all I know is that when it became his turn to
6 testify, Mr. Gray indicated to me that he no longer wished
7 to do so.

8 Q Thank you. Let's step back. I got a little off
9 track.

10 A Okay. Sorry ---

11 Q Getting back ---

12 A --- about that.

13 Q No. That's fine. Getting back to preparation for the
14 case, did Mr. Gray help you by providing any witnesses or
15 any information about this case?

16 A I think he did -- yes, he did.

17 Q Okay. And you were able to investigate or meet with
18 those witnesses?

19 A Well, and to -- the answer is yes. However, I also
20 got OID to -- to allow me to hire an investigator. And so
21 the investigator is the one that went over to the gardens
22 and met with these individuals.

23 Q Regardless, as a cumulation of effort, you were able
24 to develop a case based on information he provided?

25 A Yes, I was.

1 Q And you went to Gonzales Gardens with Mr. Gray?

2 A I went to the Gonzales Gardens. I don't think Mr.
3 Gray was with me when I went there. I know that the
4 investigator and I went to go look at the scene and look at
5 the area so that when we started talking at -- about the
6 case and -- and looking at some aerial photos that the
7 state provided, that we would have our bearings.

8 Q Okay.

9 A Yeah.

10 Q Now, in terms of preparation, what was your
11 overarching theory of defense in this case?

12 A Well, I met with Mr. Gray several times. And the --
13 and at that point after a couple of meetings, it -- it --
14 it dawned on me that I think that there was an issue with
15 the actual cause of death. And there was an issue wherein
16 the gentleman that passed away received a vigorous beating
17 by a group of people prior to him seeing Mr. Gray. And ---

18 Q What -- I'm sorry.

19 A Go ahead.

20 Q I -- what did this information lead you to do?

21 A This information led me to then present that
22 information to OID. And then they approved monies for me
23 to hire an expert in actual cause of death.

24 Q What information was that expert able to provide?

25 A Well, it was Dr. Shaker. And after several meetings

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1 with him over the phone, he finally came in. I met with
2 him in his hotel. We went over the file and things on that
3 order.

4 And that information that he presented was that the
5 fatal blow was delivered by the original beating and not by
6 what occurred at the bottom of the hill. And that's what
7 we're referring to as when Mr. Gray and his sister
8 encountered the victim.

9 Q Did Mr. Shaker tell -- excuse me -- Dr. Shaker testify
10 at trial?

11 A Yes, he did.

12 Q Was there an expert on the state's side that he was
13 refuting a -- a -- testimony from? Do you recall?

14 A I -- I believe -- I'm -- I'm not certain.

15 Q Okay.

16 A I'm not certain.

17 Q During trial, was there any pretrial discussion
18 regarding gangs, gang affiliation, or mention of gangs?

19 A I guess the transcript would have to speak for itself.
20 But the theory of our case was that the beating that he
21 received at the top of the hill was delivered by a -- a --
22 a -- gang members. And -- and -- and that's how we
23 presented it, is that it was uncalled for; it was -- it was
24 -- it was a very brutal beating; and they just jumped on
25 him and beat the brakes off the guy, to be blunt.

1 Q Do you recall if Mr. Gray had a gang affiliation?

2 A I'm not certain.

3 Q Based on these facts, would it have been harmful or
4 prejudicial if any mention of gangs was made at trial?

5 A Well, I -- I don't think it was harmful. I think that
6 what we were trying to do is paint a picture in the jury's
7 mind that this wasn't just a couple of random passerbys
8 that interfered and -- and beat the victim, but this was a
9 brutal beating by the hands of gang members and that the
10 cause of death was directly related to that brutal beating.

11 Q So is it fair to characterize that mention of gangs,
12 in relation to the -- the original assault and the fact
13 that your client was not related to a gang, could've been
14 beneficial?

15 A I think it was beneficial.

16 Q Okay.

17 A Yes.

18 Q All right. Also, pretrial there was a *Batson* motion.
19 Do you recall that?

20 A I do.

21 Q And do you recall whose strikes led to the *Batson*
22 motion, whether it was yours or your cocounsel?

23 A I was just looking over the transcript a second ago.
24 I think -- I think we both might've had some -- some
25 strikes that the trial judge found questionable.

1 Q Okay. During Mr. Gray's examination, Ms. Browder
2 mentioned that there was a juror who was friends with the
3 head solicitor who was selected on both juries. Do you
4 recall?

5 A I don't.

6 Q Okay.

7 A No.

8 Q Does that seem like something that could be
9 problematic, or do you think it would be a -- a case-by-
10 case analysis?

11 A I think that's case by case.

12 Q Okay. Ms. Browder also questioned Mr. Gray about
13 shackles.

14 A Yes.

15 Q Do you remember him being shackled in the courtroom?

16 A I -- I remember -- and I think it was off the record
17 that Mr. Farley, who was his sister's attorney, and I, we
18 did challenge that issue. But we were told that that was
19 -- that was required in this particular matter.

20 And -- and it was very obvious, and it was, I believe,
21 somewhat prejudicial to both -- both defendants. However,
22 there was nothing that I was able to accomplish with
23 regards to having them removed.

24 Q Was this during a chambers conference?

25 A Yes, it was.

1 Q Okay. And did you -- do you recall that you referred
2 to the shackles in your opening statement?

3 A And that's why I did: to try to soften the blow a
4 little bit.

5 Q Okay. Let's talk about plea negotiations. Were there
6 any had before trial?

7 A Yes, there were.

8 Q Can you describe how those went, please?

9 A Mr. Gray was adamant. He wanted to go to trial, and
10 he wanted to tell his story. And I agree with him with
11 regards to that.

12 And when we got to trial, that was the game plan:
13 that he would tell his story. I think there was a very
14 generous plea offer originally. I don't recall the exact
15 terms.

16 But Mr. Gray was not listening to any of that because,
17 in his mind, he hadn't done anything wrong. And he wanted
18 to tell his story. And he wanted to let the jury know that
19 basically, you know, the guy pulled away from him, startled
20 him, he clipped him up, and then him and sister then
21 roughed him up a little bit.

22 Q So it was just a -- his version is they're a -- a
23 little "Don't do that again, slap on the wrist" kind of
24 roughing him up that was subsequent to the initial attack?

25 A Yes.

1 Q Okay. But as you just stated, he was adamant about
2 going to trial and ---

3 A Yes.

4 Q --- telling his story?

5 A Yes.

6 Q And that was the plan all the way until it was his
7 turn to get on the witness stand?

8 A Well, yes. And that's why I spent so much time and
9 energy with OID getting an investigator, getting an expert
10 to come in, and everything. Because I had a client that
11 clearly wanted to go to trial and clearly wanted to
12 testify. And I prepared for that client based on that.

13 Q Do you recall if there was a plea offer made at all
14 pretrial?

15 A There was. And I spoke with Mr. Gray regarding that
16 offer. And I think at some point -- well, I think the --
17 the -- the end result is that he didn't take the offer.

18 Q Okay. Do you recall the -- the number what they
19 offered was?

20 A You know, I was trying to look back in my notes. And
21 I want to say it was somewhere between seven and ten.

22 Q And was there another offer made between the jury
23 selections, as Mr. Gray referred to?

24 A I don't have a reason to contradict him. I don't
25 recall it exactly. But I -- it's customary that they get a

1 little tougher and they don't give you the same generous
2 offer at -- when you get to trial.

3 So it's possible that -- I would say yes, there was
4 another offer. But I don't know the exact -- I don't
5 recall the exact terms.

6 Q Okay. The seven-to-ten-year offer, did that involve
7 his sister in any way? Do you recall?

8 A I don't recall.

9 Q Okay. Regardless, it was a -- an offer for seven to
10 ten years on murder and lynching charges that would dispose
11 of both?

12 A To my knowledge, yes.

13 Q Okay. I believe those are all the questions I have at
14 this time. Is there anything else you'd like the judge to
15 know about your representation of Mr. Gray?

16 A No. I think -- I think that's it.

17 Q Thank you. Please answer any questions Ms. Browder
18 has.

19 A Gladly.

20 CROSS-EXAMINATION

21 BY MS. BROWDER:

22 Q Good morning, Mr. Chaplin.

23 A Good morning.

24 Q I guess I'll start with the shackles first.

25 A Okay.

1 Q You indicated you had a conversation off the record
2 regarding the shackles, correct?

3 A Yes.

4 Q Okay. But there was never anything put on the record
5 regarding the shackles?

6 A And there probably should've been.

7 Q Okay. And are you aware of the case of *Deck v.*
8 *Missourim*, the Supreme Court case, indicating that if a
9 defendant is shackled during trial, it must be put on the
10 record why he is to be shackled because it is so
11 prejudicial for them to be shackled during trial?

12 A I'm not aware.

13 Q Okay. But your testimony just now was that it was
14 very obvious he was shackled?

15 A It was.

16 Q Okay. And you actually called attention to it in your
17 opening argument?

18 A Yes.

19 Q Okay. Regarding the *Batson* motion, there was eighteen
20 strikes by the defendants together, correct, approximately
21 ---

22 A Yes.

23 Q --- that you can -- okay.

24 And of those fifteen were found by the judge to be
25 strikes that were not good strikes or had any race-neutral

1 or gender-neutral reason, correct?

2 A Okay. I don't recall exactly. But if that's what the
3 record says, I have no reason to doubt it.

4 MS. BROWDER: Your Honor, your attention to page 101
5 of the transcript.

6 THE COURT: All right.

7 Q And of those fifteen -- well, the judge ultimately
8 found fifteen of them were non-race-neutral or gender-
9 neutral, correct?

10 A Again, it -- if the record says that, then I have no
11 reason to doubt it.

12 Q And at least nine of those were because of strikes
13 that you made and only five of the codefendant, correct?

14 A If that's what the record says.

15 Q Okay. And ultimately, some of those ended up being on
16 your jury, at least one of them ---

17 A Yes.

18 Q --- this second jury, I guess?

19 A Yes.

20 Q Okay. And I guess you had ten -- or, I guess, did you
21 do ten strikes? Do you recall? Or did you only have nine
22 struck? Because there was eighteen total strikes. Do you
23 recall how many you actually did?

24 A I don't ---

25 Q If it was ---

1 A --- recall.

2 Q --- nine or ten?

3 A I don't recall.

4 Q Okay. Well, max ten, correct?

5 A You know, the fact that the trial was not severed and
6 that we were working with -- we were -- went to trial along
7 with his sister and another attorney, I -- that makes it a
8 little confusing for me to try to recall.

9 Q Correct.

10 A So I'm not exactly certain. I would just have to rely
11 on the record.

12 Q Okay. So at least nine of -- or say you did have ten
13 -- and I'm not sure about that -- but at ---

14 A Okay.

15 Q --- least nine of the jurors that the judge found that
16 you could not strike the second time because there was not
17 a good reason, nine of them were jury members that you
18 struck, correct?

19 A Once again, I'm going to rely on the record.

20 Q Okay. Regarding -- do you recall the witness Donnetti
21 Perry?

22 A I think I -- yes.

23 Q Okay.

24 A I know the name.

25 Q And basically, I think Ms. Petty -- or -- Perry, she

1 lived in Gonzales Gardens; she was a neighbor. She
2 testified ---

3 MS. BROWDER: This is page 273 where her testimony
4 begins, Your Honor.

5 Q --- that she was scared to be there to testify. Do
6 you recall that?

7 A I read it in the transcript. But ---

8 Q Okay.

9 A --- I -- I don't necessarily recall when she actually
10 said it.

11 Q Okay. And it's fair to say, if you read the
12 transcript, that you did not object to that in any way?

13 A I did not.

14 Q Okay. Kind of regarding the gang issue ---

15 A Uh-huh.

16 Q --- this kind of came about during Investigator
17 Pegram's testimony.

18 MS. BROWDER: Which begins page 758, Your Honor.

19 Q The gangs came up. And basically, Mr. Gray was not
20 affiliated with them, but the niece was found to be
21 affiliated with the Bloods, as part of testimony. That's
22 what Investigator Pegram testified to. And at that point
23 you objected, correct, to the gang information?

24 A I would have to rely on the record.

25 Q Okay. And it was ultimately found, I believe, that

1 you had opened the door because of the Marcellius Brooks
2 and this other fight that occurred about the gang
3 information coming in?

4 A Well, I think that my concern with regards to
5 associating the person named Lucy with a gang member is
6 that I don't ---

7 Q Is ---

8 A --- think I ---

9 Q Is that the niece ---

10 A Yes.

11 Q --- Lucy? Okay.

12 A I don't think I ever received any information in
13 discovery or anything that would have linked her to that
14 group.

15 Q Okay.

16 A So I'm -- I think my -- my objection to that would be
17 that that was, like, new information and I didn't know what
18 the basis of it was.

19 Q Okay. To get, I guess, a little bit to the testimony
20 regarding Mr. Gray testifying at trial ---

21 A Right.

22 Q --- throughout your meetings with him prior to trial,
23 your testimony indicates that he indicated he was going to
24 testify all the way through?

25 A Yes.

1 Q Okay. And he obviously testified that he wanted to
2 testify. Did y'all ever have a disagreement over this?

3 A He wanted to testify. I -- I prepared a case for him
4 to testify.

5 Q Okay. And what -- did y'all ever have any
6 disagreements whatsoever?

7 A I think I had some concerns with accessibility to him,
8 with regards to getting in touch with him and him coming to
9 my office and being on time and stuff like that. And I'm
10 ---

11 Q Okay.

12 A --- I might have, you know, said that to him and
13 whatever. And I don't think I was offensive when I said
14 it. But I'm on a tight schedule, and I'm trying to get
15 some work done. And ---

16 Q Okay.

17 A --- we were on a deadline.

18 Q Okay. And he did send paperwork -- and you never
19 filed it, but he sent in paperwork to relieve you as
20 counsel at some point, correct?

21 A I never saw that.

22 Q Okay. So you're not aware if he did not?

23 A Not to my knowledge.

24 Q Okay. And so your testimony is he was going to
25 testify all the way through, then all of a sudden, just

CROSS-EXAMINATION BY MS. BROWDER - MATHIAS CHAPLIN 53

1 randomly, without giving a reason at the end, he decided he
2 wasn't going to testify?

3 A That's my testimony.

4 Q Okay. And your -- and it's your testimony that he
5 never gave you a reason why he decided not to testify?

6 A I never got a reason.

7 Q Okay. And finally, regarding -- do you recall the
8 state's closing argument?

9 A Yes.

10 Q Okay. Do you recall, at some point during the closing
11 arguments ---

12 MS. BROWDER: Beg the Court's indulgence, Your Honor.

13 Q --- Ms. Campbell making the statement that there's
14 absolutely no evidence that supports Robin Reese and Henry
15 Gray of being innocent?

16 A I don't remember that statement. But it's not beyond
17 Ms. Campbell to make a statement like that.

18 Q Okay.

19 MS. BROWDER: And that's page 1133, Your Honor ---

20 THE COURT: Okay.

21 MS. BROWDER: --- in the transcript.

22 Q Did you object to that in any way, based on the fact
23 that that could've been considered burden-shifting, that
24 there had been no evidence put up that they were innocent
25 ---

1 A Well ---

2 Q --- indicating that you could've -- you had to prove
3 that he was innocent?

4 A I would have to rely on the record. And if ---

5 Q Okay.

6 A --- I didn't object, I probably should have.

7 Q Okay.

8 MS. BROWDER: Beg the Court's indulgence.

9 (Whereupon, Ms. Browder and the applicant conferred.)

10 MS. BROWDER: No further questions, Your Honor.

11 THE COURT: All right.

12 MS. KINARD: No redirect, Your Honor.

13 THE COURT: You may ---

14 MS. KINARD: We ask ---

15 THE COURT: --- step down. Thank you.

16 MS. KINARD: Sorry. We'd ask that Mr. Chaplin be
17 excused.

18 MS. BROWDER: No objection.

19 THE WITNESS: Thank you.

20 MS. KINARD: No further witnesses from the state.

21 (Whereupon, the witness exited the witness stand.)

22 THE COURT: All right. Let's -- if someone wants to
23 make a brief argument. I don't require that, so -- be glad
24 to hear from you.

25 MS. BROWDER: I would like to make a brief one, Your

1 Honor.

2 MS. KINARD: I just want to make a quick motion. I
3 believe there's at least one allegation that was not
4 presented: that evidence was not presented regarding
5 during the presentation of the case, and we would ask that
6 be deemed abandoned.

7 THE COURT: All right. Which was that?

8 MS. KINARD: Specifically, H on the amendment about
9 failure to obtain a ruling on a lesser-included offense.

10 THE COURT: All right.

11 MS. BROWDER: That's as to the lynching, Your Honor.
12 We don't object to that.

13 THE COURT: All right. So be it.

14 MS. BROWDER: All right. Thank you, Your Honor.

15 Your Honor, we would ask that this case be overturned
16 on several reasons. Ultimately, the main one -- or the one
17 I think is most significant is this fact that Mr. Gray was
18 obviously shackled throughout the trial. Mention was made
19 of it in the opening argument. His testimony indicated he
20 was shackled both feet and arms.

21 *Deck v. Missouri*, Your Honor, Supreme Court case, 125
22 SC 2007, which was decided in 2005, indicates that it is
23 inherently prejudicial for a defendant to be shackled
24 during a trial. However, there are exceptions. And it
25 just needs to be put on the record why these defendants are

1 shackled, whether it be for safety or some other reason for
2 that. It must be on the record, or else it's inherently
3 prejudicial.

4 In this case Mr. Chaplin testified they had a
5 discussion about it in chambers. But it's very clear,
6 there's nothing in the record about it. So we would ask
7 that it be overturned on that, Your Honor.

8 In addition, we would be -- ask that it be overturned
9 regarding this *Batson*-motion issue. Mr. Chaplin pretty
10 much deferred to the record -- record when it came to the
11 *Batson*. There were, I believe -- let me find my notes
12 again, Your Honor.

13 (Off the record briefly.)

14 MS. BROWDER: I believe there were eighteen total
15 strikes by the defendants. There were fifteen, I believe,
16 that were found to be non-race-neutral or gender-neutral.
17 Fourteen of those were Mr. Chaplin, Your Honor.

18 In addition, there were, I believe -- or nine were Mr.
19 Chaplin. I believe five were Mr. Farley, who is the
20 cocounsel for Robin Reese, the codefendant in this case,
21 Your Honor.

22 It's our -- it's our position that: (1) he was
23 ineffective for not having reasons to strike those
24 particular jury -- jurors. In addition, some ended up
25 actually back on the jury that was on Mr. Gray's jury panel

1 for this trial.

2 In addition, he did not object to the fact that Mr.
3 Farley had some of these jurors and that Mr. Gray would be
4 prejudiced by the fact that those jurors were back in the
5 jury pool, when it's based on something that Mr. Gray nor
6 his attorney had anything to do with, Your Honor.

7 Those are the main issues, Your Honor, in addition to
8 the object to the burden-shifting in the state's closing
9 argument, indicating that there was no evidence to prove
10 that they were innocent. I do believe that's a clear
11 burden-shifting he should have objected to.

12 And then, we would just rely on the record and it's in
13 your discretion regarding whether Mr. Gray would've
14 testified or not. That's -- obviously, it comes down to a
15 credibility -- credibility issue between Mr. Gray and Mr.
16 Chaplin.

17 But it's our position that he did not testify because
18 Mr. Chaplin was indicating to him that he should not
19 testify, and the fact that Mr. Chaplin could not give a
20 reason whatsoever why Mr. Gray, all of a sudden, just
21 decided at the last minute to testify, I believe, is
22 inconsistent. And it shows that Mr. Gray wanted to
23 testify. I -- I don't believe he would just have randomly,
24 all of a sudden at the end, just said, "I'm not going to do
25 it."

1 So those are our reasons, Your Honor. We ask that it
2 be overturned.

3 THE COURT: Thank you.

4 MS. KINARD: Thank you, Your Honor. Specifically,
5 regarding *Deck v. Missouri* and the shackling issue, that's
6 a direct-appeal issue, the state would allege. There is
7 nothing in *Deck v. Missouri* about ineffective assistance of
8 counsel being found for that. And we believe that that
9 could've been taken up on direct appeal.

10 Regarding *Batson* the fact that some of the same jurors
11 ended back up on the jury for different reasons is not, per
12 se, ineffective assistance of counsel. He could've
13 objected. He may have objected. And I believe the record
14 will reflect that just because some race-neutral reasons
15 may have been given and they ended up on the jury is not an
16 ineffective-assistance-of-counsel issue.

17 Regarding burden-shifting, perhaps that should've been
18 objected to. But it certainly is not prejudicial, in light
19 of the entirety of the trial and the record taken as a
20 whole.

21 As far as overall performance -- oh. Excuse me. I
22 forgot about the testifying. I think it's very credible
23 for Mr. Chaplin that based on his work, the evidence
24 presented of him hiring an expert, hiring an investigator,
25 he went through a great deal of effort and time in order to

1 prepare this -- this case for trial. He has no memory of
2 Mr. Gray ever saying he didn't want to testify. And it is
3 not beyond the realm of possibility or believability that
4 Mr. Gray just changed his mind at trial, for whatever
5 reason.

6 There were -- there was at least one plea offer, a
7 very good plea offer, in the state's opinion, that was
8 rejected by Mr. Gray. And for that reason there -- there
9 seems to be no indication that Mr. Chaplin ever advised,
10 coerced, or any other manner tried to change Mr. Gray's
11 mind regarding testimony.

12 So for all of these reasons, we believe that there is
13 simply no -- no prejudice done to Mr. Gray by Mr. Chaplin
14 in his representation. Therefore, none of these
15 allegations fit the test that's provided in *Strickland v.*
16 *Washington*, and this PCR should be dismissed. Thank you.

17 THE COURT: Thank you, Counsel. Appreciate y'all's
18 presentations. All right. I'll have to take a look at all
19 these documents. It's going to take a little while.

20 MS. KINARD: Thank you, Your Honor.

21 MS. BROWDER: Thank you, Your Honor.

22 (Whereupon, the proceeding was concluded at 11:56 a.m.)

23 --- END OF TRANSCRIPT OF RECORD ---

24

25

CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 30TH
DAY OF AUGUST, 2017.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JANUARY 30, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Henry L. Gray, #162134,

2014-CP-40-4139

Applicant,

vs.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

JEANETTE W. McBRIDE
C.C.P., G.S., & F.C.

2019 JUL -1 PM 12:07

RICHLAND COUNTY
FILED

This matter is before the Court by way of a Post-Conviction Relief (PCR) Application filed on July 1, 2014, and an Amended Application filed on July 10, 2017. Respondent made its Return on November 19, 2014. The Court held an evidentiary hearing into the matter on August 30, 2017, at the Richland County Courthouse. Applicant (Gray) was present at the hearing and Anna Rawl Browder, Esquire, represented him. Assistant Attorney General Jessica E. Kinard represented Respondent.

Gray testified on his own behalf at the evidentiary hearing, while the State presented testimony from trial counsel, Mathias Chaplin, Esquire. The Court also had before it a copy of the trial transcript; the records of the Richland County Clerk of Court regarding Gray's convictions; the records from Gray's direct appeal; and Gray's South Carolina Department of Corrections (SCDC) records. The Court now denies relief and makes the following findings:

I. PROCEDURAL HISTORY

Gray is presently confined in the McCormick Correctional Institution of SCDC, as the result of his Richland County convictions and sentence. The Richland County Grand Jury indicted him on March 10, 2010, for lynching in the first degree. The Richland County Grand Jury

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thereafter indicted him on October 5, 2011 for murder. The Richland County Grand Jury similarly indicted his sister, Robin Reese (Reese), in March 2010 for lynching in the first degree (2010-GS-40-0040), and for murder in October 2011 (2011-GS-40-4916).

On February 28-March 2, 2012, Gray and Reese received a joint jury trial before the Honorable G. Thomas Cooper.¹ At trial, Mathias Chaplin, Esquire, represented Gray and Andrew Farley, Esquire, represented Reese. Fifth Circuit Deputy Solicitor K. Luck Campbell, and Assistant Solicitors April Sampson and Nicole Simpson prosecuted the case. The jury convicted both defendants, as charged. Judge Cooper imposed concurrent sentences of thirty years imprisonment for each conviction, on each defendant.

Gray timely served and filed a notice of appeal. Assistant Appellate Defender David Alexander represented him on appeal. On October 21, 2013, Gray filed a Final Brief of Appellant, in which he presented two issues to the South Carolina Court of Appeals:

1. Whether the trial court erred in admitting gruesome autopsy photographs that were unnecessary to prove any contested fact and which unduly prejudiced appellant?
2. Whether the trial court erred in refusing to give an involuntary manslaughter charge because evidence showed that the decedent's death could have been the result of a trivial fight?

The State filed a Final Brief of Respondent on October 4, 2013. The South Carolina Court of Appeals affirmed Gray's convictions and sentence on June 11, 2014. *State v. Gray*, 2014-UP-5240 (S.C. Ct.App., June 11, 2014). It sent the Remittitur to the Richland County Clerk of Court on June 27, 2014.

II. ALLEGATIONS

Gray alleged the following grounds for relief in his original Application:

¹ Judge Cooper denied the defendants' pretrial motions for a severance.

1. **Ineffective Assistance of Counsel:**

- a. but for counsel Mathias Chaplin's unprofessional errors, the result of my trial would have been different;
- b. "[Counsel failed] to properly research and investigate the facts, laws and or "any" reasonable sound trial strategy(ies) surrounding the entitlement of my case with prejudiced my trial and appeal. (Sic).

Additionally, he raised eight claims in his Amended Application:

- a. Ineffective assistance of counsel - counsel failed to adequately prepare for trial with Applicant;
- b. Ineffective assistance of trial counsel—counsel failed to object and allowed Applicant to be shackled during entirety of trial;
- c. Ineffective assistance of trial counsel—counsel failed to object to the same jury pool being used after a *Batson* motion was granted;
- d. Ineffective assistance of trial counsel—counsel failed to object to witnesses testifying they were scared to testify;
- e. Ineffective assistance of trial counsel—counsel failed to object to information regarding gangs being introduced and/or opening the door to such testimony;
- f. Ineffective assistance of trial counsel—counsel failed to object to burden shifting in the State's closing argument;
- g. Ineffective assistance of trial counsel—counsel forced the Applicant to not testify regarding his defense; and
- h. Ineffective assistance of trial counsel —counsel failed to obtain a ruling on the record regarding a lesser-included charge on lynching.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and

conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Evidence Presented At Trial

1. The prosecution's case.

On the afternoon of February 13, 2010, two officers with the Columbia Police Department were dispatched to a fight involving several people on McDuffie St. in Columbia.² They were told that one person involved in the altercation was wearing a red hoodie or hat, and that another person involved in it had on a black sweat shirt or hoodie and was carrying a red backpack or satchel. *Tr. 175; 177-78; 192-96; 206.*

The officers did not find a fight when they first arrived at McDuffie St. However, one officer saw an individual with a red backpack enter an apartment, as they drove through an apartment complex near this street. So, after notifying the other officer of what he was going to do, this officer went to that apartment and spoke with Ms. Valerie Goodwin. She told him that that "Bloom," Marcellius Brooks, had come into her apartment but was no longer there. *Tr. 178-79; 182; 189-90; 196-98; 205-07.*

The officers then received a call that there was a person on the ground between two buildings in the apartment complex. When they investigated the call, they found an unconscious man, later identified as Kenneth Mack, lying on the ground. Mr. Mack looked like he had fallen and he had injuries to his nose and lip. Also, he did not respond to a sternum rub and it appeared that he was having a seizure.³ So, the officers immediately called EMS, and Mr. Mack was

² All locations referred to in this Order are in Richland County, unless otherwise specified.

³ Mr. Kevin Thomas, a Richland County EMT who responded to the call testified that Mr. Mack "was having some posturing signs." He explained that this is an involuntary response that is similar to a seizure "but it is more indicative of a brain injury. It's a different part of the brain than a seizure." *Tr. 386, lines 9-18.*

transported to Richland Memorial Hospital shortly before 3:30 p.m. *Tr. 179-81; 184; 198-200; 382-88; 678-80.* Mr. Mack was pronounced brain dead shortly after he arrived at the hospital. *Tr. 679-80; 760.*

A number of witnesses testified at trial to the attacks that ultimately resulted in Mr. Mack's death. As can be expected, these eyewitnesses gave varying accounts of the attacks. The first eyewitness called by the State was Angelo "Ricky" Boyd. Boyd testified that he was sixteen years old when the beatings occurred and that he lives on McDuffie St. On the afternoon of February 13, 2010, Boyd met up with his friend, Marcellius Brooks, and the two started walking to Cousins Mini Mart, on Forest Dr., which was a very short distance from where the victim was later found. *Tr. 242-45; 254; 523-25.*

As they were walking, they saw a man grabbing on the arm of Melquanna S., a/k/a "Lucy," Robin Reese's thirteen year old daughter. "She was yelling 'Stop.'" The man, Mr. Mack, did not stop and, eventually, he "threw her to the ground." Boyd is a friend of Lucy and her brother. So, he and Brooks intervened. Brooks tackled the victim and held him down. Boyd kicked the victim's face or body with his Timberland boots and, at the insistence of Brooks and Boyd, Lucy hit the victim "a couple" of times while Brooks held the victim down. *Tr. 245-48; 254-55; 260-63.*

By this time, a crowd had gathered. After this beating, Brooks and Boyd took Lucy to Cousins Mini Mart, to let Reese know about what had happened. They also let her know that "it was already good." Reese looked as if she was going to finish her video poker game.⁴ Boyd and Brooks then both left the store. *Tr. 248-54; 256-57.*

⁴ While Boyd testified that he did not recall doing so, he admitted that he could have told police that upon hearing that the man was harassing her daughter, Reese "jumped up and said, 'Hell, no.'"

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Police reviewed the store's surveillance video and could see that several men came into the store and approach a woman who was playing video poker. The men then left and headed back towards the apartment complex. *Tr. 457-58; 523-28; 798-99; State's Exhibit 78.* Malik Akbar, one of the store's co-owners at the time, testified that he ran the store's restaurant. He was familiar with Reese, Gray and Brooks. He testified that Reese would come into the store and play video poker. *Tr. 523-25; 530-31.*

Mr. Akbar saw Reese playing video poker there on the afternoon of February 13th. At some point, a group came into the store and Mr. Akbar saw the group, including Lucy and Brooks, talking to Reese and "dancing around" where Reese sat. Also, there was "quiet fussing." Lucy and Reese left a short time later. *Tr. 532-39; 541-42.*

Police also reviewed a video of a nearby fish market. State's Exhibit 93. This video "corroborated that Brooks went to the store after the attack, "told Ms. Reese about the assault with her daughter and that she had left with her daughter and that she was on the cell phone at the time when she walked out the door." However, there were technical problems when police tried to seize the video. *Tr. 773-75.*

Donetti Perry lived across the hall from Gray's father in the Columbia apartment complex where the crimes occurred. Her friend, Sanovia Thompson, came to her door about mid-afternoon on February 13, 2010, and told her that something was happening outside. When Ms. Perry went to her door and looked outside, she saw Mr. Mack having a conversation with "Six," or Gray.⁵ *Tr. 274-79.*

He also could have told police that Reese stayed in the store and finished her video poker game. *Tr. 250-51; 253.*

⁵ Ms. Perry did not know Mr. Mack at the time and she was unaware of the first assault. *Tr. 295-96.*

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Gray was apparently unaware of the previous difficulty at that time and asked Mr. Mack what had happened to him because Mr. Mack looked like he had been in a fight. As soon as Gray received a phone call, however, Gray returned and used his feet to "clip" or undercut Mr. Mack's feet from under Mr. Mack. This caused Mr. Mack to immediately fall to the ground and strike his head. *Tr. 279-81.*

Even though Mr. Mack stayed on the ground, Gray repeatedly kicked him "all over." Gray also cussed him and asked him what he had done to Gray's niece. At some point, Reese came from her apartment and joined the assault. Reese said, "yes, that's him" and started kicking him [while] saying ... 'I'm going to teach you for messing with my daughter' ... [or] something similar to that." Mr. Mack never got off of the ground or "put up a fight." Nevertheless, Reese got a metal chair off of a nearby porch, and both she and Gray hit Mr. Mack with it "two or three times." *Tr. 281-87; 301; 303-06.*⁶

By then, a crowd had gathered. Eventually, the sibling co-defendants stopped their savage onslaught and walked back to their respective apartments. Ms. Perry could see that Mr. Mack was injured "all over," and that blood was coming from his mouth. Thompson called the police. *Tr. 287-90.*

⁶ Police seized the chair (State's Exhibit 72) and it was swabbed for DNA. *Tr. 444-46; 448-49.* Subsequent testing of these swabs by SLED DNA analyst Katie Ukra revealed that a presumptive test for the presence of blood was positive on several swabs. More importantly, a partial DNA profile was developed from the bottom seat of the chair and this partial profile matched the DNA profile of Mr. Mack, the victim. "The probability of randomly selecting an unrelated individual having a DNA profile matching this item is one in approximately twenty-five million." *Tr. 605-12.*

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Mary Anderson testified that her deceased sister also lived in the same apartment complex in February 2010, and that she had visited her sister on the afternoon of February 13th. As she was leaving, she saw Reese and Gray⁷ "beating the boy down [on] the ground[,] stomping [him], kicking him, doing everything and beating him with an iron chair," and the victim "wasn't moving at all."⁸ She testified that she was unable to recall who used the chair, but she had indicated in her statement to police that both defendants did. Reese was wearing a pair of boots. *Tr. 347-53; 361; 367-68; 379-80.*

As Reese was attacking Mr. Mack, Ms. Anderson heard Reese say, "[M]otherfucker, why [did] you approach my 13-year-old?" This attack "[l]asted for a while" and was so intense that Ms. Anderson momentarily turned away from it and eventually had to leave. She was concerned that Reese and Gray were going to kill the man. After Reese and Gray stopped their attack, they walked to their father's apartment. *Tr. 353-56; 361; 368.*

In February 2010, Kara Chase was homeless but her best friend, Synovia Thompson, lived in the apartment complex where the beatings occurred.⁹ On the afternoon of February 13th, she and Ms. Thompson were outside with one of the children of Ms. Thompson's cousin. Ms. Chase remembered seeing a man whom she did not know walking down the street that runs through the complex. This man had a "disagreement" with "Six," i.e., Gray, over something the man had said. Gray grabbed the man and told him, "you[re] gonna talk to me." *Tr. 393-99.*

⁷ She knew them through their father and recognized both. She identified Gray as "Six." *Tr. 349.*

⁸ She did not know the victim but knew that he worked at a Forest Drive barber shop. *Tr. 351.*

⁹ She was blind and on dialysis by the time of trial. *Tr. 401, lines 22-23.*

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The grab "wasn't forceful but it looked like Mr. Mack didn't want to go with him either." Something else was said and Gray hit Mr. Mack hard enough to take Mr. Mack's feet out from under him. Mr. Mack fell to the ground and did not get up. *Tr. 399-401; 403.*¹⁰

"That's where it kind of gets blurry to me because I don't remember exactly what happened from right there while the man was lying on that particular area. ... I know when the man hit the ground that [Gray] walked off." Ms. Chase remembered Mr. Mack saying, "I'm not going anywhere;" Reese saying, "That's him;" and Reese hitting Mr. Mack. She also remembered telling police that it looked like Mack hit his head when he fell to the ground and was "out cold" after this point. And she remembered telling police that "the other man continued to kick and stomp the man in his face once the female stopped." However, she claimed that did not remember Reese striking Mr. Mack with a chair or even picking up a chair. *Tr. 401-07; 410; 412-13; 422-24.*

During the attack, Gray hit Mr. Mack with the chair. Also, Gray was wearing construction boots in the attack. Once the attack ended, Mr. Mack just lay on the ground. "Either he was faking it, so that way nothing else would happen to him, or he was seriously hurt." *Tr. 407-08; 412-13.*

Because of the inconsistencies between Ms. Chase's testimony and what she told police, the State was allowed to introduce and publish her February 16, 2010 statement to police, as State's Exhibit 88. In her statement, she stated that:

I saw the victim in between ... [two] buildings of [the apartment complex] having a conversation with another man. The other man grabbed the victim and went to walk him down the sidewalk. The victim snatched back and the other man swept the victim from [off] his feet causing the victim to hit his head on the pavement A few seconds later a female runs up the street saying "That's him." She begins

¹⁰ Ms. Chase's daughter is the best friend of Reese's daughter (*Tr. 402*) and, unfortunately because of that friendship, her physical limitations or because Reese, Gray and Lucy S. are all affiliated with the Bloods (*Tr. 765; 799-800; 827; 830*), Ms. Chase's trial testimony deviated wildly from her statements to police, beginning at this point forward. *See also Tr. 421, lines 22-24* (admitting that she would like to do what she could to help the defendants).

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kicking the man repeatedly, picking up an old metal chair, throwing it on top of the victim. The other man continued to kick and stomp the man in his face. Once the female stopped, the victim laid on the ground the whole time this was occurring."

*Tr. 750, lines 1-16.*¹¹

Ms. Chase did not know the victim but she identified the male attacker as "Six" and the female attacker as his sister. Likewise, she had heard Mr. Mack say, "I am not going anywhere. Just do what you're doing to do to me here." Further, she indicated that Mr. Mack "did not have a chance to fight back or flee" and that "Six" was wearing construction boots. *Tr. 750-52.*

On February 13, 2010, Amber Hardy was the pharmacy manager at the CVS pharmacy located on Forest Drive near the apartment complex. While she was in her car following a shoplifter and on the phone with police that afternoon, she saw four black males and a black female taking turns kicking and punching another black male on McDuffie St. The victim was trying to defend himself. The beating only lasted for about "five minutes," but Ms. Hardy testified that "[i]t seemed like forever." *Tr. 474-78; 480-83; 490.*

After this "brutal" attack ended, the attackers walked away from the victim and to the open air market. The victim could stand after the attack. However, he was very unsteady on his feet. Ms. Hardy returned to CVS. *Tr. 477-78; 489-90.*

Marcellius Brooks, a/k/a "Bloom," testified that he had been charged with murder in this case, but that he cooperated with law enforcement and was testifying because he was innocent of killing Mr. Mack. *Tr. 572-73; 575; 578-79; 592.* Brooks used to live in the apartment complex where the beatings occurred and he was familiar "with the open air market ... on Forest Drive,"

¹¹ When interviewed by an investigator with the Fifth Circuit Solicitor's Office on the day before the trial started, Ms. Chase confirmed that her February 16th statement was correct. *Tr. 732-36; 745.*

Cousins. He was friends with Reese and used to be her next door neighbor. He also knew that she had a thirteen year old daughter named Lucy. He "knew of" Gray, to whom he referred as "Six." *Tr. 552-56; 580.*

As Brooks was walking down McDuffie St. on the afternoon of February 13, 2010, he saw Lucy involved in an altercation with a man that he had never seen. At first, she and the man were talking, but she soon slapped him. After that, the man picked up Lucy and slammed her on the ground. In response, Brooks decided to help Lucy. *Tr. 556-58; 582.*

Brooks "bum rushed" the man, or "tackl[ed] him off of her." Brooks admitted that he hit the man twice "[w]ith a closed fist" while he held the man down. He denied anyone else kicked the man except for Lucy, whom Brooks persuaded to kick the man several times. However, Brooks was on top of the man and she could not kick him cleanly. As they were on the ground, a crowd started to gather. *Tr. 558-61.*

At some point, Boyd pulled Brooks off of the man. The man ran away from Brooks and "towards the bottom of [the complex]." The man had a busted lip. *Tr. 562; 569; 583; 590-91.* Brooks and Boyd then walked Lucy to the open air market because Reese was there playing video poker and he wanted to tell Reese about what happened. The crowd followed them. When Brooks told Reese what had happened, she was "upset." She asked who the man was, and both Brooks and Lucy said that they did not know. *Tr. 562-65; 597.*

Reese and Lucy soon left the store. Although she called someone on her cell phone as she was leaving, Brooks did not know whom she had called. Reese was mad when she and Lucy left the store, and she walked down Forest Drive. Brooks did not accompany them. Instead, he walked down McDuffie St. and went to Valerie Goodwin's apartment, as he had previously planned to do.

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There, he got some money to give to her incarcerated son. Brooks' mother then picked him up and took him to her home. *Tr. 565-70.*

The police called Brooks' phone the following day and he turned himself in on February 15th. The charges against him were still pending at the time of trial and he had not received any promises or consideration on his charges, in exchange for his testimony. *Tr. 570-76; 578-79.*

Sanovia Thompson testified that she lived in the apartment complex where the beatings occurred. On the afternoon of February 13, 2010, Ms. Thompson was babysitting her cousin and five children. The children were running around playing outside, but Ms. Thompson "was back and forth" because Ms. Chase was staying with her at the time. As Ms. Thompson was sweeping her stairs outside, she saw a man whom she did not know walking on the sidewalk on Forest Drive, "with his hand over his head. He appeared to be intoxicated" *Tr. 635-38.*

Although the man could talk, he "had a knot on his head and it obviously was bleeding. He was kind of like staggering." After the man spoke to someone else, Gray looked at him and asked, "[w]hat happened to you?" Gray then started to go "on about his business." The man "said something about some young b-i-t-c-h up the street." Just then, Gray's telephone rang and he went into his father's apartment to answer it. *Tr. 637-41.*

As soon as Gray came back outside, his demeanor had changed. He said, "you put your hand on my niece." He grabbed [the man] on the collar. He said, 'we're going to talk to my sister.'" ¹² Ms. Thompson followed the men, and when she saw them again, the man was on the ground. Reese was walking up the sidewalk and "looked like she was upset, maybe crying." *Tr. 642-45; 653.*

¹² Thompson had known Reese for roughly five years at the time. *Tr. 642.*

Because Ms. Thompson was unsure about what would happen next, she took the children inside. When she came back out, she saw Reese ask the man, "Why did you put your hand on my baby' or something like that. She kicked him on the leg one or two times." Then, Reese and Gray walked away from the man, who had never defended himself and did not get up. Ms. Thompson called 911 and Ms. Chase reported that the man was lying on the ground. *Tr. 645-47; 650.*¹³

Issac Weathers testified that he lived in the same apartment complex in February 2010, and that he witnessed a fight on February 13th. "A young lady and a guy [were] arguing." At first, Mr. Weathers thought that they were playing. They got "tangled up and they fell." Then, "a bunch of guys just went and jumped on him." Brooks or "Bloom" was the first person to hit the man. The girl also hit him at Brooks' invitation for her to "get your licks in." *Tr. 656-58; 662; 664.*

The man who was being beaten tried to convince his attackers that he and Lucy had been playing. Also, he tried to defend himself. When the attackers stopped beating him, the man "jumped up and ran." The attackers went to the store. Mr. Weathers heard Brooks say that he did not get the man good enough. *Tr. 658-60; 665; 670-71.*

Dr. Bradley Marcus testified that he is a forensic pathologist and he works as the chief medical examiner for Richland County. *Tr. 672-73; 677.* On February 16, 2010, Dr. Marcus performed an autopsy on Kenneth Mack.¹⁴ Dr. Marcus detailed the injuries that he found on autopsy through diagrams (State's Exhibit 86-87) and photographs (State's Exhibits 51-57 and 80-83). There was a contusion caused by blunt force trauma on the right portion of the face (State's Exhibit 52); a laceration over the left eye (State's Exhibit 53); a laceration to the side of the left

¹³ At some point, Ms. Thompson noticed that a neighbor's chair was in the grass instead of where it was normally kept. *Tr. 646.*

¹⁴ Although Mr. Mack was declared brain dead shortly after arriving at the hospital on February 13th, he was kept on life support until his organs could be harvested. *Tr. 679-80.*

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eyebrow (State's Exhibit 53); sclera hemorrhaging in whites of the eyes (State's Exhibit 54); an injury to his inner lip that had hemorrhaged (State's Exhibit 55); hemorrhaging along the scalp on the right side; hemorrhaging in the scalp on the back of the head; and hemorrhaging in the skin underneath the blunt force trauma contusion. *Tr. 681-89; 696-98.*

Dr. Marcus' internal examination focused on the head area and he concluded that the cause of death was a closed head injury due to blunt force trauma to the head. When he removed the skull cap and looked at the victim's brain, Dr. Marcus found "a significant injury and the ultimate cause of his death. ... There was a massive amount of subdural hemorrhage, a massive area of blood around the left area of the head." On the right, Dr. Marcus likewise found a subarachnoid hemorrhage and "cerebral contusions, which is actually hemorrhage in the brain itself." This is usually caused by blunt force trauma and required a "significant amount of trauma." *Tr. 698-703; 706; 710-11; 716-17. See also State's Exhibits 80-83.*

Dr. Marcus explained that a person can live with trauma on the scalp but a person cannot live with the hemorrhage on the brain, itself. Dr. Marcus opined that the victim could have possibly lived if there had only been a subdural hemorrhage. *Tr. 703-05.* Dr. Marcus also found a skull fracture "in the right parietal area," or "[t]owards the back of the head" and in the same area where he found the cerebral contusion and the hemorrhaging. Such an injury would require a "[s]ignificant amount of force" and it was "[a]bsolutely" consistent with a person having his feet swept out from under him and landing on his head. *Tr. 699-700; 704-05; 710-11; 712.*

The injuries that Dr. Marcus found on autopsy were also consistent with the "posturing" observed by the EMT. He opined that "[t]he second assault certainly contributed to [the victim's] death in this case," but he could not distinguish which injuries were sustained in the first attack from those injuries that were sustained in the second attack. *Tr. 706-09; 712; 719.*

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On cross-examination, it was established that a toxicology screen on the victim's blood reflected that he had marijuana and .125 mg. of Lorazepam, or Ativan in his system. Lorazepam is an anti-anxiety medication that is used to relax people. This level of Lorazepam was "in the midrange of therapeutic" and would not have contributed to the victim's death. *Tr. 712-15; 727.*

Dr. Clay Nichols, a forensic pathologist, testified that he was the chief medical examiner for Richland County when the autopsy was performed. In that role, he had reviewed the autopsy procedures followed by Dr. Marcus and concluded that it was correctly performed. *Tr. 1008-11.* Dr. Nichols had also reviewed Dr. Marcus' findings and the history that had been provided. He explained that "[t]he timeline and injuries indicate that it would have been a second assault where the deceased fell and hit the concrete, resulting in closed head injury. The first assault, the evidence isn't there for a head injury. The second assault, there is real good evidence for a head injury." *Tr. 1012.* Dr. Nichols had discussed his opinion with both the Coroner's Office and police and he adhered to that opinion. *Tr. 1012.*

Sgt. William Pegram testified that he is the supervisor of the City of Columbia Police Department's violent crimes unit and that he was the lead investigator in this case. The victim was already brain dead by the time Sgt. Pegram reached the hospital on February 13, 2010. *Tr. 758-60.* As part of the investigation, a search warrant was issued and the records obtained for Brooks' Nextel cell phone. *Tr. 771; see also State's Exhibit 75 (portions of Brooks' records).* Also, investigators spoke to many of the witnesses, including Brooks, Reese, and her daughter, Lucy.¹⁵

¹⁵ Lucy was interviewed on February 14th and provided information about Brooks. A warrant was obtained for Brooks' arrest on the 15th. *Tr. 769-70.* Reese had not mentioned being involved in an incident involving a chair and police were focusing on Brooks because they did not know that there had been a second attack. *Tr. 1036-40.*

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Police were unaware of the second attack when Reese and her daughter were questioned. *Tr. 769-71; 775-81.*

Because Reese's calls from her cell phone became important, Sgt. Pegram testified that a search warrant was likewise issued and the records obtained for her Nextel cell phone. *Tr. 786-87; see also State's Exhibit 76* (portions of Reese's records). He explained that there was a phone call from Reese to Brooks at 3:11 p.m. on the 13th and other calls between them that day. This showed deception in that Brooks and Reese knew each other, whereas they had tried to distance themselves from each other when interviewed. There was also a call from Reese to her father's telephone at 3:07 p.m. on the 13th, which police believed corroborated information that Gray had received a call before his attack on the victim. *Tr. 788-91.*

Among the witnesses presented in reply, the State presented SLED toxicologist Quintas Young, who testified that he had analyzed blood samples of the victim. There was "a negative blood alcohol." However, the drug screen was "positive for [benzodiazepines] and tetrahydrocannabinols[,] which we found later to be Lorazepam and a [metabolite] of marijuana/THC." Mr. Young indicated that the carboxyl THC that was present was "inactive" or non-interfering. This just meant that there was marijuana use in the past, and that it could possibly have been a week earlier, depending on the frequency of use. *Tr. 1015-16; 1018-20.*

Mr. Young further explained that Lorazepam, or Ativan, is in a class of drugs called "benzodiazepines." Benzodiazepines are commonly used to treat anxiety. However, "Lorazepam is normally administered in hospitals for head injuries ... [because] it [slows] the brain activity to prevent brain swelling." Ativan is "a very simple central nervous system depressant similar to that of alcohol" and the amount of Ativan found in Mr. Mack's system fell within the therapeutic range.

Even combined with Ativan, the THC found in Mr. Mack's system "would not play a role in impairment" because it was inactive. *Tr. 1020-22.*

2. Gray's evidence.

Gray's first witness was Dr. Adel Shaker, a forensic pathologist. While Dr. Shaker was critical of the manner in which the autopsy had been performed, he agreed that the cause of death was blunt force trauma to the head and that he could not determine which attack led to the death. However, Dr. Shaker opined that the fatal blow could have been struck in the attack McDuffie St. and that the victim could have experienced a lucid interval before herniation due to bleeding of the brain. Dr. Shaker further opined that, during the lucid interval, the victim could have walked to the location where the second attack occurred and then collapsed. *Tr. 844; 849-51; 854-60; 866-67; 892-93; 895.*

Dr. Shaker opined that the injuries he observed were not consistent with being beaten with a metal chair. Also, he hypothesized that the level of benzodiazepine in the victim's system, when combined with marijuana could have made the victim so unsteady on his feet that he fell. However, the drugs were unrelated to the cause of death and he conceded that hospital personnel had given the victim Ativan when he was admitted. *Tr. 852-53; 857; 863; 883; 889; 900.*

Ms. Kiki Burns testified that she had witnessed an incident on February 13, 2010, and that she had given a statement to police. She was working at a BP gas station immediately across Forest Drive from McDuffie St. As she was waiting on customers, she saw "four or five people running up the street." One man was in front of the others, and the others wore black hoods. *Tr. 993-96.*

The man in front ran to his left and he "must have tripped over a chain or something and he fell." The people who had chased him then beat him. Ms. Burns also saw a black female involved in the beating. After the attackers had walked away, the man tried to stand. However, "he

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stumbled back down." Ms. Burns "went to turn around and look and he was gone." *Tr. 996-97; 1002-04.*

3. Reese's evidence.

Dr. Sandra Conradi, Reese's forensic pathologist, testified that she had reviewed the autopsy report, the coroner's report, the investigative reports from the City of Columbia Police Department, the laboratory report and the photographs in this case. *Tr. 912-13.* Based upon Dr. Conradi's review of this evidence, she opined that the cause of death was brain injury, as the result of blunt force trauma to the head. *Tr. 915-16.*

She further opined that:

Mr. Mack was fatally injured in the second fight and in my opinion, he struck, his head on a hard surface, fractured his skull, suffered very severe head injuries including bleeding between the scalp and his skull, bleeding under the skull, between the skull and the brain and he had bruising or contusions of his brain along with the other fractures and associated abrasions and contusions of his face and mouth, which were not fatal. The fatal injury was the brain injury. He suffered that from falling and being propelled onto a hard surface on the back of his head.

Tr. 914, lines 8-20. See also Tr. 918, line 24 - 919, line 6.

She explained that it takes "quite a severe" force to fracture a skull, and this could not be caused by simply falling to the ground. Rather, "you have to be propelled very hard to fracture the skull as this Mr. Mack did on the right side of his head and causing the degree of brain bruising and bleeding that he had." *Tr. 916, lines 17-25.*

Melquanna "Lucy" S. testified that she was thirteen years old in February 2010. She had planned to get her nails done, at a salon on Forest Drive, on the afternoon of February 13th. However, the store was locked and a lady told her that it would not be open until Thursday.¹⁶ As

¹⁶ A review of a 2010 calendar reflects that February 13, 2010, was a Saturday.

she was standing there, a man approached her and said that she could come in his house. Although she did not know the man at the time, she later learned that this man was Mr. Mack. *Tr. 921-26.*

Lucy went into the open air market and told her mother that she could not get her nails done that day and she bought some potato chips. As she was walking home, Mr. Mack approached her again and asked her if he could have some chips. Lucy told him to leave her alone because she was "trying to avoid having a conversation with him." However, he stopped her in her tracks and was "jerking" her around. *Tr. 926-27.*

He also threw a snowball at her. When she told him that she was going to get her mother, he grabbed her with his right hand. In response, Lucy hit him with her right hand. Mr. Mack then picked her up, threw her between two bushes and they began "tussling." At that point, Brooks came over, "got [Mr. Mack] off of me, hit him a couple of times and then some dudes came and jumped on him." *Tr. 927.*

Lucy also got in "some licks," meaning that she hit him "a couple of times" because she was upset and thought that Mr. Mack had "harassed" her.¹⁷ After the fight, Brooks took her to the open air market, and the other participants in the beating followed. They told her mother what had occurred, and Reese took Lucy home. Lucy was crying when they got home and she told her mother that the man had attacked her. Reese was also upset, but they did not call the police. *Tr. 927-29; 933-34.*

The remaining defense witness was Robin Reese. She testified that she went to the open air market on February 13th to play a video game. Lucy "was on punishment" that day because of

¹⁷ She admitted on cross-examination that she had told police that she had also kicked him "a time or two. *Tr. 932, lines 4-7.*

her grades but Reese allowed her to go to the nail salon because it was close to Valentine's Day. When Lucy came back and told her the salon was closed, Reese told her to go home. Lucy left after buying a bag of potato chips with money that Reese had given to her. Reese stayed and continued playing the video game. *Tr. 936-38.*

Between twenty and twenty-five minutes later, Lucy came back, accompanied by Brooks and another man. At first, Reese was mad because she thought that Lucy had disobeyed her. However, Brooks, who had been Reese's neighbor, told her that he had just pulled a man off of Lucy. Lucy was crying and wet. Upset by what she had heard, Reese "wanted to know what happened and what do you mean 'pulled off?'" *Tr. 938-40; 955-56; 959; 962-63.*¹⁸

Reese got the tickets for her video game, took them to the counter and cashed them in. She and Lucy then left the open air market. She tried to call her brother but her father answered the phone. Reese hung up because he was too intoxicated to speak. *Tr. 941-42; 955; 964.*

I still wasn't satisfied. The only thing I know at this time was a grown man on top of my daughter. So I called [Brooks] and asked him what happened. He said that he really didn't know, that he'd just seen that the guy was tugging at her. He knew that was Lucy but he didn't know that grown man.

So after he seen it, they told me that it happened like two or three times that he had pulled on her coat. She'd turned around and hit him. He scooped her up and was on top of her and that's when [Brooks] came to her.

I was never a part of this. This is what came back to me.

*Tr. 942, line 18 - 943, line 6.*¹⁹

Following this conversation, Reese walked Lucy back home. After talking to Lucy to make sure that she had not been touched sexually, Reese "told her that I was going back to the store."

¹⁸ She did not think to call the police. *Tr. 963; 969-70.*

¹⁹ Reese also unsuccessfully attempted to call her then-husband, Lucy's stepfather. *Tr. 943.*

Reese left the apartment. Instead of going back to the store, however, she went to an area where she was told the man had gone and where a crowd had gathered because she wanted to know who had been on top of Lucy. *Tr. 943-44.*

Gray was on his way back from the Lizard's Thicket at that point. By the time Reese first saw the man, he was "[lying] on the ground and he had his hands ...covering his face." The man was "all bloodied up," but Reese did not see how he got that way. Also, she never saw the man's face but his clothes matched the description that Lucy had given her. *Tr. 944-46; 976-78.*

So I was raising hell, excuse me, excuse me, and I just wanted to know ... 'Why [were] you on top of her? Why would you even be hav[ing] a conversation or anything with a thirteen year old.' But he was just [lying] there. When I ran up, I tried to kick him but I slipped and fell because ... [of] the ice and stuff.

So instead of getting back up, I just reached over and I slapped him across his face and told him 'you stay away from my kid, you need to round grown women, there's grown people out here that you can be around.'

Tr. 946, lines 8-19.

According to Reese, this is when Gray first appeared at the scene and he helped her back to her feet. While she was still upset, he told her to let the police handle the matter. Reese saw the metal chair in front of an apartment and she slung it onto the grass. It did not, however, make contact with Mr. Mack's body. The man was not moving when Reese walked back to her apartment. *Tr. 946-47; 977-78.*

B. Ineffective Assistance of Trial Counsel

In a PCR action, the applicant bears the burden of proving the allegations in his 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 make a twofold showing. First, he must demonstrate that his attorneys' "representation fell below an objective standard of

reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). “Judicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” *Id.* (Citation omitted).²⁰

Even if an inmate proves deficient performance, he must also prove that he was prejudiced by his attorneys’ ineffectiveness because “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had

²⁰ As the Court in *Harrington v. Richter*, 562 U.S. 86, 105 (2011), explained,

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. —, —, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

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no effect on the judgment.” *Strickland*, 466 U.S. at 691. To show prejudice, he must prove “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. It is insufficient to prove “that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Instead, “[c]ounsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’ ” *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687).

Applying this standard to the claims raised by Gray, the Court finds that he has not met his burden of proof.

1. Counsel’s failure to adequately prepare for trial with Gray (Ground a).

The Court finds that Gray has not met his burden of proving that trial counsel was ineffective for failing to properly and adequately prepare for trial with him.

Gray testified at the PCR hearing that he was arrested in February of 2010 on charges of murder and lynching in the first degree. He made bond roughly a week later and remained on bond until he was arrested on unrelated charges in July of 2011. Although a different attorney represented him at his bond hearing, Mr. Chaplin represented him after that point and at the February 28 - March 2, 2012, trial. Counsel met with him three or four times prior to trial. *PCR Tr. 7-9.*

They first met in counsel’s office for roughly an hour after Gray made bond. Gray claimed that they had a disagreement about whether Gray would testify at trial. Gray wanted to testify and tell his version of the incident, but counsel allegedly was opposed to this strategy. Their next meeting was in November of 2011, after Gray was incarcerated at the Alvin S. Glenn Detention Center. They met for about thirty minutes and again had a disagreement about whether or not he

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would testify at trial. Counsel supposedly never explained why counsel did not want him to testify.

PCR Tr. 9-12; 21-22; 26-28; 30-31.

Gray claimed that he was so unhappy about their disagreement that he filed a motion to have Mr. Chaplin relieved as counsel and have someone else appointed to represent him. However, he changed his mind before the court acted upon this request. *PCR Tr. 12-13; 28.* He claimed that he did not testify at trial because he followed counsel's advice. According to Gray, he wanted to testify that it was "a freak accident." *PCR Tr. 22.*

He explained the "accident" as follows:

Mr. Mack was talking to another fellow ... when I rolled out the front door [of my father's apartment]. ... I'm looking at him. He all bust up, head knot and stuff on his head, bleeding.

So I said, "Oh, what happened to you?"

You know, he said, "Just beat."

So I ain't pay it no more attention. I walked back into my daddy house. Phone rang. My sister. She told me my niece was attacked. Dude slam her was on top of her.

....

So I asked her, "What ... he got on?"

She said, "This and that."

So I said, "Well, he around here." So I hung up the phone.

So I walked back off the porch. And I asked him, like, "Yo, what you did to my niece?"

So by then, I grabbed him from the -- by, like, back of [his] shirt on around the collar. And we ... proceeded to walk down the sidewalk. We were going to meet my sister and my niece. He snatch away; startle me. I clipped him up. [L]ike I say, when he turn around and jump around, I clipped his feet from under [him].

So ... after that ... he hit the ground. He was laying on t e ground with his hand over his face. I walked to the edge of building to see -- if I could see my sister and my niece coming.

So they came around and ... say that was him. And ... we roughed him up a little bit. And then we went on about our way.

PCR Tr. 23-24.

Gray testified that he did not intend to kill the victim. Rather, the victim startled him by "snatching away" as they were walking on the sidewalk looking for Reese. So, Gray "clipped him up. And he hit the ground." *PCR Tr. 24-25.* He acknowledged that counsel presented testimony from a doctor that the first fight, in which Gray clearly was not involved, "had a part in Mr. Mack's injuries," and that his sister had testified. However, he thought that his testimony would have supported a jury instruction on a lesser-included offense. *PCR Tr. 25.*

Despite his disagreement with counsel over whether or not he should testify, he admitted that counsel had "scanned through" the discovery with him, counsel had given him a copy of the discovery, counsel had discussed the charges against him and what the State would have to prove, and they had discussed the possibility of submitting the lesser-included offense of involuntary manslaughter. Gray admitted that he had understood those discussions. Also, he understood the benefits and risks for pleading guilty as opposed to going to trial, and he had rejected an offer to plead guilty to lynching in the first degree with a sentence of between two and twenty years. Gray understood that counsel was "shooting for" an involuntary manslaughter conviction. *PCR Tr. 10; 13-15; 29-30; 32-33.*

Trial counsel, Mr. Chaplin, testified that he was appointed to represent Gray because the Richland County Public Defender's Office had a conflict of interest. Mr. Chaplin's "practice is to meet with clients immediately after [being appointed]," and he was "pretty sure we met fairly quickly after I got the letter of appointment," which was after Gray had been released on bond. In total, he met with Gray "between eight to ten times" because "we covered a lot of ground." *PCR*

Tr. 35-36.

Counsel explained that:

We needed to develop all of the possible witnesses that we could identify. I had to get an investigator. I think my investigator spoke with Mr. Gray at least once or twice. We had to arrange times to go over to Gonzales Gardens and meet with all of these different witnesses and ... find out what their versions of it was.

Mr. Gray and I also talked extensively about me hiring [an] expert witness to come in and talk about the actual cause of death. Now, I will admit that a lot of these meetings after that were with me and these other parties. ... [S]o I know I spent a great deal of time on the case.

But I know that I spent a sufficient amount of time with Mr. Gray to apprise him of what I was doing, how I was doing it, and getting his input.

PCR Tr. 36.

To counsel's knowledge, the State had fully complied with discovery, and counsel both reviewed the discovery with Gray and gave him a copy of it. Also, counsel had discussed the charges Gray faced and the elements of both offenses with him. Unlike Gray, counsel's recollection was that their meetings were "somewhat pleasant." **PCR Tr. 36-37.**

Counsel obtained the services of a private investigator, and the investigator went to the apartment complex where the crime occurred and interviewed the potential witnesses whom Gray had identified. Counsel also personally went to the apartment complex to "look at the scene and look at the area so that when we started talking ... about the case ... and looking at some aerial photos that the state provided, that we would have our bearings." **PCR Tr. 39-40.** Counsel explained that after several of counsel's meetings with Gray, "it dawned on me that I think that there was an issue with the actual cause of death" because the victim had "received a vigorous beating by a group of people prior to him seeing Mr. Gray." **PCR Tr. 40.**

Based on this evidence of the previous beating, counsel was able to obtain funding for a forensic pathologist to testify as to the cause of death, Dr. Shaker. Counsel had several telephone conversations with Dr. Shaker and he met with Dr. Shaker once before Dr. Shaker's testimony. In this meeting, counsel reviewed the file with Dr. Shaker, and Dr. Shaker provided his opinion, which counsel then presented at trial. *PCR Tr. 40-41.*

As discussed, Dr. Shaker opined that the fatal blow could have been struck in the attack McDuffie St., that the injuries he saw were inconsistent with beating with a metal chair, and that the victim could have experienced a lucid interval after the initial beating and before herniation due to bleeding of the brain. Dr. Shaker further opined that, during the lucid interval, the victim could have walked to the location where the second attack occurred and then collapsed. *Tr. 844; 849-51; 854-60; 866-67; 892-93; 895.*

Counsel expressly denied advising Gray not to testify. To the contrary, counsel's defense – including obtaining Dr. Shaker's opinion – was based upon Gray's desire to testify at trial. *PCR Tr. 38-39.* Counsel testified that the State had offered a "very generous" plea to lynching that would have disposed of the charges, with a sentence of "somewhere between seven and ten" years. However, Gray rejected the plea because he was adamant that "he hadn't done anything wrong" and he wanted to tell his version of what happened.²¹ Yet, when the opportunity to testify at trial arrived, he decided that he no longer wanted to do so. He did not explain why he changed his mind. *PCR Tr. 38-39; 44-46.*

The Court finds that Gray has not proven either deficient performance or prejudice under *Strickland*. In *Strickland*, the United States Supreme Court gave the following explanation of the

²¹ The version that he told counsel was consistent with his PCR testimony. The State placed rejection of plea offer on record. *See Tr. 30.*

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deference reviewing courts owe to counsel's strategic judgments in terms of the adequacy of the investigations supporting those judgments:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. (Emphasis added). The Court further explained that:

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. at 691. (Emphasis added). *See also Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

The Court finds that counsel's testimony on the allegations before it credible and gives it great weight. Based upon his credible testimony, the Court finds that counsel's investigation was more than constitutionally adequate under *Strickland*. Specifically, the Court finds that: (1) counsel met with Gray between eight and ten times;²² (2) counsel filed discovery motions and reviewed the discovery responses with Gray; (3) counsel provided a copy of the discovery to Gray; (4)

²² While the Court rejects Gray's claim that counsel only met with him three or four times as not credible, the Court notes that even if it had accepted this testimony as credible, he would not be entitled to relief because "there is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'" *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005) (citing *United States v. Olson*, 846 F.2d 1103 (7th Cir. 1988)).

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counsel had no reason to believe that the State had not fully complied with discovery; (5) counsel obtained the services of both a private investigator and a forensic pathologist, Dr. Shaker; (6) the private investigator interviewed the potential witnesses that Gray had given to counsel; (7) counsel inferably had those witnesses' statements available to him; (8) counsel and the private investigator had visited the crime scene; and (9) counsel had Dr. Shafer's opinion, which contested the prosecution's theory of proximate causation and which he presented to the jury. The Court further finds that counsel kept Gray apprised of the results of the investigation and that Gray understood his conversations with counsel.

The Court rejects as incredible Gray's testimony that counsel opposed his decision to testify, or that counsel in any way discouraged him from testifying. Rather, the credible evidence is that counsel had reasonably based his defense of Gray, in large part, upon Gray's adamant desire to testify at trial and tell the above version of what had occurred. *See* Ground g. The Court further finds that Gray's ultimate decision to not to testify at trial – despite consistently leading counsel to believe that he would testify did not render counsel's pretrial investigation and preparation with Gray deficient under *Strickland*. *See United States v. Pellerito*, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so That is not the sort of 'ineffectiveness' for which relief can be granted").

The Court further finds that Gray has failed to prove that he was prejudiced by counsel's allegedly inadequate investigation or preparation with him for trial because he has failed to demonstrate any potential witness or defense that counsel's investigation supposedly overlooked. Accordingly, the Court is left to speculate as to what, if anything, further investigation may have yielded and he cannot show prejudice from counsel's alleged error. *See Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by

counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence") (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). See also *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result"). Finally, the Court finds that the prosecution presented overwhelming evidence of Gray's and Reese's guilt, both individually and under a theory of accomplice liability, as set forth in detail above. "The Prosecution's Case," *supra*. In light of this evidence of guilt, Gray cannot prove that he was prejudiced by counsel's alleged errors. See *Strickland*, 466 U.S. at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

2. Counsel's failure to object to Gray being visibly shackled during the trial (Ground b).

Gray's second allegation is that counsel was ineffective for not objecting to Gray being visibly shackled during the trial. In *Strickland*, the Supreme Court emphasized that "[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. This Court finds that is unnecessary to address *Strickland*'s deficiency prong on Ground b because Gray was not prejudiced by counsel's deficient performance. *Id.*

The trial transcript does not reflect that either defendant was shackled at trial, much less that the shackles were visible. However, trial counsel made the following comments in his opening statement:

Do any of you have any idea what the end of the world sounds like? If you were to ask my client that question, he would tell you it sounds like being wrongfully accused. It sounds like being arrested. It sounds like being incarcerated. It sounds like being taken away from your family. It sounds like being forced to sit in a courtroom, shackled. It sounds like pure and utter despair.

*Tr. 162, line 17 – 163, line 7.*²³

Gray testified before this Court that both he and Reese wore shackles, which were visible to the jury; that his legs and wrists were restrained; that jurors clearly saw him in shackles when he stood; and that they clearly saw Reese in shackles when she walked to the stand to testify in their presence. Relying on *Deck v. Missouri*, 544 U.S. 622 (2005), he asserted that counsel was ineffective for not objecting to the trial judge requiring them to be tried while wearing these visible restraints without making a finding that they were necessary. *PCR Tr. 15-17; 26-27; 55-56.*

When questioned about this issue, trial counsel testified it was obvious to jurors that his client was in shackles. *PCR Tr. 47.* He explained that both he and counsel for Reese objected to their clients being shackled in front of the jury during in chambers hearing because it was prejudicial. However, the trial judge ruled “that ... was required in this particular matter.” So, counsel felt that “there was nothing that I was able to accomplish with regards to having them removed.” *PCR Tr. 43.* He did not place his objection on the record. *PCR Tr. 47.* Counsel made

²³ Counsel’s remaining comments suggested that the State could not prove its case against Gray because a third defendant, Marcellius Brooks, was actually responsible for the victim’s death. However, he was not being tried and the State did not mention him. Counsel suggested that “Brooks and his thugs beat the life out of the deceased” and then did “a celebratory dance acknowledging that.” *Tr. 164.* Counsel agreed with the State that others were involved in the victim’s murder but not Gray, who was innocent of the charges against him. *Tr. 163-67.*

the reference to Gray's shackling in opening statement "to try to soften the blow a little bit." *PCR Tr. 44; PCR Tr. 47.*

In *Deck*, the United States Supreme Court held that visible restraints may be used if "justified by an essential state interest" such as security. *Deck*, 544 U.S. at 624 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)). However, relying on precedent concerning the guilt phase of trials, the Court concluded that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial judge's determination, in the exercise of his discretion, that they are justified by a state interest specific to a particular trial" including "potential security problems and the risk of escape at trial." *Id.* at 629. *See also id.* at 632 ("But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case"). Even if exceptional circumstances warrant the use of visible restraints, the trial judge must make on-the-record findings as to the circumstances that compel their use. *Id.* at 633 (emphasizing that the determination "should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial").

Gray's reliance upon *Deck* is misplaced. *Deck* did not involve an ineffective assistance of counsel claim relating to his shackling on collateral review but instead involved a direct appeal where trial counsel objected to shackling before the jury. Thus, while *Deck* may not require a defendant to demonstrate actual prejudice to make out a due process violation where the issue is raised at trial and on direct appeal, Gray has asserted an ineffective assistance of counsel claim under *Strickland* based on the failure to object to him being forced to wear visible shackles. The Court finds that he must establish prejudice to be entitled to relief on a *Strickland* claim of ineffective assistance of counsel.

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This Court finds that the absence of an objection to the trial judge's failure to place his findings as to why visible shackling was required in Gray's case constituted deficient performance under *Strickland*. However, the Court finds that he cannot show resulting prejudice from this error. First, counsel's testimony that the trial judge made a finding that shackling "was required in this particular matter" is unrefuted. Thus, an objection would have simply required the trial judge to place his previously-found his reasons for requiring shackling in this case on the record and thereby preserve the issue for appellate review. *See 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. If the issue is raised but not ruled on, it is not preserved for appeal"). *See also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge"). Also, this Court finds that the record contains sufficient facts that support the trial judge's decision requiring Gray to be shackled during his trial.²⁴

²⁴ For instance, Gray has a prior criminal record dating back to a 1989 armed robbery conviction, for which he received a YOA sentence. Additionally, that YOA sentence was revoked in 1994 and he had a 1998 conviction for possession with intent to distribute (PWID) cocaine, first offense; convictions for two counts of criminal domestic violence in 2000; a 2005 conviction for PWID cocaine, third offense; and then-pending charges of trafficking in marijuana and trafficking in cocaine, which were made after the murder. *Tr. 1184-85*.

Also and the possible gang affiliation of Gray and Reese aside, most of the prosecution's witnesses were neighbors, friends and/or acquaintances of Gray and Reese. These individuals had witnessed the viciously brutal and savage manner in which the two defendants had murdered the victim. Courtroom security for potential witnesses, courtroom personnel, and the jury, is unquestionably a legitimate concern under these circumstances. *Accord United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970) ("the right to the *indicta* of innocence is a relative one. The judge presiding at the trial, the jurors, courtroom personnel and spectators are entitled to security in the performance of their functions or in observing the trial. The members of the public out of the courtroom are entitled to security in the pursuit of their daily activities. The public also has an interest in the expeditious trial of persons accused of crime, and an interest in preventing the guilty from being at large and committing other offenses. Thus, in appropriate circumstances, the accused's right to

Moreover, to prove prejudice under *Strickland*, Gray is required to prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Court finds that he cannot meet this burden in light of the overwhelming evidence of this brutally malicious crime, which occurred in broad daylight and in complete disregard of the presence of numerous. *Id.* at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). See also "The Prosecution's Case," *supra*.

In *People v. Clyde*, 961 N.E.2d 634 (N.Y. Ct. App. 2011), the appellant represented himself *pro se* in leg irons that were visible to the jury. The New York Court of Appeals found that the use of the visible restraints violated due process under *Deck*. The Court then considered whether harmless error could apply to this error, explaining that:

Because we find that the trial court committed error as a matter of federal constitutional law, we apply Supreme Court precedent in deciding whether the error is of a type that may be harmless . . . In *Deck*, the Supreme Court declared that the burden is on the State to prove beyond a reasonable doubt that a shackling error "did not contribute to the verdict obtained" (544 U.S. 622, 635, 125 S.Ct. 2007 [internal quotation marks omitted], quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. 824). By quoting language from *Chapman*, a case that holds, as a matter of federal law, that federal "constitutional errors can be harmless" . . . the *Deck* Court made it clear that harmless error analysis applies to shackling errors.

Clyde, 961 N.E.2d at 639.

The Court of Appeals noted the overwhelming evidence in that case and found that "A jury, faced with a defendant accused of assaulting and/or attempting to rape a civilian while incarcerated, is more likely to conclude that the defendant was shackled as a precaution, because

the *indicia* of innocence before the jury must bow to the competing rights of participants in the courtroom").

of the nature of the crimes charged, than to conclude that the defendant was shackled because he was independently known to be dangerous.” *Id.*

This Court notes that several other courts have concluded either that any due process violation under *Deck* was harmless beyond a reasonable doubt on direct review or that the inmate could not establish prejudice under *Strickland* on his shackling ineffective assistance claim in light of the overwhelming evidence of guilt. *See, e.g., Marquard v. Secretary for Dept. of Corrections*, 429 F.3d 1278, 1313 (11th Cir. 2005) (“Under the circumstances of this case—a brutal, premeditated murder, a unanimous jury recommendation of a death sentence, and a sentencing judge’s finding of four aggravating and no statutory mitigating evidence—we cannot say that the Florida Supreme Court’s decision on the prejudice prong of Marquard’s IAC-shackling claim is contrary to or involves an unreasonable application of federal law or involves an unreasonable determination of facts”); *Lakin v. Stine*, 431 F.3d 959, 966 (6th Cir. 2005) (“Despite the substantial risk of prejudice that shackles pose, we are compelled to conclude that the error was harmless in this case due to the overwhelming evidence against Lakin”); *Jones v. Secretary Florida Department of Corrections*, 834 F.3d 1299 (11th Cir. 2016) (finding that defendant was not prejudiced by counsel’s failure to object to his alleged shackling in front of jury venire during voir dire for capital murder trial, where there was no reasonable probability that if jury had not seen defendant in shackles it would have acquitted him or would not have returned an advisory verdict recommending a death sentence in light of overwhelming evidence of defendant’s guilt and aggravated nature of murder he committed); *Keys v. Booker*, No. 14-1274, 2015 WL 4926693, *11 (6th Cir., Aug. 19, 2015) (appellate counsel was not deficient for failing to investigate issue regarding shackling of petitioner before jury at voir dire stage, since petitioner was not prejudiced as a result of jury seeing him in shackles, and even if had been so prejudiced, the outcome of the

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trial would remain unchanged due to the overwhelming evidence of Petitioner's guilt); *Evans v. Voorhies*, 2007 WL 2891003, at *26-*27 (S.D. Ohio Sept. 28, 2007) (unpublished) ("upon review of the entire trial transcript, the Court is convinced beyond a reasonable doubt that the trial court's error in ordering the shackling and handcuffing of petitioner at trial without specific and sufficient justification was harmless as it did not contribute to the verdict obtained" in light of overwhelming evidence of petitioner's guilt); *Antoine v. Mackie*, No. 14-14933, 2015 WL 6671570, at *8 (E.D. Mich., Nov. 2, 2015). ("because of the overwhelming evidence against him in this case, Petitioner likewise cannot establish that he was prejudiced by appellate counsel's failure to raise a claim on direct appeal that trial counsel was ineffective for failing to object to Petitioner's shackling").

Like the Eleventh Circuit in *Marquard and Jones*, and the Sixth Circuit in *Keys*, this Court finds that any error by counsel in failing to object did not contribute to the jury's verdict and thus was not prejudicial under *Strickland* in light of the overwhelming evidence of Gray's and Reese's guilt, both individually and under principles of accomplice liability, as discussed above. *See also Clyde*, 961 N.E.2d at 639.

3. **Counsel's failure to object to the same jury pool being used after the trial judge granted the State's *Batson* motion. (Ground c).**

Gray also alleges that counsel was ineffective because he did not object to the same jury pool being used after the trial judge granted the State's *Batson v. Kentucky*, 476 U.S. 79 (1986), motion. He asserts that the failure to object was prejudicial because several jurors who were improperly struck were seated on the petit jury that tried him and his sister. The Court finds that he has failed to prove deficient performance or resulting prejudice.

The record reflects that the State made a *Batson* motion after the original jury was selected because it contended that eighteen of nineteen jurors and all three alternate jurors struck by the

defendants were white. *Tr. 88-89.*²⁵ Following a hearing on the State's motion in which each defense attorney offered his reason for the strikes (*Tr. 89-99*), the trial judge granted the motion as follows:

THE COURT: The vast majority of your strikes were white. That in and of itself is not reason enough to grant the State's Motion. However, ... I've counted, one, two, three, four, five, six, seven, eight, nine, ten, eleven of [your] strikes, combined, for which you have been unable to give a race neutral reason for your strikes. That, to me, is evidence that your strike were pretextual and gives rise to the implication that they are race-based.

Twenty-one out of twenty-two strikes ... [w]ere strikes of white. Overwhelmingly strikes of whites for which I find you cannot give satisfactory answers for the strikes. I am going to grant the State's Motion.

I do find that one, two, three, four, five, six, seven of your strikes -- [the] reasons given -- are not pretextual, that they have some basis in my mind for the strikes.

The penalty, so to speak, for using strikes in a pretextual manner is that on the second draw you would not be allowed to use those strikes again. Do you understand?

MR. CHAPLIN: So what is that number?

THE COURT: You can use the seven and I will give you the names.

MS. CAMPBELL: Of who you can't strike.

THE COURT: You cannot strike.

Tr. 99, line 10-101, line 2.

The trial judge then ruled that the defendants could not strike jurors #11, #16, #33, #53, #112, #114, #120, #155, #159, #164, #176, #222, #226, #233, and #241, when seating the new

²⁵ The State did not challenge trial counsel's strike of a white male juror who was a chaplain in the military and whose daughter worked for the Richland County Sheriff's Department. *Tr. 88.*

jury. Counsel stated that he understood the trial judge's ruling. *Tr. 101, line 2 – 102, line 1*. When the jury was re-drawn the next day, jurors #11, #164, #16, #114, #155, and #153 were seated on the jury. *Tr. 114-29*. This Court finds that the trial judge's finding of pretext in the defendants' use of their peremptory challenges is supported by the record.

Counsel recalled that the State made a *Batson* motion but did not recall the specifics of it. *PCR Tr. 42-43; 47-48*. Gray contended at the PCR hearing that counsel was "ineffective for not having reasons to strike those particular ... jurors" and that he was ineffective for not objecting when jurors who had been struck during the original jury selection were allowed to be seated on the second jury that was selected. *PCR Tr. 17-18; 56-57*.

The Court finds that Gray is not entitled to relief for either of the reasons asserted by him. First, counsel was not ineffective for failing to object to the seating of jurors on the petit jury whom the defense attorneys had offered pretextual reasons for striking from the original jury because any such objection would have been frivolous. In *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995), the South Carolina Supreme Court found that the trial judge did not abuse his discretion by seating a juror who had previously been improperly excluded by defense counsel in violation of *Batson*. In rejecting the appellant's claim of error, the Court explained that:

The majority of jurisdictions addressing the question of whether the trial judge may seat a juror improperly excluded in violation of *Batson* have found no error in seating such a juror. The rationale for allowing the trial judge the discretion to seat the improper juror is sound. As noted in *People v. Moten*, 159 Misc.2d 269, 603 N.Y.S.2d 940 (1993):

To hold otherwise would inadvisably reward a party for his own improper conduct, as would the declaration of a mistrial, which, in my view is an inappropriate remedy where the court is confronted with a valid *Batson* ... challenge. The declaration of a mistrial, as an alternative to a difficult decision involving a remedy for a *Batson* ... violation, merely avoids the critical issue and is inappropriate since such a declaration would give the offending party exactly what he wanted, namely, a different jury panel. Thus,

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it would reward him for the very discrimination which *Batson* ... [was] designed to prevent. [emphasis added].

Id., 603 N.Y.S.2d at 947.

Nor do we believe the defendant's constitutional right to a fair and impartial jury is in any way violated by this procedure. "It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S.Ct. 2348, 2358, 120 L.Ed.2d 33, 50 (1992). "Peremptory challenges are not constitutionally protected fundamental rights." *Id.* Franklin was not denied his peremptory challenge. Rather, he was simply prohibited from exercising it in a racially discriminatory manner. We hold once a new venire has been selected in compliance with *Jones, supra*, "that it is within the trial judge's discretion to fashion the appropriate remedy under the particular facts of each case and, as long as neither party's constitutional rights are infringed, that remedy may include the seating of an improperly challenged juror." [*Jefferson v. State*, 595 So.2d 38, 41 (Fla.1992)].

Franklin, 318 S.C. at 52-53, 456 S.E.2d at 360 (footnote omitted).

In *State v. Lewis*, 363 S.C. 37, 609 S.E.2d 515 (2005), the Supreme Court relied on *Franklin* and *Payton v. Kears*, 329 S.C. 51, 495 S.E.2d 205 (1998) (discriminatory explanation vitiates entire selection process regardless of genuineness of other explanations for the strike), in finding that the Court of Appeals erroneously reversed the trial judge's decision not to allow the respondent to strike a juror who had previously been stricken in violation of *Batson*. *Lewis*, 363 S.C. at 45-46, 609 S.E.2d at 519-20. The Court in *Lewis* explained that:

To allow a striking party to challenge the reseated juror a second time would require the trial court to ignore its prior determination and the prior explanations and conduct each successive evaluation of a newly proffered rationale as if on a blank slate. *Coleman v. Hogan, supra*. Such a process improperly restricts the ability of the trial court to make the required evaluation. *Id.*

We conclude that once a juror has been unconstitutionally stricken, the jury selection process relative to that juror is tainted. If the trial court chooses to reseat the improperly stricken juror, the striking party may not use a peremptory strike to remove that juror from the panel a second time.

Lewis, 363 S.C. at 46, 609 S.E.2d at 520.

Strickland does not require trial counsel to make a frivolous objection or motion. See *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986) (trial counsel is not required to make frivolous objections to avoid a charge of ineffective representation); *Hough v. Anderson*, 272 F.3d 878, 897 (7th Cir. 2001). Thus, counsel was not deficient in failing to object to the seating of the previously stricken jurors on the ground urged by Gray.²⁶

Likewise, the Court finds that Gray's claim that counsel was "ineffective for not having reasons to strike those particular ... jurors" is without merit. It is unclear as to whether his claim is that counsel should have given alternative reasons for striking these jurors from the jury that was seated or from the first jury. Regardless, neither claim entitles him to relief. Obviously, he could not advance reasons for the strikes exercised by his co-defendant, and those jurors would have still been seated under *Lewis* and *Franklin*. Moreover, the Court finds that any alternative reason given by counsel for exercising his strikes of white jurors would not uphold his strike of the those jurors because the alternative reasons would be pretext and the South Carolina Supreme Court has already rejected application of the dual motivation doctrine in the context of *Batson* motions in *Payton*:

²⁶ Counsel's inability to recall why he did not object does not overcome the "strong presumption" of constitutionally adequate performance under *Strickland*. See *Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance' ") (citing *Strickland*, 466 U.S. at 689)). See also *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); *Fretwell v. Norris*, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of correctness); *Williams v. Head*, 185 F.3d 1223, 1227-28 (11th Cir. 1999) (where the record is unclear about what counsel did because of inability to recall due to the passage of time, the presumption that counsel did what should have been done and exercised reasonable judgment prevails).

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In our opinion, it is inappropriate to apply the dual motivation doctrine in the *Batson* context. Once a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints the entire jury selection procedure. By adopting dual motivation, this Court would be approving a party's consideration of discriminatory factors so long as sufficient nondiscriminatory factors were also part of the decision to strike a juror and the discriminatory factor was not the substantial or motivating factor. However, any consideration of discriminatory factors in this decision is in direct contravention of the purpose of *Batson* which is to ensure peremptory strikes are executed in a nondiscriminatory manner.

Payton, 329 S.C. at 59-60, 495 S.E.2d at 210 (footnote omitted). Therefore, Gray is not entitled to relief on his Ground c.

4. Counsel's failure to object to testimony that prosecution witness Donetti Perry was scared to testify. (Ground d).

Gray claims counsel was ineffective because he did not object to prosecution witness Donetti Perry's testimony that she was scared to testify. The Court finds that Gray has failed to prove either deficient performance or prejudice under *Strickland* and that the current allegation is based on a misunderstanding of the record.

Gray's claim is based on the following exchange that occurred on direct examination:

Q And you're under subpoena here today, aren't you?

A Yes, ma'am.

Q You don't want to be here?

A Don't want to be here.

Q And you are a little upset or scared?

A Yes.

Tr. 278, lines 17-23.

The record, however, makes clear that the witness was upset, rather than scared or afraid. Counsel for Reese had problems hearing her testimony early on direct examination. *Tr. 279, lines*

17-19. She subsequently became emotional when describing what she had seen on February 13, 2010, and her testimony was paused so that she could have a tissue and some water. *Tr. 287, lines 20-23*. At one point on cross-examination by Reese's counsel, she gave a series of non-verbal responses before her testimony had to be paused, again, so that she could regain her composure. *Tr. 302, line 23 – 303, line 10*. And, trial counsel asked Ms. Perry whether she needed "water or something" before beginning his examination of her, but she declined his offer. *Tr. 306, lines 13-15*. Also, Ms. Perry testified that Gray's father lived in the apartment building across from her. *Tr. 277, lines 19-23*.

The Court finds that it is understandable that a witness might become emotional when testifying about the brutally malicious attack carried out by her neighbor's son and his sister. *Cf. Foster v. State*, 294 Ga. 383, 384, 754 S.E.2d 33, 35 (2014) (finding that crying could be "reasonably expected by one who is a close friend of a murder victim"). Moreover, even though the witness cried, there is no evidence that she became hysterical, made any prejudicial comments, or had an emotional outburst, such as that in *State v. Anderson*, 322 S.C. 89, 90-94, 470 S.E.2d 103, 104-06 (1996) (affirming trial judge's denial of mistrial where victim's sister had emotional outburst directed toward the defendant after identifying him) or *State v. Wagstaff*, 202 S.C. 443, 25 S.E.2d 484 (1943) (at the conclusion of her testimony, the mother of a rape victim rushed toward the defendant screaming "I could tear your eyes out." Although issue was not preserved for appellate review, the Court found mistrial would have been inappropriate).

Further, while the trial judge had to pause her testimony twice in order to allow her to regain her composure, a recess was unnecessary. Also, "[t]he conduct of a trial is left largely to the sound discretion of the trial judge." *State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). Here, the trial judge apparently did not view the witness' emotional state to be such that further

action was necessary. Under these circumstances, the Court finds that counsel's failure to object did not amount to deficient performance under *Strickland*. See *Paige v. State*, 277 Ga. App. 687, 690-91, 627 S.E.2d 370, 374 (2006) (finding no prejudice from counsel's failure to move for a mistrial after the victim in an aggravated assault with intent to rape case began crying on the witness stand, requiring a recess, where there was no evidence that the victim became hysterical or made any prejudicial comments; thus, defendant failed to show that if his counsel had moved for mistrial, it would have been abuse of discretion for trial court to deny it). See also *Meade v. State*, 779 S.W.2d 659, 660 (Mo. App.Ct.1989) (defense counsel not ineffective for failure to move for mistrial after eleven year old witness-victim "began crying and became hysterical"); *State v. Johnson*, 672 S.W.2d 160, 163 (Mo.App.Ct.1984) (denial of mistrial where witness "became hysterical" was not an abuse of discretion).²⁷

The Court further finds that Gray has not shown any prejudice from counsel's failure to object. First, counsel established in camera that Ms. Perry denied being afraid of what gang members might do to her for testifying. *Tr.* 323. Second, the trial judge instructed jurors that they could "consider the appearance and the manner of the witness while on the witness stand" in assessing a witness' credibility. *Tr.* 1142. He likewise instructed jurors that "[y]our verdict cannot be based on sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case." *Tr.* 1156. Because jurors are presumed to follow jury instructions, the Court finds that these instructions insured that jurors would only consider Ms. Perry's demonstrations of emotion

²⁷ Counsel did not clearly recall the witness *PCR Tr.* 49-50. As discussed, counsel's inability to recall why he did not object does not preclude this Court from finding that his performance was objectively reasonable under *Strickland*. See *Burt*, 571 U.S. at 23 ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'") (citing *Strickland*, 466 U.S. at 689).

as they bore on her credibility and not on the question of whether either defendant was guilty of the crimes charged. See *United States v. Olano*, 507 U.S. 725, 740 (1993) (“[It is] the almost invariable assumption of the law that jurors follow their instructions”) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); see also *Strickland*, 466 U.S. at 694 (“a court should presume ... that the judge or jury acted according to law”); *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985) (“The Court presumes 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”).

Third, counsel developed favorable testimony on cross-examination of Ms. Perry and pointed out in closing that she had testified that Gray swept the victim’s legs out from under him and the victim fell in a grassy area. On the other hand, the State’s expert testimony was that the victim hit his head on concrete (not grass) when he fell and that this caused the closed head injury. *Tr. 1102-03*. Fourth, “there is no federal constitutional violation in allowing a witness to continue testifying after witness becomes emotional.” *Nelson v. Ballard*, No. 2:14-CV-86, 2016 WL 259326, at *5 (N.D.W. Va. Jan. 21, 2016), *appeal dismissed*, 654 F. App’x 633 (4th Cir. 2016).

Fifth and finally, Ms. Perry was only one of a number of prosecution witnesses who testified to the brutally malicious attack that occurred in broad daylight and with a complete disregard for human life and the presence of witnesses. The Court finds that there could not be any Sixth Amendment prejudice in light of this overwhelming evidence of guilt, as discussed, *supra*. See *Strickland*, 466 U.S. at 696 (“... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”).

Accordingly, the Court finds that Gray has not shown either deficient performance or prejudice under *Strickland* based on counsel’s failure to object.

5. Counsel's failure to object to testimony about gangs being introduced and/or opening the door to such testimony. (Ground e).

Gray further alleges that counsel was ineffective because he did not object testimony about gangs being introduced and for "opening the door" to such testimony. The Court finds that Gray has not proven either deficient performance or prejudice resulting from counsel's conscious and reasonably strategic decision to "open the door" to evidence of gang membership.

While not entirely clear from the trial transcript, apparently the defense moved pretrial to bar the introduction of evidence of gang affiliation, and the prosecution agreed not to do so unless the defense opened the door to its admission. *See Tr. 108, lines 10-16*. In counsel's opening statement, he stated that there should be a third defendant being tried for the murder, Marcellius Brooks, but that the State had not mentioned him. *Tr. 163-64*. Counsel suggested that "Brooks and his thugs beat the life out of the deceased" and then did "a celebratory dance acknowledging that." *Tr. 164*. Counsel therefore agreed with the State that others were involved in the victim's murder but not Gray, who was innocent of the charges against him. *Tr. 164-67*.

Counsel did not mention either gang affiliation or the Bloods in opening statement and no such mention was made during the parties' examination of the first four prosecution witnesses, including Angelo Boyd, one of the individuals involved in the first attack on the victim. Likewise, there was no mention of gangs in the State's direct examination or Reese's cross-examination of Ms. Perry. *Tr. 274-303*. However, Reese did elicit that Ms. Perry was friends with Marcellius Brooks' brother. *Tr. 305-06*. Trial counsel elicited that Ms. Perry learned later on the day of the murder that Brooks was one of the persons who had been involved in the earlier attack on the victim. *Tr. 313*. When counsel thereafter questioned Ms. Perry as to whether she had given a statement that she had seen Brooks' brother Lamar, a/k/a Big Baby, wearing a t-shirt with pictures

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of Reese and Gray on the front and the word "Innocent" on the back of it, the trial judge excused the jury and heard further testimony in camera. *Tr. 318.*

Outside the jury's presence, she claimed that she could not recall anyone wearing a shirt like the one described. *Tr. 320-21.* On further in camera examination, she admitted that she had told police that she had heard the Bloods of McDuffie St. had beaten up the victim. She also admitted that the apartment complex supervisor came to her residence and told her that members of the Bloods had been in her house and that she would be evicted if they were caught in her house. However, she denied telling the private investigator that the Bloods "would be at the young girl's house who stayed around the corner," that she had identified "Bloom" as a Blood, or that members of the Bloods had been to her residence. *Tr. 321-23.*

When she denied that she was testifying because she was afraid of what gang members might do to her, counsel informed the trial judge that he had a signed statement that contradicted everything to which she had just testified. The trial judge ruled that he could not present hearsay, but that he could question her about whether she knew who the Bloods were and whether they had been to her residence. The State indicated that if counsel opened the door to gang affiliation, it would go into Gray's gang affiliation. *Tr. 323-24.* In response to the State's questioning the relevancy of asking about the t-shirt with pictures of Reese and Gray on it and the word "innocent" on the back, counsel stated that contrary to Ms. Perry's claim she only knew Brooks casually, "I think that she knows a great deal more, and I do believe that I would like to examine her more thoroughly in front of the jury to determine whether or not there is a bias here[,] [o]r if maybe she is fearful or something [is] going on as to why her statements are so contradictory." *Tr. 324-25.*

The trial judge inquired as to how counsel could impeach her with hearsay, and counsel noted that she had admitted being a "person of interest as far as affiliating with gang members and

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that the Gang Task Force has been to her house." Also, counsel that stated the Bloods occupy the apartment complex where the murder occurred and that he believed that was the reason she had testified as she did. *Tr. 325*. Ms. Perry then responded "No" to whether she was afraid of the Bloods. The State again warned that counsel was opening the door to evidence of prior bad acts by Gray and why Ms. Perry "would be scared of him." *Tr. 326*.

After the jury returned to the courtroom, counsel elicited that Ms. Perry had been questioned by the City of Columbia Police Department's Gang Task Force, but she denied that she was affiliated with or a member of a gang. Although she admitted that she knew Brooks' brother and that she had later learned that Brooks was involved in the initial attack, she denied knowing whether he was a Blood and she denied that she was testifying "out of fear of reprisal when you get back to [the apartment complex]." *Tr. 327-30*.

The State thereafter presented testimony from Sgt. William Pegram. He is the supervisor for the City of Columbia Police Department's Violent Crimes Unit and was the chief investigating officer in this the case. *Tr. 758-64. See also Tr. 766-99*. He testified that it was not unusual for no one to come forward with information about an assault in the apartment complex where the murder occurred. He explained that he had been assigned to the FBI in 2006 and he was responsible for investigating the Killer Gangster Bloods. The FBI identified the apartment complex where the murder occurred "as a hot spot for the Bloods street gang. People in that neighborhood generally will not talk to the police, because ... [if they do], there is a very good likelihood that you will be killed." So, residents there "are not going to be seen talking to the police." *Tr. 764-66*. He later testified that Lucy S. was affiliated with the Killer Gangster Bloods. Counsel did not object to this testimony. *Tr. 799-800*.

Following trial counsel's cross-examination of Sgt. Pegram, in which counsel elicited that Sgt. Pegram had seen a video of one of the men doing the Bloods bounce and that he was aware of the Bloods forcing people to make statements (*Tr. 826-27*),²⁸ the State elicited that Reese and Gray are members of the Bloods. The State also elicited that if a witness was afraid of anyone in the case, it would be Gray and Reese the witness feared. *Tr. 827*.

In response to the State's redirect examination, Reese elicited a concession from Sgt. Pegram that it was possible witnesses could fear reprisal whether or not she and Gray were gang affiliated. However, he added, "it's a different scenario when you have people there on scene in view of everyone else giving a statement as opposed to someone who comes secretly to a police department days later, voluntarily, and provides information." Still, he agreed that people in this apartment complex "don't really like to speak with the police." *Tr. 829*. Trial counsel established that the only evidence Sgt. Pegram had that Gray was a member of the Bloods was "hearsay information." *Tr. 803*.

Gray testified before this Court that there was a pretrial motion to bar mention of gangs at trial to avoid prejudice to him and his co-defendant sister. Although Gray denied ever being in a gang, he agreed with PCR counsel's characterization that the apartment complex where his father lived was "gang-related." Subsequent to the trial judge's original ruling, there was testimony presented relating to gangs and, when counsel objected, the trial judge ruled that counsel had

²⁸ Earlier, counsel had elicited that Brooks was the first person charged with the victim's murder and that Sgt. Pegram felt that Brooks had minimized his involvement in the case, and that some of what he told police was not accurate. *Tr. 816-17*. See also *Tr. 824-25*. Counsel also established that Pegram's investigation "assaulted the victim. I don't know how many [times] he struck [the victim]." *Tr. 826*.

opened the door to admitting this testimony. Gray thought counsel was ineffective in this regard.

PCR Tr. 19-20; 31-32.

When asked whether there was pretrial discussion regarding gang affiliation, counsel testified as follows:

I guess the transcript would have to speak for itself. But the theory of our case was that the beating that he received at the top of the hill was delivered by ... gang members. And ... that's how we presented it, is that it was uncalled for; ... it was a very brutal beating; and they just jumped on him and beat the brakes off the guy, to be blunt.

PCR Tr. 41, lines 19-25.

Counsel did not recall whether or not Gray was a gang member, but he did not think that the evidence of gang involvement was harmful. *PCR Tr. 42.* He further explained that:

I think that what we were trying to do is paint a picture in the jury's mind that this wasn't just a couple of random passerbys that interfered and ... beat the victim, but this was a brutal beating by the hands of gang members and that the cause of death was directly related to that brutal beating. I think it was beneficial.

PCR Tr. 42, lines 5-15.

When Gray's PCR attorney asked trial counsel about his objection to testimony that Lucy S. was a gang member, counsel replied, "I think that my concern with regards to associating the person named Lucy with a gang member is that ... I don't think I ever received any information in discovery or anything that would have linked her to that group." So, his objection was not to evidence of her gang affiliation *per se*. Rather, the objection was based on the State's failure to comply with discovery because counsel was unaware of the basis for the testimony. *PCR Tr. 50-51.*

The Court finds that counsel made a reasonable strategic decision to question Ms. Perry about whether she had been questioned by the City of Columbia Police Department's Gang Task

Force, whether she was aware that Marcellius Brooks was a Blood, and whether she was testifying "out of fear of reprisal when you get back to [the apartment complex]." The Court finds that this was an objectively reasonable effort to impeach her credibility and support counsel's defense that the first attack on the victim, which was carried out by Brooks²⁹ and others, actually caused the victim's death. Several jurisdictions have found that activities associated with street gangs can be probative on the issues of identity, motive, bias and impeachment. *See Nguyen v. Hickman*, 475 F. App'x. 180, 181 (9th Cir. 2012) ("Evidence of gang affiliation may be used ... to impeach witnesses") (citing *United States v. Abel*, 469 U.S. 45, 51-53 (1984) (holding gang evidence admissible to demonstrate racial bias); *United States v. Ozuna*, 674 F.3d 677, 681 (7th Cir. 2012) ("evidence of gang affiliation was admissible, from the beginning, to show bias, interest, or motive"); *Clark v. O'Leary*, 852 F.2d 999, 1006 (7th Cir. 1988) (Confrontation Clause case where Court overturned district court's exclusion of evidence that victims were members of a gang that was a rival of the defendants' gang, because this inter-gang animosity provided evidence that the victims lied about the identity of their assailants). *State v. Vickers*, 159 Ariz. 532, 768 P.2d 1177, 1182 (1989) (evidence of membership in prison gang probative of bias); *People v. James*, 117 P.3d 91, 94 (Colo.App. 2004) (Evidence regarding gang culture and evidence of gang retaliation may be admissible to explain a witness' change in statement or reluctance to testify); *People v. Skinner*, 53 P.3d 720, 724 (Colo.App. 2002) (finding no error after evidence admitted establishing "code of silence" between inmates in DOC; testimony of witnesses regarding fear of retaliation for being a "snitch" was relevant to explain why the victim and other witnesses had given conflicting statements); *People v. Sanchez*, 58 Cal.App.4th 1435, 69 Cal.Rptr.2d 16, 24 (1997) (evidence that

²⁹ As discussed, Ms. Perry admitted that she knew Brooks' brother, Lamar, but denied knowing Brooks or "Bloom."

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witness is afraid to testify and fearful of gang retaliation relevant to credibility of witness; not necessary to show threats against witness were made by defendant personally); *People v. Maldonado*, 240 Ill.App.3d 470, 181 Ill.Dec. 426, 608 N.E.2d 499, 504 (1992) (same); *United States v. Santiago*, 46 F.3d 885, 890 (9th Cir. 1995) (same and noting that evidence of witness's fear of retaliation, without specifying any particular acts of intimidation, does not qualify as Fed.R.Evid. 404(b) evidence); *Diaz v. Lizarraga*, No. CV 11-7888 RGK AJW, 2015 WL 134269, at *15 (C.D. Cal., Jan. 9, 2015) ("In petitioner's case, gang membership was relevant to the credibility of petitioner and his defense witnesses because it permitted an inference that they were biased in petitioner's favor"). The Court likewise finds that trial counsel's cross-examination of Sgt. Pegram, in which counsel elicited that had seen a video of one of the men doing the Bloods bounce and that he was aware of the Bloods forcing people to make statement, was an objectively reasonable strategy for this same reason and because it was a reasonable effort to present evidence relevant to impeaching other eyewitness testimony. *Id.*

The Court further finds that Gray has failed to prove that he was prejudiced by counsel's performance. The South Carolina Supreme Court has recently explained that:

A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction. *State v. Young*, 364 S.C. 476, 486-87, 613 S.E.2d 386, 391-92 (Ct. App. 2005). However, we are wary of a "thinly-veiled attempt to show propensity" by way of the open-door doctrine. *State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 390 (2008). Testimony in response must be "proportional and confined to the topics to which counsel had opened the door." *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018).

State v. Heyward, Op. No. 27887, 2019 WL 2121677, at *3 (S.C. May 15, 2019).

The Court finds that the State's response to trial counsel's cross-examination of Ms. Perry and Sgt. Pegram was "proportional and confined to the topics to which counsel had opened the

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door." *Id.* Although the State did present evidence that Gray and Reese were gang members and that Lucy S. was affiliated with the Bloods, neither Lucy S. (*Tr. 921-35*) nor Reese (*Tr. 936-88*) was asked any questions regarding her possible gang involvement, and the parties did not make any reference to the Bloods or gangs in closing argument. *See Tr. 1051-83; 1112-35* (the State); *1083-94* (Reese); *1094-1112* (Gray). Indeed, the prosecution's evidence - and the thrust of its closing argument - was that Reese and Gray acted in concert with one another to exact revenge on the victim as the result of his perceived mistreatment of thirteen year old Lucy S., who is Reese's daughter and Gray's niece. *See "The Prosecution's Case," supra.* In other words, the State's theory of the crimes was that they sought revenge as family members, as opposed to having a gang-related motive. *See Tr. 1071-83; 1112-35.*

Further, while trial counsel did not mention the Bloods or gangs in his closing argument, he vigorously assailed the State's case by arguing that in the two years between the incident and the trial, the State had not found "Juve, Trigger, Genesis and whoever else, all those little hooded people that were beating the brakes off of this man at the top and they don't know where they are." Counsel also urged jurors that the State had failed to establish proximate cause and that the trial evidence actually proved that the victim was killed by the administered by Brooks and these other individuals. He likewise argued that the testimony of other witnesses demonstrated that Brooks was a liar whose testimony could not be trusted. *Tr. 1099-1102; 1105-12.*

Further, counsel argued that many of the prosecution witnesses lied on Brooks' behalf when they gave statements to police implicating Gray because they were Brooks' witnesses:

Now, Brooks testified, and he said these were his witnesses. You know, I'm sitting here and I've been looking at this file for like the last four months. I'm convinced at this point the only person that really investigated this case is Marcellius Brooks. Marcellius Brooks is the one that came to the police and said, 'Oh, no, no, no. There was another attack.'

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Oh, really? Well, we're looking kind of foolish right now. Tell me about that.

See, it happened that the bottom.

Tell me about that.

Well, do you got any witnesses?

Then he sends his witnesses in to tell the police about the attack that he told them about. Who are his witnesses? Mary Anderson Donetti Perry, Kara Chase. Now, when they came in, and all of them came in on the 16th of February, 2010. None of them were under oath. Now, I don't know why they all showed up together, and I'm not trying to say anything bad about these ladies. All I'm telling you is they all got in the car or whatever the case may be. They all ended up in the police department at the same time. They all gave statements.

But let me tell you, when Donetti Perry and Kara Chase got here to the courtroom this week, their stories were different. And you know why, because they had to look that the man and raise their hand and they had to go under oath. They said, *'no way I'm going to get hit with a zero-to-five perjury charge for trying to help somebody like Marcellius Brooks, who in all counts is going to walk. I am not going to do that.'*

They got on that stand and what did they do? They told the truth. That's the only time that these people were under oath. The other times I'm not sure why they did what they did or how they did it or if they were influenced or whatever. ... All I'm telling you is that something happened. I do know that when they got in here, they had a great deal to say and it was inconsistent and they were under oath.

Now, it's up to you to determine how reliable those statements are, and that's your job. You're going to take in the back with you ... a statement from Kara Chase[,] a couple of them. I just want you to keep in mind that in none of those statements was Kara Chase under oath. The only time that Kara Chase swore on the Bible -- and you heard what Marcellius Brooks said, he said, *'Yeah, I was lying but not on the Bible.'* The only time Kara Chase was under oath was when she sat on that stand and she told you all what she remembered occurring occurred on the 13th of February on that day.

Tr. 1102, line 18 -- 1105, line 3 (emphasis in original).

Earlier, Reese's counsel argued her defense of innocence and that she had only acted in defense of her thirteen year old daughter, whom the victim assaulted. As pertains to the present allegation, her attorney argued in pertinent part, that

[Sgt. Pegram] wants it both ways. He wants to have you understand that there's a lot of problems in [the apartment complex]. It's difficult to get statements out of the [apartment complex], it's hard to believe anyone in [the apartment complex], but that everyone in this case is believable and every statement in this case is credible. It's just ordinarily they're not, but 'we have everything in this case.' I think you can certainly question that.

Tr. 1086, line 20 – 1087, line 1:

Reese's counsel also assailed the credibility of prosecution witnesses Donetti Perry and Mary Anderson:

I'd also like to bring up two of the witnesses that did say they see the incident at F and G building, Donetti Perry. You can certainly judge the credibility of Miss Perry. She was here on the witness stand. [She] came to say what she was going to say, but once she had said what she observed she couldn't elaborate. She couldn't give you any more details. When pressed, she was unsure of how far away, what her angle of vision was, what exactly the distance. I think that credibility in itself could be called into question.

Mary Anderson, another witness. She came to testify as to what she saw. Also could not tell you how far away she was, and that at one point she said she was twenty-five feet away, at another point she said she was one foot away. She also testified that the entire time she was wearing reading glasses, which I think would be very difficult to see something that's happening twenty-five feet away. If she were only one foot away, I think it would be even more difficult.

Tr. 1087, line 22 – 1088, line 19.

Thus, counsel was able to argue Brooks' control over key prosecution witnesses who lived in the apartment complex and thoroughly attack their credibility, without further mention of gang involvement. Further, the absence of prejudice is underscored by the presence of overwhelming evidence of Gray's guilt, as discussed. See *Strickland*, 466 U.S. at 696. For the foregoing reasons,

the Court finds that Gray cannot show either deficient performance under *Strickland* or that he was prejudiced by counsel's alleged error.

6. Counsel's failure to object to the State's closing argument as burden-shifting. (Ground f).

The Court also finds that Gray has failed to prove either deficient performance or resulting prejudice based upon counsel's failure to object to the State's closing argument as burden-shifting.

Specifically, he claims that the following comments by the Assistant Solicitor shifted the burden of proof to him to disprove his guilt:

Now, I'm almost done. I want to talk to you a little bit about being a juror. We all get instructions on how to be lawyers. We go to law schools. Y'all are professionals, you have instructions on how to do your jobs. Nobody gives instructions on how to be jurors. We put you twelve strangers in here and say go figure it out. So I do want to give you instructions, look at the evidence, listen to what you heard, remember what you heard. Go back there and discuss it because at the end of the day, there is absolutely no evidence that supports Robin Reese and Henry Gray of being innocent.

Tr. 1133, lines 6-18.

Gray testified at the PCR hearing that he thought that counsel should have objected to the prosecution's closing argument, but counsel did not object. *PCR Tr. 21; 33*. Counsel did not recall whether he had objected to the State's closing argument. *PCR Tr. 53-54*.

The United States Supreme Court has made clear that "...it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). Therefore, a criminal defendant is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). See also *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not automatically require reversal if

they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument"); *State v. Brisbon*, 323 S.C. 324, 474 S.E.2d 433 (1996) (The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial).

The standard in *Donnelly* is a very high standard for a defendant to meet. "[I]t is not enough that the remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). See also *Parker v. Matthews*, 567 U.S. 37, 45 (2012); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." *United States v. Young*, 470 U.S. 1, 12 (1985).³⁰

Applying this standard to the challenged comments, the Court finds that Gray cannot show either deficient performance or prejudice under *Strickland* because he has not proven that the challenged remarks were so prejudicial that they deprived him of a fair trial under *Donnelly*. See 416 U.S. at 637; *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. The Court rejects Gray's contention that the challenged portion of the State's closing argument improperly shifted the burden of proof to him. In doing so, the Court is mindful that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting

³⁰ As the Court explained in *Robinson*: "In *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper, but we held that, in context, those statements did not necessitate reversal." Rather, in both cases, the Court held that the accused must prove that the remarks deprived him of due process. *Robinson*, 485 U.S. at 33 n. 55.

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through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647.

Additionally, the challenged remarks were confined to the record and its reasonable inferences and they did not involve either a direct or indirect comment on Gray's exercise of his right not to testify. Rather, a fair reading of Assistant Solicitor Sampson's comments reflects that she was urging jurors that neither the expert evidence presented by both defendants nor the other evidence presented by Reese created a reasonable doubt as to the guilt of either defendant. This construction of the comments is supported by Deputy Solicitor Campbell's acknowledgement, while opening on the law, that "the burden of proof is on the State of South Carolina to prove this defendant's guilt beyond a reasonable doubt, and I submit, ladies and gentlemen, in this case, ... perhaps more than any other[,] that is a burden the State welcomes based on this evidence. Proof beyond a reasonable doubt." *Tr. 1036, lines 14-20*. And, the State never suggested that the burden of proof was on anyone but the State. *Tr. 1051-83; 1112-35*.

This Court's interpretation of the challenged remarks is further supported by the fact Assistant Solicitor Sampson expressly addressed the expert testimony presented by both defendants and pointed out that their expert testimony did not create a dispute as to the cause of death. *Tr. 1131-32*. The Court further finds that the challenged comments were a fair response to the closing arguments of both Reese and trial counsel. *See Young*, 470 U.S. at 12. Counsel for Reese argued that the State had not met its burden of proof, that her testimony was credible, and that rather than seeking revenge against the victim, she was merely a mother trying to protect her daughter. Reese's counsel further argued that she had fallen when she tried to kick him and had merely flung the iron chair. *See Tr. 1084; 1091-92*.

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Gray's counsel likewise argued that the State had not met its burden of proof. *See Tr. 1095; 1110*. Counsel also argued that the State had conveniently ignored the presence of both Ativan and marijuana in the victim's system and suggested that these drugs impacted the victim's state of mind and actions. Counsel noted the absence of blood on the chair with which the State alleged the defendants beat the victim, and counsel pointed out that Ms. Perry testified that Gray swept the victim's legs out from under him and the victim fell in a grassy area. On the other hand, the State's expert testimony was that the victim hit his head on *concrete* (not grass) when he fell and that this caused the closed head injury. *Tr. 1102-03*.

The Court finds that it was clearly appropriate for the Assistant Solicitor to address the arguments of opposing counsel suggesting that the State had failed to meet its burden of proof. *Id.* *See also State v. Durden*, 264 S.C. 86, 212 S.E.2d 587, 590 (1975) (" 'So long as he stays within the record and its reasonable inferences, the prosecuting attorney ... argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider' "); *State v. Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999) (the State is entitled to call into question the credibility of a defense).

Again, counsel's inability to recall why he did not object does not preclude this Court from finding that his performance was objectively reasonable under *Strickland*. *See Burt*, 571 U.S. at 23 ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'" (citing *Strickland*, 466 U.S. at 689)); *Romine*, 253 F.3d at 1357 (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance).

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Moreover, the Court finds there could not be any conceivable prejudice to Gray resulting from the challenged comments. In addition to the previously-stated reasons, the Court finds that there was overwhelming evidence of his guilt, as discussed. Also, the trial judge's opening comments informed jurors "what the attorneys tell you in their opening statements, is not evidence in this case." Rather, he charged the jury that "[t]he evidence in this case will be presented to you by testimony, by sworn witnesses from this witness stand and any other exhibits that may be introduced during the course of the trial." *Tr. 12-21*. The judge subsequently charged jurors on the presumption of innocence, the State's burden of proof to prove each defendant's guilt on each charge beyond a reasonable doubt and he defined reasonable doubt as "the kind of doubt that would cause a reasonable person to hesitate to do something, and in this case, to convict." *See State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (holding a jury instruction explaining that "[a] reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act" was "a correct statement of South Carolina law"). *Tr. 1138-39*. He also defined reasonable doubt as "proof that leaves you firmly convinced of the defendant's guilt." *Tr. 1139-40*. *See Victor v. Nebraska*, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring in part and in judgment) ("This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly"); *State v. Darby*, 324 S.C. 114, 115-16, 477 S.E.2d 710, 710-11 (1996) (approving of this definition of reasonable doubt).

Again, because the Court must presume that "jurors follow their instructions," *Richardson*, 481 U.S. at 206; *see also Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law"); *Francis*, 471 U.S. at 324 n. 9, the Court finds that the jury (1) did not consider the State's closing argument as burden-shifting and (2) did not consider Gray's failure

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to testify in reaching its verdict. Therefore, the Court finds that Gray has failed to meet his burden of proof on the current allegation.

7. Counsel "forcing" Gray to not testify at trial. (Ground g).

The Court likewise rejects Gray's allegation that counsel was ineffective because counsel "forced" him to not testify in his defense at trial. The Court finds that this claim is not supported by any credible evidence.

The record reflects that the trial judge conducted an on-the-record waiver of Gray concerning his right to testify at trial. *Accord State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991) (requiring trial judges to conduct on-the-record inquiry of whether an accused will testify). In pertinent part, the trial judge informed Gray that he had the right to testify, and that he had a Fifth Amendment right not to testify. The trial judge explained that this was a personal right, that no one could compel him to testify, and that if he chose to testify, he could be cross-examined like other witnesses on any relevant issue in the case. His credibility could be impeached with "any convictions involving dishonesty or false statement or crimes punishable by imprisonment for more than one year and this court determines that the probative value of admitting this evidence outweighs the prejudicial effect to you." The trial judge further explained that the decision to testify "must be freely, voluntarily, [and] intelligent[ly] made with knowledge of the protections given to you by the Fifth Amendment to the Constitution and the consequences of your decision to testify." *Tr. 840-41.*

The trial judge also explained that if Gray decided not to testify, the judge would charge jurors that "they cannot give the fact that you do not testify any consideration whatsoever. That there is to be absolutely no prejudice to you because you did not testify." Of particular importance to this allegation, the trial judge explained that:

It's left entirely up to you whether or not you wish to testify. You may talk with your attorney, your family and friends, or anyone else but the final decision will be left entirely up to you.

Tr. 841, line 24 – 842, line 3 (emphasis added).

Gray stated that he understood the trial judge's explanation, that he did not have any questions, and that he had spoken with his lawyer about this. **Tr. 842.** Gray did not subsequently testify, and the trial judge instructed jurors that:

I instruct you and emphasize the fact that the defendant Henry Gray did not testify. I this case is not a factor to be considered by you in any way in your deliberations and your consideration on the question of the guilt or innocence of Henry Gray. It must not be considered by you in any manner whatsoever.

A defendant has the Constitutional right to remain silent and the assertion of this right must not be considered by you in your deliberations. I repeat, under your oath, you are to draw no conclusion whatsoever from the fact that the defendant Henry Gray in this case did not testify. The fact that this defendant did not testify should not even be discussed in the jury room.

[The] [b]urden of proof, as I have stated to you, ... is on the State to prove his guilt. The defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

Tr. 1153, line 11 – 1154, line 9.

As discussed, Gray testified before this Court that he wanted to testify but that he did not because counsel was opposed to his decision. He further claimed this was the source of such disagreement that he had initially asked that counsel be relieved and another attorney appointed. However, he thereafter withdrew his request. On the other hand, trial counsel testified that the discussions he and Gray had were "somewhat pleasant," and he expressly denied advising Gray not to testify.

To the contrary, counsel testified that his defense of Gray – including obtaining Dr. Shaker's opinion - was based upon Gray's desire to testify at trial and tell his version of what

happened. However, even though Gray repeatedly said that he wanted to tell his version of what happened, he decided that he no longer wanted to testify at trial when actually given the opportunity to do so. And, he did not tell counsel why he changed his mind.

The Court again finds that the credible evidence is counsel's testimony and that Gray's contrary testimony is not credible. Based upon the counsel's testimony and the trial judge's colloquy with Gray, the Court finds that Gray had led counsel to believe that he would testify at trial and that counsel, quite reasonably, based his defense of Gray on Gray's representations that he would testify. *See Strickland*, 466 U.S. at 691 ("inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions").

The Court further finds that Gray's responses to the trial judge were truthful and that he understood the trial judge's correct explanation that the decision of whether or not to testify was personal to him and that while he could and did receive advice from counsel about his decision, he, alone, had to make the decision. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("... the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (same, citing *Jones*); *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1 (1977) (Burger, C. J., concurring); *State v. Gunter*, 286 S.C. 556, 559, 335 S.E.2d 542, 543 (1985) ("The Fifth Amendment does not prevent a defendant from making a voluntary choice to testify, but it prohibits compelled testimony"). The Court further finds that aware of the personal nature of his rights, Gray departed from what he had previously told counsel he would do and made a voluntary, knowing, and intelligent decision not to testify for reasons he has not yet explained. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

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Additionally, the Court finds that he was not prejudiced by his exercise of his right to not testify. As noted, the trial judge's jury instructions made clear to jurors that his decision to not testify was his constitutional right and that it could not be considered in any way in their deliberations on the question of Gray's guilt or innocence. "[It is] the almost invariable assumption of the law that jurors follow their instructions." *Olano*, 507 U.S. at 740 (citing *Richardson*, 481 U.S. at 206); *see also Strickland*, 466 U.S. at 694. Accordingly, the Court finds that the jury did not consider Gray's failure to testify or offer evidence in reaching its verdict.

8. Counsel's failure to obtain a ruling on the record regarding a lesser-included charge on lynching. (Ground h).

Gray's final claim is that counsel was ineffective for not obtaining a ruling on the record regarding a lesser-included instruction to the charge of lynching in the first degree. The State moved for a directed verdict on this claim at the conclusion of the evidentiary hearing because Gray did not present any evidence in support of it. Gray's counsel did not object to the State's motion. *PCR Tr. 55*. The Court finds that Gray, through his PCR counsel, made a voluntary, knowing and intelligent decision to abandon this allegation. *See Zerbst*, 304 U.S. at 464.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Gray has not established any constitutional violations or deprivations that would require this Court to grant his Application. Therefore, the Court denies and dismisses his PCR Application with prejudice.

The Court notes that Gray must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See Rule 203, SCACR*. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), he has a right to appellate counsel's assistance in seeking review of the denial of post-

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conviction relief. Rule 71.1(g), SCRCF, provides that if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his behalf. Gray is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 25th day of June, 2019.



PAUL M. BURCH
Presiding Circuit Court Judge


_____, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT
LYNCHING 1ST DEGREE

At a Court of General Sessions, convened on March 10, 2010, the Grand Jurors of Richland County present upon their oath:

LYNCHING, FIRST DEGREE

CDR: 0313 16-03-0220

210

Amended by
Order
G. L. [Signature]

That HENRY L GRAY did in Richland County on or about February 13, 2010, band together with two or more persons thus constituting a mob for the premeditated purpose and intent of inflicting violence upon the body of Kenneth Mack, such violence resulting in the death of Kenneth Mack. All in violation of Section 16-03-0220, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

W. B. Giese
WARREN B. GIESE, SOLICITOR

WITNESSES

(S) Inv. W. Pegram, CPD

ARREST WARRANT NUMBER

K642288

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

MAR 11 2010

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2010-GS-40-0039

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

MARCH TERM 2010

42

**THE STATE
vs.**

HENRY L GRAY

Indictment for

LYNCHING 1ST DEGREE

SC Code: 16-03-0210

CDR Code: 0312

CLASS Felony-Exempt

After being fully advised of my legal rights, I hereby waive my right to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JAN 11 2010
C.C.C. P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA }
COUNTY OF RICHLAND }

INDICTMENT

At a Court of General Sessions, convened on OCTOBER 5, 2011,
the Grand Jurors of Richland County present upon their oath:

MURDER

That Henry L Gray did in Richland County, on or about February 13, 2010,
willfully, feloniously, and intentionally kill the victim, KENNETH MACK, with
malice aforethought, either express or implied, by means of PHYSICAL
ASSAULT, and the victim did die as a proximate result thereof in Richland
County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as
amended

Against the peace and dignity of the State, and contrary to the
statute in such case made and provided.


DAN JOHNSON, SOLICITOR

WITNESSES

✓ (S) PEGRAM - CPD

ARREST WARRANT NUMBER

DP11156

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

OCT 05 2011

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011GS4004915

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

OCTOBER TERM 2011

42

THE STATE

vs,

Henry L Gray

Indictment for
MURDER

SC Code: 16-03-0010

CDR Code: 0116

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
James H. W. W. W. W.
C.C.C. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

VS.

AKA: _____
 Race: Black Sex: Male Age: _____
 DOB: _____ SS#: _____
 Address: _____
 City, State, Zip _____
 DL# _____ SID# _____

INDICTMENT/CASE#:

2010

- GS -

4039

A/W#:

K642288

Date of Offense:

2-13-10

S.C. Code §:

16-3-210

CDR Code #:

0 / 3 / 1 / 2☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

Lynching - 1stin violation of § 16-3-210 of the S.C. Code of Laws, bearing CDR Code # 0 / 3 / 1 / 2
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
 Solicitor

X

Defendant

[Signature]
 Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of
 \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years
 and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
 are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient: _____

*Fine: _____

\$14-1-206 (Assessments 107.5%)		\$
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$35.13 (Public Def/Prob)	\$500	\$
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$
TOTAL		\$

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____

\$ _____ to be paid to Public Defender Fund

Other: _____

CERTIFIED TRUE COPY
 OF ORIGINAL FILED
 JUDGE # 211
 C.C.C.P. & G.S.
 RICHLAND COUNTY
 SOUTH CAROLINA

☐ Appointed PD or appointed other counsel, \$35.13 TP
 Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

[Signature]
2 / 1 / 2 / 6
5-2-12

Clerk of Court/ Deputy Clerk

Court Reporter: [Signature]

1424

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE VSAKA: Henry L. GrayRace: BlackSex: Male

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip _____

DL# _____

SID# _____

IN THE COURT OF GENERAL SESSIONS

2011

INDICTMENT/CASE#

- GS -

40

4915

A/W#:

Date of Offense: 2-19-10S.C. Code §: 16-3-10CDR Code #: 0 / 1 / 1 / 6☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murderin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC) ☐ §17-25-45 w/minor 1st or Lewd ActThe charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Solicitor

X

Defendant

[Signature] 69874
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 7-15-11☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ _____

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE [Signature]Judge Code: 2 / 1 / 1 / 2 / 6Sentence Date: 3-2-12